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THE
FEDERAL REPORTER.

VOLUME 66.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 66.

JUDGES

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¹Commissioned January 21, 1895.

²Resigned January 21, 1895.

³Commissioned March 1, 1895.

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⁴Commissioned Circuit Judge February 22, 1895.

⁵Commissioned March 1, 1895.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

CRABTREE v. McCURTAIN

(Circuit Court of Appeals, Eighth Circuit. January 25, 1895.)

No. 365.

PRACTICE—MOTION FOR REARGUMENT—DILIGENCE.

Where a standing order of the circuit court of appeals directs that mandates upon decisions of that court shall be retained for 60 days before transmission to the lower court, a motion for reargument should be made within such 60 days, unless it appears that counsel were not notified of the decision, or could not, with reasonable diligence, have ascertained the facts on which the motion is based within that time; and a motion made over six months after the decision, on grounds easily ascertainable at any time, comes too late.

In Error to the United States Court in the Indian Territory.

Motion for leave to file a petition for rehearing, which was received by the clerk November 24, 1894, denied.

George E. Nelson, for plaintiff in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. May 7, 1894, the judgment of the United States court in the Indian Territory in this case, which was brought to this court on writ of error, was affirmed with costs because it appeared from the record presented to this court that no assignment of errors was filed until after six months from the entry of the judgment below. Crabtree v. McCurtain, 61 Fed. 808, 10 C. C. A. 86. Pursuant to the standing order of February 20, 1893, the clerk issued the mandate of this court to the court below 60 days after this decision, on July 7, 1894. November 24, 1894, the clerk received a motion for a rehearing on the ground that the assignment of errors was in fact filed within six months of the entry of the judgment below, although by mistake it appeared in the record presented to this court to have been filed more than six months thereafter. The motion papers were not filed, but were

returned to counsel for plaintiff in error on the ground that the application came too late. He now applies for leave to renew the motion, and to file the motion papers.

No showing of diligence in preparing this motion for rehearing is made, and we think that the lapse of time from May 7, 1894, to November 24, 1894, evidences such a lack of diligence that we ought not now to hear this motion. Motions for rehearings should be made within the 60 days fixed by the order of this court for the retention of the mandate to the lower court, unless it clearly appears that counsel was not informed of the decision, or that he could not have ascertained the facts on which his motion is based, by the exercise of reasonable diligence, within that time. The mistake upon which this motion is based is that the original record in the court below shows that the assignment of errors was filed September 10, 1893, while the printed record in this court shows it to have been filed September 18, 1893. We can conceive of no reason why counsel could not have ascertained this fact within 60 days of the decision affirming the judgment of the court below, as notice of that decision, and of the ground on which it was made, was mailed to him on the day it was filed. The motion for leave to file this petition for rehearing must be denied, and it is so ordered

WHITE et al. v. EWING.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 212.

CIRCUIT COURTS—JURISDICTION—ANCILLARY SUITS—AMOUNT IN DISPUTE.

Has the circuit court of the United States, in a general creditors' suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver, in accordance with its order, against debtors of such corporation, so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding \$2,000? *Held*, by the circuit court of appeals for the Sixth circuit, that the question should be certified (Act March 3, 1891, § 6) to the supreme court of the United States for its proper decision.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

This was an ancillary suit, instituted by Boyd Ewing, as receiver in the main cause of Bosworth against the Cardiff Coal & Iron Company, against J. H. White and numerous others. From the decree entered, both parties appeal. The circuit court of appeals reserves the question of the jurisdiction of the circuit court for decision by the supreme court upon certificate.

John W. Yoe, John F. McNutt, and Tully R. Cornick, for appellants.

Pritchard & Sizer (Clark & Brown, of counsel), for appellee and cross appellant.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

PER CURIAM. The Cardiff Coal & Iron Company was a corporation organized under the laws of Tennessee, with power to purchase real estate, to establish manufacturing plants thereon, to improve and subdivide the land, and to sell the same in lots. It sold many lots to different persons, more than 100 in all, and took their notes in part payment of the purchase price therefor. It became financially embarrassed, and the improvements begun by it were abandoned. Bosworth, a citizen of Massachusetts and a judgment creditor in the sum of \$2,300, filed a general creditors' bill in the court below against the company. He alleged the insolvency of the company, the wasting of its assets by abandonment, and his inability under the laws of Tennessee, by reason of the incumbrance of a mortgage, to levy execution on the real estate and improvements which, with choses in action, constituted the only available assets of the company; and he prayed for the sale of the property, and the collection of its choses in action, and the distribution of the proceeds among the creditors found to be entitled. He further asked the appointment of a receiver and an injunction against further disposition of assets by the company. A receiver was appointed, and ordered to take possession of all the assets of the company, and to manage and protect the same for the benefit of the creditors, under order of the court. He was further ordered "to ascertain and report to the court what assets the company had, the kind and situation thereof, and any proper steps to be taken in respect thereto; especially any debts or liabilities to the company, and the amount and kind thereof." Creditors were ordered to file their claims against the company in the court on or before a certain date, and due publication of the order was ordered. Subsequently the receiver filed the following petition in the case:

"To the Judges of the Circuit Court of the United States for the Southern Division of Eastern District of Tennessee: Your petitioner, Boyd Ewing, respectfully represents and shows the court that he was heretofore appointed receiver of this court in the above-named case, which is a general creditors' bill, brought to wind up the affairs of the defendant company as an insolvent corporation, and to administer its assets for the benefit of its creditors. The record of the case as made up to this time is referred to without going further into detail, which is not deemed necessary for the purpose of this petition. Petitioner, as such receiver, was directed in the order of appointment to make report to the July rules in regard to the debts, assets, property, and general condition of the defendant company, which he has done. Petitioner shows the court that a large portion of the assets of said company consists of promissory notes due said company, amounting in the aggregate to about the sum of \$225,000, given for land purchased from said company, with liens retained to secure same. There are also debts by account to the amount of about \$14,000 due said company. On all of said notes and accounts, your petitioner is informed and believes that it will be necessary to bring suit or suits to collect the same, and he has been requested to bring such suits by the creditors in this court, and comes by this petition for specific authority and directions to institute suit, and as to his duty in respect thereto. Petitioner is advised and informed that, in order to save costs and the expense of many suits, it is proper, if it may be done, to bring in all the debtors by bill or petition in the above case in one suit, and is so requested by creditors. Petitioner further shows that to sue said debtors separately would require one hundred (100) suits or more, with the enormous expense incident thereto. Petitioner further shows that it would be proper, in his judgment, to allow him to sell, on such terms as he may think best, certain personal property of defendant

company on hand, and of no use or service, consisting of surplus office furniture and fixtures, pipe fittings, tools, hotel range, fixtures, etc., live stock, and other personal property, excepting notes and accounts, and petitioner asks authority in this respect also. Premises considered, petitioner prays for all such orders and directions as will enable him to fully discharge his duty in regard to the matters set forth in the foregoing petition, as well as for such general instructions, if any, as the honorable court may see proper to give."

Thereupon the court made the following order:

"Nashville, Tenn., July 11th, 1891. At Chambers.

"Upon application by the foregoing petition, the receiver in this case is ordered and directed to institute suit by proper bill or petition in the pending case against all persons indebted to the defendant company (the Cardiff Coal & Iron Co.) by note or account, as set forth in his petition. Such suit may be brought without any additional bond to that already given for costs of the principal cause. The receiver is also authorized and allowed to proceed to sell, on such terms as he may deem best for the interest of all concerned, the personal property of said defendant company referred to in his petition, and such other personal effects belonging to the said company, except the notes and accounts due it, as he may think best, in advance of the hearing of the cause. He will report his action in the premises to the court after making sale of such personalty. An entry in conformity with this order and permission will be made by the clerk upon the minutes of the court in said cause.

[Signed] Howell E. Jackson, Circuit Judge."

In pursuance of this order, the receiver filed his bill in the cause, as follows:

"Boyd Ewing, a citizen of Hamilton county, Tennessee, and receiver in the above cause, brings this bill and petition, as such receiver in said cause, against the defendants named below, and residents and citizens of the places stated, to wit: [Here follow the names of 130 persons, of whom 30 were alleged to be citizens of Tennessee, and the remainder citizens of other states.]"

The bill then proceeds:

"Said defendants above named are indebted to the Cardiff Coal and Iron Company by notes given for lots or parcels of land purchased from said company, it being a real-estate company. The amounts due from said defendants are shown below, where the note or notes, with dates when due and the parcel of land for which given, are stated, in connection with the name of each defendant, as follows: [Then is set forth a list of the defendants before named, with the number and amount of the notes owing by them, together with the lot or lots for which each note was given. The amounts alleged to be due from the several defendants, respectively, were in most cases less than \$2,000.]"

The bill then proceeds:

"A map of said company's land is registered in the register's office of said Roane county, Tennessee, and a correct copy of the map is herewith filed as Exhibit No. 1, and made part hereof, for further and perfect description of the lands, but not for copy. Special liens were retained in each case in the deed to each purchaser to secure the deferred payments of purchase money, and copies of the deeds will be filed on or before the hearing, if necessary. Your petitioner is advised that he has the right to have said liens in favor of said company so retained enforced in this court by sale of said lots in satisfaction of the balances of purchase money, and to have decrees against each and all of said defendants separately for the amounts due upon their several notes. In addition to the debts due said company for real estate purchased, the defendants below named are indebted to said company in the amounts and manner stated, with residence and citizenship stated, that is to say: [Then follows a list of debtors of the company not lot purchasers.]"

The bill proceeds:

"Petitioner is advised that he has a right to collect said debts, and bring them into the office of this court for administration, as part of the assets of

said company, and for this purpose to have decrees thereon. Your petitioner respectfully shows that some of said notes are in the possession of others by hypothecation or pledge as collateral security for debts, but the title is in said company, and your petitioner desires and is advised that he has the right to collect the same subject to the rights growing out of the pledge, and to have the balance of proceeds over and above the debts secured by the pledge brought into court, as part of the assets to be administered as aforesaid, and for this purpose parties holding said collateral are in like manner made defendants hereto; and petitioner does not admit the validity of any contract or pledge, as he has not personal information, but submits to the court this question, and calls on the holders of the collateral to disclose all the facts of the transaction. This discovery in case of banks to be made by the presidents of such banks. The holders of such collateral, the particular collateral, the names and the residences of the holders are as follows: [Then follows the list of collateral holders, with the amounts of the same respectively held by them.] Your petitioner further states and shows that the above-named case, in which this petition or bill is filed, is a general creditors' bill, pending in this court to wind up the affairs of the defendant Cardiff Coal & Iron Company as an insolvent corporation, and to administer its assets as a trust fund for the benefit of all its creditors ratably, said company, as stated, being a corporation organized under the laws of Tennessee. For this purpose, and to better effectuate this object, your petitioner has been duly appointed receiver of the property and assets of said company by this court, and he has qualified and entered upon his duties as such, under the general directions common in such cases. Your petitioner, upon examination, ascertained the debtors were very numerous, as will be seen, and that the debts could only be collected by suit, and that the expense of separate suits would result in an unnecessary and enormous loss of the assets, and that such course would also, for obvious reasons, be almost impracticable and endless. In this situation your petitioner applied to this honorable court for specific instructions as to his right and duty in the matter, and an order has been duly made by this court directing this suit as brought. Said application for instructions and the order thereon are on file in the case, and referred to. All or nearly all of said notes provide for attorney's fees in case of suit thereon, and petitioner is advised he has the right to recover the same in this suit for the purpose of paying same. Premises considered, let those named as defendants hereto be made such by process according to the practice of the court against the defendants residing in the state, and as to the nonresidents, on whom process cannot be served, let an order be made pursuant to the act of congress (18 Stat. 472) directing such defendants to appear on a day to be fixed in the order, and plead, answer, or demur, and let such order be served upon such nonresident defendants, wherever found, or, in case such service of order cannot be had, let publication be made as the court may direct, as to any one or more of such defendants who cannot be so served. On the hearing, let petitioner have decree against each and every one of the defendants for the amounts so due from each, with all proper interest and reasonable attorney's fees, to be ascertained by reference, if necessary. Let the parcels of land on which liens exist for balance of purchase money, as shown herein, be sold on time in bar of the equity of redemption, for the satisfaction of such decrees, and let them have execution for any balance not so satisfied. Let decree be made against the other defendants named who are indebted to said Cardiff Coal and Iron Company. Let the proceeds arising from any of said notes held as collateral be applied in satisfaction of any debt for which the court may hold that they are legally and validly held, and let the surplus be paid over and go into the general assets for creditors. Finally, grant all such orders and decrees, special and general, as will fully effectuate the objects of this bill, as well as all proper and general relief upon the facts of the case."

Subpoena was issued and served on the resident defendants, and an order of publication made against those nonresident lot-purchasing defendants whose notes were a lien on their lots. No exception was taken to the form of the bill by demurrer or otherwise. The defendants nearly all answered, denying their liability. The cause

was referred to a master, and on his report decrees were entered against those found to be indebted. The decrees against individual defendants were, in a majority of instances, for sums less than \$2,000. The lots were ordered sold to pay the amounts so found due. Appeals from these decrees were duly taken and perfected by the defendants. The nonresident defendants who had answered were permitted to withdraw their answers by Judge Key, holding circuit court, and decrees against them in personam were then refused. The right of the court to do this is denied by the receiver, and it is made the basis of his cross appeal.

Questions on the merits of the defenses are made by many of the defendants below. But the first issue presented for our consideration is that in respect to the jurisdiction of the court below to entertain the bill of the receiver, and to enter decrees thereon. We conceive that any objection to the receiver's bill on the ground that it is multifarious, or that it should have been filed as an independent bill, was waived by the filing of answers without making it, and, in case of the nonresidents, by the withdrawal of their answers, with the consequent decrees by default. More than this, we cannot think, after the decision of the supreme court of the United States in *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, that there is any doubt of the right of the receiver in this cause to bring actions in the federal court without regard to the citizenship of the parties thereto, because his suit, being only maintainable on the authority of an order of the United States circuit court, authorizing him to bring it, is one arising under the constitution and laws of the United States, and is thus manifestly within the jurisdiction of the circuit court of the United States, by virtue of the first section of the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. 433), provided that the amount in controversy exceeds, exclusive of interest and costs, \$2,000.

But a much more difficult question arises when the receiver embraces, in his suit, defendants against whom he neither claims nor recovers an amount exceeding \$2,000. The defendants who raise this question of jurisdiction were each of this class. Had the circuit court the power to authorize its receiver to sue, in the pending cause, persons for less sums than \$2,000, and to enter decrees therefor? This is a question which might have been carried directly to the supreme court, under section 5 of the circuit court of appeals act (11 C. C. A. vii.). The jurisdiction of the circuit court to make the order to entertain the bill and to enter the decrees is based on the view that the entire estate of the debtor company was in the hands of the court for administration and distribution, and that the right to enforce the collection of sums less than the usual jurisdictional amount of \$2,000 is merely ancillary or auxiliary to granting the relief sought in the original bill, of which the court is conceded to have had jurisdiction.

Because we find difficulty in reaching a conclusion on the question, and because it is of a class of questions which congress has provided may be examined on direct appeal to the supreme court,

it is ordered that, upon the foregoing statement of facts, the following question, concerning which this court requests the instruction of the supreme court of the United States for its proper decision, be certified to that court, in accordance with section 6 of the act to establish circuit courts of appeals, approved March 3, 1891 (11 C. C. A. x.):

"Question: Had the circuit court of the United States, in a general creditors' suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver, in accordance with its order, against debtors of such corporation, so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding \$2,000?"

It is further ordered that the consideration of all other questions in this cause be stayed until the action of the supreme court upon the foregoing certificate be certified to this court.

TUTTLE v. CLAFLIN et al.

(Circuit Court of Appeals, Second Circuit. February 11, 1895.)

EQUITY PRACTICE—FINAL DECREE.

T. brought suit against C. for infringement of a patent. Upon final hearing a decree for an accounting was entered, and the cause referred to a master, who reported a large sum due to the complainant. On exceptions to the master's report, a decree was entered, sustaining certain exceptions, and adjudging that the complainant might have the cause sent back to the master for further proofs, if he should elect to do so, by filing a notice to that effect in the clerk's office within 60 days, and that in default of such election the complainant recover six cents damages and the costs up to the order of reference, and that the costs of the proceedings before the referee be taxed in favor of the defendant. The complainant appealed from the decree. *Held*, that such decree had all the essential elements of a final decree, and might properly be treated as such.

This was a motion for a writ of supersedeas, issuing out of the circuit court of appeals, to stay all proceedings in the cause in the United States circuit court for the Southern district of New York until the hearing and decision by the circuit court of appeals of the appeal that had been taken therein.

The suit was in equity, for the infringement of certain letters patent for improvements in crimping and ruffling machines. The final hearing resulted in an interlocutory decree for an accounting. 19 Fed. 599. The master reported \$76,215.85 due to the complainant, as profits. The defendant filed exceptions to this report, some of which were sustained. The court set aside the report. On April 19, 1894, a decree was entered on this decision, of which the operative part is as follows: "Ordered and decreed that the said exceptions, so far as they relate to said questions, especially the eleventh, twelfth, seventeenth, eighteenth, and twentieth exceptions, be, and the same are hereby, sustained, and that the said report be, and hereby is, set aside; and it is further order and decreed that the complainant may, if he desires, have the cause sent back to the master for further proofs and for a further report thereon, such election to be expressed by a notice in writing to be filed with the clerk of this court within sixty days after the entry of this decree. That in default of such notice the complainant recover of the defendants the sum of six cents damages, and that the complainant recover of the defend-

ants his costs to be taxed for all proceedings prior to and including the order of reference made herein on the — day of March, 1894, and that the costs of the proceedings thus far had before the masters herein be taxed in favor of the defendants." The time within which to elect was extended by successive orders to and including September 20, 1894. On October 5, 1894, an appeal was taken from so much of the decree as sustained the exceptions and set aside the master's report and awarded to complainant nominal damages only, and to defendants certain costs, a supersedeas bond in the usual form being given. On November 17, 1894, the defendants attempted to tax their costs before the clerk of the circuit court. The clerk held that it was out of his power to do so, by reason of the appeal having operated as a supersedeas. The matter was brought for review before the circuit court, which decided as follows on December 27, 1894: "The objections to taxation should have been overruled, and costs taxed. The order appealed from was not a final one. The adjustment of respective costs and decree for difference yet remained to be done and entered." The complainant thereupon moved for a writ of supersedeas, and the motion came on to be heard before WALLACE and SHIPMAN, Circuit Judges.

Benjamin F. Lee, for the motion.

Edmund Wetmore, opposed.

WALLACE, Circuit Judge. The question whether the decree appealed from is to be regarded as a final decree in the cause is not free from doubt. Apparently, it was not intended to be in formal, final disposition of the cause; but another was to be made in case the election reserved to the complainant, to reopen the case, should not be exercised pursuant to the conditions specified, and after proof of the default. Nevertheless, it is so expressed as to be final in case a notice should not be filed in the clerk's office within a specified time,—a fact which could be ascertained merely by consulting the files of the court,—and provides that in default of filing such notice the complainant recover of the defendant the sum of six cents damages and his costs to be taxed, for all proceedings prior to and including the order of reference therein. Upon the authority of *Forgay v. Conrad*, 6 How. 202; *Thomson v. Dean*, 7 Wall. 342; *French v. Shoemaker*, 12 Wall. 86; *Rubber Co. v. Goodyear*, 6 Wall. 153,—we think the decree has all the essential elements of a final decree, and may properly be treated as such. The circumstance that the costs were not taxed and entered in the judgment is not material. *Fowler v. Hamill*, 139 U. S. 549, 11 Sup. Ct. 663. The motion for a writ of supersedeas is granted.

The following is a copy of the order and writ issued in accordance with the above opinion:

Theodore A. Tuttle, Trustee, etc., versus John Claffin, as Executor, etc., et al.
In Equity.

Theodore A. Tuttle, as trustee, etc., the complainant and appellant in the above-entitled cause, having moved this court for a writ of supersedeas directed to the United States circuit court for the Southern district of New York, staying and enjoining said court from taking any further proceedings herein until the decision by this court of the appeal herein, and this motion coming on to be heard upon the petition of the said Theodore A. Tuttle, trustee, etc., verified January 10, 1895, upon the record on appeal herein, heretofore filed with the clerk of this court, and upon all the proceedings heretofore had herein, and after hearing Benjamin F. Lee, Esq., in support of said motion, and Edmund Wetmore, Esq., in opposition thereto, and due deliberation having been had, it is adjudged and decreed that the

decree entered herein in the United States circuit court for the Southern district of New York on the 10th day of April, 1894, is a final decree, from which an appeal properly lies to this court; and it is further ordered, adjudged, and decreed that the appeal taken herein by complainant, and allowed on the 5th day of October, 1894, with the security thereon taken and approved, were such as properly to operate herein as a supersedeas to stay all proceedings in the United States circuit court for the Southern district of New York pending the hearing and decision of the said appeal, and the return of the mandate thereon; and it is further ordered, adjudged, and decreed that this motion for a writ of supersedeas be, and it hereby is, granted; and it is further ordered, that the clerk of this court be, and he hereby is, directed to issue such writ in the form hereto annexed, directed to the United States circuit court for the Southern district of New York, its judges, clerk, and marshal, staying and enjoining said court, its judges, clerk, and marshal, from taking, or suffering to be taken before them, any further proceedings herein until the hearing and decision by this court of the appeal herein, and the return of the mandate thereon; and it is further ordered that this writ be served by lodging the same in the office of the clerk of the United States circuit court for the Southern district of New York.

The United States of America—ss.

The President of the United States, to the Judges of the Circuit Court of the United States for the Southern District of New York, and to the Clerk and Marshal of Said Court, Greeting:

Whereas, An appeal has heretofore been taken to the United States circuit court of appeals for the Second circuit from a certain final decree entered in the United States circuit court for the Southern district of New York on the 10th day of April, 1894, in a certain cause wherein Theodore A. Tuttle, as trustee in insolvency of the Elm City Company, is complainant and appellant, and John Claflin, as executor of the last will and testament of Horace B. Claflin, deceased, John Claflin, Edward E. Eames, Horace J. Fairchild, Dexter N. Force, and Daniel Robinson, are defendants and appellees; and whereas, said appeal was taken, and good and sufficient security was given, in due time, to operate, by virtue of the statute in such case made and provided, as a supersedeas and stay of all proceedings in said cause in said circuit court; and whereas, notwithstanding such supersedeas, said defendants and appellees have attempted to take certain further proceedings in said cause in said circuit court; Now, therefore, we, being willing that full justice should be done the said Theodore A. Tuttle, trustee, in this behalf, and that his rights in the premises should be fully protected, do command and enjoin you to refrain from taking, or suffering to be taken before you, any proceedings whatsoever, and especially any proceedings in the nature of taxation and collection of costs, in the said cause, until the hearing and decision by this court of the appeal taken herein, and the return to you of the mandate thereon.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this — day of — in the year of our Lord one thousand eight hundred and ninety-five, and of the independence of the United States of America the one hundred and nineteenth.

Attest: —, Clerk.

BRIDGENS v. DOLLAR SAV. BANK OF KANSAS CITY, MO., et al.

(Circuit Court, W. D. Missouri, W. D. January 7, 1895.)

No. 1,916.

CORPORATIONS—MISCONDUCT OF OFFICERS—EQUITY JURISDICTION.

B., as receiver in insolvency proceedings of the C. Bank, filed his bill against the D. Bank and one K., alleging that K. was a director and president of the C. Bank, and a director, cashier, and managing agent, as well as a stockholder, of the D. Bank, which had long been the holder of a large majority of the stock of the C. Bank, and had full control of the affairs

of that bank. The bill further alleged that, at the time of the insolvency of the C. Bank, it had \$26,061 on deposit with the D. Bank, and held a certificate of deposit of the D. Bank for \$3,040; that while the C. Bank was thus insolvent, and on the day before the appointment of the receiver, K., without authority of the directors of the C. Bank, caused a contract to be executed for the purchase by it from the D. Bank of the C. Bank stock, and a quantity of notes, owned by the D. Bank, for the amount of the C. Bank's deposits with the D. Bank, and thereupon caused the certificate of deposit to be surrendered to the D. Bank, and a check drawn to its order for the \$26,061, and delivered to it, the stock and notes being delivered to the C. Bank. The bill prayed for a rescission of the sale of the stock and notes, which the complainant offered to return, and for repayment of the \$26,061. *Held*, on demurrer, that the bill stated a case of breach of trust by K. as an officer of the C. Bank charged with the duty of protecting its creditors and stockholders, and also of misconduct by him in acting at the same time for the two banks whose interests were opposed, which case was within the jurisdiction of a court of equity.

W. H. Bridgens, as receiver of the Citizens' Bank of Kansas City, Kan., filed his bill against the Dollar Savings Bank of Kansas City, Mo., and Kelly Brent, praying for the rescission of a sale of certain stock and notes by the Dollar Savings Bank to the Citizens' Bank, and a decree for the repayment to said Citizens' Bank of \$26,061.25. The case, as made by the bill, was as follows:

Kelly Brent was a director and the president of the Citizens' Bank, and was also cashier and managing agent of the Dollar Savings Bank. The Dollar Savings Bank owned 797 shares out of a total of 1,000 shares of the capital stock of the Citizens' Bank, and through its officers and agents had full control of said Citizens' Bank. On July 17, 1893, the Citizens' Bank was wholly insolvent, and was known to Brent to be so. On that day said bank had on deposit, subject to check, in the Dollar Savings Bank, \$26,061.25, and held a certificate of deposit of said Dollar Savings Bank for \$3,040 more. On said 17th day of July, 1893, Brent, as cashier of the Dollar Savings Bank, and by virtue of his authority as president of the Citizens' Bank, compelled one Charles S. Squier, cashier of the Citizens' Bank, to execute a contract of sale with the Dollar Savings Bank, by which the 797 shares of the stock of the Citizens' Bank belonging to the Dollar Savings Bank were sold to the Citizens' Bank at their paid-up value, \$19,925, and a number of notes belonging to the Dollar Savings Bank were also sold to the Citizens' Bank at their face value, \$9,176.25. The stock and notes were received by Squier for the Citizens' Bank, and the certificate of deposit for \$3,040 and a check for the \$26,061.25 were delivered to the Dollar Savings Bank. This contract and transfer were made without the knowledge or consent of the directors of the Citizens' Bank, and were never ratified by them, and the transfer was never entered on the books of the Citizens' Bank. On July 18, 1893, in insolvency proceedings in a state court, the complainant was appointed receiver of the Citizens' Bank. On August 10, 1893, complainant tendered to the Dollar Savings Bank the stock and notes, and demanded the return of the \$26,061.25, which was refused. The total liabilities of the Citizens' Bank, exclusive of capital stock, were \$78,608.37, and its assets, apart from the amount claimed from the Dollar Savings Bank, were \$17,587.72.

The defendants demurred to the bill for want of equity.

Scroggs & McFadden, McGrew, Watson & Watson, and Karnes, Holmes & Krauthoff, for complainant.

Lathrop, Morrow, Fox & Moore and Teasdale, Ingraham & Cowherd, for defendants.

PHILIPS, District Judge. The principal question raised by the demurrer to the bill is whether or not the complainant has a full

and adequate remedy at law for the grievances complained of. The contention on the part of the defendants' counsel is that a court of equity in the federal jurisdiction will not sustain a bill in a case of fraud to obtain only a decree for the payment of damages in money, when the like amount might be recovered in an action at law. This is predicated of the fact that under the judiciary act of 1789, under which the first congress established the courts of the United States, and defined their jurisdiction, it was enacted that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law"; and, further, because five days after the enactment of this statute the same congress proposed to the legislatures of the several states the article, afterwards ratified as the seventh amendment of the constitution, which declares that "in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." It may also be conceded that it is now the settled rule of law in the federal courts that an insolvent corporation, prior to dissolution and the cessation of business, may, the same as a natural person, dispose of its property by way of preferences among its creditors in payment of debts, and make sales to bona fide purchasers, so that the preferred creditor or bona fide purchaser will hold the property transferred as against the other creditors of the corporation and its stockholders. But it is just as true as ever that such transfers and purchases must be in good faith, and so as not to secure any unjust advantage to the managing officers of the insolvent corporation; and it is just as true as it ever was that the directors and managing officers of corporations sustain a trust relation to the corporation for the use and benefit of its creditors and stockholders, and that courts of equity will, as between such officers and those dealing with them, enforce a strict observance of their duties in favor of the stockholders and creditors of the corporation, and will interpose to prevent a misapplication and perversion of the trust property committed to their keeping and management. And it is the especial province of a court of equity to undo their acts and restore the status quo whenever and wherever, by fraudulent collusion with other parties, they misapply the trust property so as to work a fraud upon the *cestuis que trustent*. To this end, in order to work out the trust for the benefit of the wronged creditors and stockholders, a court of equity will pursue the trust property into whosoever hands it may pass with notice of the wrong, and either restore it in kind or compel the participant to make equivalent restitution. This rule is clearly recognized in *Wardell v. Railroad Co.*, 103 U. S. 658, where Mr. Justice Field observed:

"They [the officers and directors] cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many

unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration."

The bill of complaint alleges, and the demurrer admits, that one Brent was the president and one of the directors in the active management of the Citizens' Bank of Kansas City, Kan., and that through its officers and agents the defendant bank "had full control and management of the business and affairs of said Citizens' Bank." It further charges, and the demurrer admits, that Brent, the president and director of the Kansas bank, "persuaded, induced, and compelled Charles S. Squier (cashier of the Citizens' Bank) to accede to said Brent's demand" to make the pretended contract and transfer of said stock in the Citizens' Bank, and to cancel the certificate of deposit held by the Citizens' Bank against the defendant bank. It is the settled rule of equity jurisprudence that the directors and agents of two companies are disqualified from representing both companies in a transaction where the interests of the two companies are opposed; nor will one corporation be permitted to form a company ancillary to the original one, and contract with it to the disadvantage of the creditors and stockholders of one of the companies. *Mor. Priv. Corp.* §§ 529, 530. And a court of equity will, in such case, notwithstanding the apparent legal effect of such transfer and transaction between two such corporations, treat the same according to the real facts and equities of the case. *McVicker v. Opera Co.*, 40 Fed. 861; *Interstate Tel. Co. v. Baltimore & O. Tel. Co.*, 51 Fed. 49; *Trust Co. v. Kneeland*, 138 U. S. 414, 11 Sup. Ct. 357; *Day v. Telegraph Co. (Md.)* 7 Atl. 608.

Brent, as cashier of the one bank and president of the other, and the active manager of both, is presumed to have known of the financial condition and insolvency of the Citizens' Bank at the time of the transaction in question. He knew that the 700 and more shares of stock which he was putting off on the Citizens' Bank in satisfaction of its claim against the defendant bank was worthless; and, under the averments of the bill, the case stands as if he had made these mutual transfers and had entered the satisfaction in the Dollar Savings Bank of its indebtedness to the Kansas bank. As cashier and director of the Dollar Savings Bank, he was a stockholder and interested directly in its assets; so that, by the arrangement so made by him between these two banks, he sought to secure a direct advantage and benefit to himself as such stockholder. This a court of equity says cannot be done, and it will interpose to undo the act, and either establish the status quo between the two companies, or compel the one thus obtaining an unconscionable advantage to make restitution in a money equivalent. Under the statutes of the state of Kansas, under which the Citizens' Bank was organized and conducted, provision is made in case of the insolvency of such bank for the state court, upon petition of any party in interest, to interpose and adjudge the fact of insolvency, and to appoint a receiver therefor, who, by virtue of his office, becomes the representative of the state which grants the franchise, and of the creditors and stockholders of the insolvent corporation.

In his official capacity it becomes his duty, and he is invested with authority, to take such action for the use and benefit of such creditors and stockholders as will protect their interests in the trust property. So that in this action the receiver is not only pro hac the corporation, but he is the representative of all its creditors and stockholders. The bill in this case seeks to uncover the apparent legality of this transaction, and to get at the real bona fides thereof in the enforcement of the trust relation that the president, director, and manager of the Citizens' Bank sustained to it; and to that end it asks for a rescission and cancellation of the transfer of the certificate of deposit held by the Citizens' Bank against the defendant bank, and the transfer of said stock, and the notes attempted to be made by said Brent, representing the defendant bank, to the Citizens' Bank, which he also represented. Pomeroy, in his work on Equity Jurisprudence (volume 1, par. 110), observes that, notwithstanding the expansion of the powers of the law courts, "there are certain species of equitable remedies which have become well established and familiarly known, and which are accordingly designated by the term 'equitable remedies' wherever it is used." Among these he enumerates:

"Those which the legal procedure recognizes, but does not directly confer, and the beneficial results of which it obtains in an indirect manner. A familiar example is the relief of rescission or cancellation. A court of equity entertains a suit for the express purpose of procuring a contract or conveyance to be canceled, and renders a decree conferring in terms that exact relief. A court of law entertains an action for the recovery of the possession of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages; and although nothing is said concerning it, either in the pleadings or in the judgment, a contract or a conveyance, as the case may be, is virtually rescinded. The recovery is based upon the fact of such rescission, and could not have been granted unless the rescission had taken place. Here the remedy of cancellation is not expressly asked for nor granted by the court of law, but all its effects are indirectly obtained in the legal action. It is true the equitable remedy is much broader in its scope, and more complete in its relief; for its effects are not confined to the particular action, but by removing the obnoxious instrument they extend to all future claims and actions based upon it."

Counsel for defendants in their brief, while not controverting what seems to be the settled law of the state of Kansas (in *Bank v. Wulfekuhler*, 19 Kan. 63), that such banking corporation cannot become the purchaser of its own stock, as was attempted in this case, yet contend that there is this exception to the rule, that it may do so if necessary to secure a debt owing to it by the stockholder; and suggest that a state of facts may be shown by the defendant to bring this action within the exception, and that on such an issue, and possibly of complicated and doubtful testimony, it ought to be entitled to a trial thereof by a jury. It would be a sufficient answer to this to say that no such state of facts appears, even suggestively, on the face of the bill; and even if, on the hearing of this case, such an issue should arise, as one of the incidents of the case, it would not oust the jurisdiction of the chancellor to pass upon such issue; and, should he feel any embarrassment in passing upon such state of the evidence, it is perfectly competent

for him, under recognized chancery practice, to refer such issue of fact to a jury. Of course, if it should turn out on the hearing that the single question between these two corporations is whether or not the defendant corporation, as such, in its dealing with the Citizens' Bank, by mere deceit and fraud obtained possession of the property of the Citizens' Bank, under circumstances which a court of law would declare to be void for fraud in its inception, remedial by a judgment for damages, the remedy at law would be adequate, plain, and complete, and the defendant would be entitled to its trial by jury. But it seems to the court, from a view of the whole bill, looking at the trust relation between these two banks, the one being operated as an adjunct of the other, and this transaction being conducted, in effect, by the managing officer for both banks, it discloses a breach of duty on the part of the trustee, which a court of equity is peculiarly constituted to inquire into, and remove out of the way of securing the ends of exact justice, in favor of the creditors and stockholders of the Citizens' Bank, the legal forms gone through with in the impugned transactions and transfers between the two banks. See *Bank v. Wulfekuhler*, supra; *Railway Co. v. Miller* (Mich.) 51 N. W. 981; *Mor. Priv. Corp.* §§ 1, 227; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192, 13 S. W. 822; *Patton v. Glatz*, 56 Fed. 367.

It may further be observed that while the bill alleges that the attempted transfer of the stock of the bank was illegal, for the reason that it was not done on the books of the Citizens' Bank, and by authority of its directors, it does not follow that, as between third parties, a written transfer indorsed on such certificates may not, as between them, have the effect, in equity, if not in law, to invest the transferee with the title and the right to have the formal transfer on the books of the corporation made. *Kortright v. Bank*, 20 Wend. 93, affirmed 22 Wend. 360. See, also, *International Bank v. German Bank*, 71 Mo. 191. Why a court of equity has not jurisdiction to set aside such transfer as between these two banks, in holding the managing officer conducting the transaction to a faithful execution of his trust, is not apparent. The demurrer is overruled, with leave to the defendant to answer the bill if desired.

FOWLER et al. v. JARVIS-CONKLIN MORTGAGE TRUST CO.

(Circuit Court, S. D. New York. December 27, 1894.)

1. RECEIVERS—APPOINTMENT OF OFFICERS OF CORPORATION — PRIOR MISMANAGEMENT.

Officers of a corporation, appointed its receivers because its business was complicated, intricate, and widely extended, with millions of dollars invested upon small mortgages scattered through several states, will not be removed from the receivership because of former imprudent investments, and other mismanagement of the business of the corporation, as its officers, no fraudulent practices which would disqualify them being shown.

2. SAME—FILLING VACANCY UPON RESIGNATION—NOTICE TO INTERVENER PETITIONING FOR REMOVAL.

After the denial of an application by an intervener for removal of receivers, one of them voluntarily withdrew; and the vacancy was filled by

the court, of its own motion, appointing a new receiver. *Held*, that the fact that such intervener was not notified in advance of the court's action, nor consulted as to the selection of the new receiver, was not ground for vacating the appointment; there being nothing to show unfitness or incompetence in the person selected, or sufficient reason to change the composition of the receivership.

This was a suit by Benjamin M. Fowler and others against the Jarvis-Conklin Mortgage Trust Company, in which Samuel M. Jarvis and Roland R. Conklin were appointed receivers of the defendant corporation. A petition for their removal, filed by Elizabeth Garnett, intervening, was denied. 63 Fed. 888. Thereafter, the intervener again moved for their removal, and the receiver Jarvis having resigned, and the court having, of its own motion, filled the vacancy by appointing a new receiver, the intervener moved also to vacate the order of appointment.

The grounds of removal, on which the application was renewed, were charges of mismanagement of the business of the corporation by the receivers while its officers, of the same nature as the charges previously made, supported by affidavits, part of which had been filed on the first application in reply to affidavits on behalf of the receivers, but contained new averments as to the management of the corporation, which were not then considered, because not matter in reply to the affidavits or argument on behalf of the receivers. See 63 Fed. 889.

Fabius M. Clarke, for the motion.

Arthur H. Masten and Winslow S. Pierce, opposed.

LACOMBE, Circuit Judge. The papers submitted on the original motion, as well as those upon which the present application is based, have been examined, and the opinion heretofore expressed (63 Fed. 888) remains unchanged. No sufficient cause is shown for the removal of the receivers first appointed, nor is any necessity apparent for referring it to a master to take proofs on the points suggested, and already so fully covered by affidavits on both sides. The motion to remove the receivers first appointed is denied.

The new receiver was appointed by the court, *ex proprio motu*, to fill a vacancy caused by the voluntary withdrawal of one of those originally appointed, but whose withdrawal from further administration of the affairs of the receivership in no way relieved himself or his bondsmen from full accountability for all his transactions as receiver, nor himself from like accountability for any action as an officer of the company before its affairs were taken charge of by the court. The fact that the intervening petitioner was not notified in advance of the court's action, nor consulted as to the selection of the new receiver, is no ground for reversing that action, there being nothing to show unfitness or incompetence in the individual selected. If the question of appointing receivers were now before this court as an original application, upon all the papers now on file, the course best fitted to secure a careful and intelligent administration of the extensive and complicated business of winding up the affairs of the corporation would indicate the selection of receivers, one of whom was wholly unconnected with its prior administration, and the other thoroughly familiar with the

same. The receivership is now thus constituted, and no sufficient reason to change its composition is shown. Motion to vacate the order of October 11, 1894, is denied.

**CLARKE v. CENTRAL RAILROAD & BANKING CO. OF GEORGIA et al.
CENTRAL RAILROAD & BANKING CO. OF GEORGIA v. FARMERS'
LOAN & TRUST CO. et al. BROWN et al. v. CENTRAL RAILROAD &
BANKING CO. OF GEORGIA.**

(Circuit Court, E. D. Georgia, S. D. June 30, 1893.)

1. RECEIVERS—MAY PROMOTE RAILWAY REORGANIZATION SCHEME.

It is not improper for the receiver of a railway corporation to promote any reorganization scheme which offers the prospect of securing the largest measure of protection to all persons concerned in or connected with the property and assets in the custody of the court, but in so doing he must not promote one interest at the expense of others equally entitled to the court's protection.

2. RECEIVERS—REMOVAL—MISLEADING REPORTS.

The receiver of a railway corporation should not be removed for making reports as to the condition of the property in his care, which are alleged to be misleading, and to depress its value in the estimation of the public, when it appears that he has continued the existing method of accounting and reports, without intentionally misstating or misrepresenting the company's true condition.

3. SAME—FRAUDULENT ACTS OF AGENT.

The receiver of a railway corporation should not be removed on motion of a creditor because his agent has fraudulently permitted certain brokers to buy lumber at one price, and bill it to the corporation at a higher price, when it appears that he has used due care in the selection and supervision of his agents, and has discharged the wrongdoer as soon as he heard of the transaction.

4. SAME—LOW FREIGHT RATE TO INTRODUCE NEW PRODUCT.

The receiver of a railway corporation may properly, in the exercise of his business judgment, give an unusually low rate, in order to introduce into general use a cheap and valuable article, which, if brought into general demand, would add to the freight receipts of the roads handling it.

5. SAME—RESPONSIBILITY FOR WRONGFUL ACTS OF OTHERS.

The receiver of a railway corporation should not be discharged on motion of a creditor because labor paid for by the corporation has been used by private parties for their advantage, when it is not alleged or shown that he either knew of or consented to such use.

6. SAME—BREACH OF TRUST—CONTRACTS WITH INTERESTED PARTIES.

It is improper for the receiver of a railway corporation to procure supplies from or enter into contracts with a company composed of the superintendent and other officials of the railway.

7. SAME—RESPONSIBILITY FOR BREACH OF TRAFFIC AGREEMENT.

The receiver of a railway corporation should not be discharged on motion of a creditor because a competing line has for a considerable time broken the traffic agreement between the two roads, when it appears that he has upon discovery of this state of facts taken successful steps to put an end to it.

In Equity. Bill by Rowena M. Clarke, the Farmers' Loan & Trust Company, and Alexander Brown & Sons against the Central Railroad & Banking Company of Georgia. For prior opinion, see 50 Fed. 338, and 54 Fed. 556. Heard on motion by Alexander Brown & Sons to remove H. M. Comer from the receivership. Denied.

Calhoun, King & Spalding, Leopold Wallace, and M. C. Butler, for the motion.

Lawton & Cunningham, Denmark & Adam, and N. J. & T. D. Hammond, opposed.

Before JACKSON, Circuit Justice, and SPEER, District Judge.

JACKSON, Circuit Justice. The receiver is criticised for his connection with and approval of the Hollins & Co. scheme of reorganization, and is charged with the making of reports and representations as to the condition of the Central Railroad, which, it is claimed, have been misleading, and have had the effect to unduly depress the value of its properties and assets. These and certain specific acts of mismanagement constitute the general and special grounds on which the application for his removal is based.

It is not improper for a receiver, in cases like the present, to advise, aid, and encourage reorganization schemes, which offer the prospect of securing the largest measure of protection to the various interests connected with or concerned in the property and assets in the custody of the court, and in the possession of such receiver, for administration and distribution. If the court said anything at Atlanta that was construed to be in conflict with this proposition or idea, it made a wrong impression. What the court intended to say at Atlanta, and what it means to say here and now, is that its receiver, as an officer of the court, should not become a partisan in favor of any particular interests or classes; that he should not so administer his trust as to represent and promote, either in his dealings with the property or in schemes of reorganization, one interest at the expense or to the prejudice of other interests equally entitled to the consideration and protection of the court and its officers; that it was the duty of the receiver, as it was the duty of the court, to act impartially as between all interests. While this is his duty, it is right and proper, and the circuit justice has instructed the receiver (as he wishes the counsel to know) that he may with propriety and in the line of his duty endeavor to bring together the various conflicting interests here involved on some equitable basis or plan that will protect the properties and assets of the Central Railroad from wreck and ruin, and, as far as possible, save the debenture holders, general creditors, and stockholders from loss, or reduce their loss to the lowest minimum; that he could by advice and suggestions aid and encourage a reorganization scheme or schemes which would bring together the interests represented by the Farmers' Loan & Trust Company, the Central Trust Company, the Terminal Company, Hollins & Co., Drexel, Morgan & Co., the Southwestern Railroad Company, the Augusta & Savannah Railroad Company, and any and all other interested parties, including the Central Railroad, and hold out the prospect of affording the largest measure of security and protection to all concerned, and according to their respective rights, but that in doing this his action or actions should be impartial as between all interests. He may not, in his official

character, favor a particular interest at the expense or to the detriment of another. If, in his approval and encouragement of the Hollins & Co. plan of reorganization, he has departed from this rule, he has done wrong. But after a careful examination of his conduct in relation to the Hollins & Co. transaction, and the scheme of reorganization they formulated, I see no evidence of partisanship on the part of the receiver. I fail to discover that in his approval of that scheme, and in his recommendation of its adoption, he was seeking to promote any interest at the expense or to the hurt and injury of other interests. The court may be permitted, after a thorough investigation of the situation, and the condition of the Central Railroad, to say that, in its opinion, it is a great misfortune that the Hollins plan of reorganization could not be carried out. An examination of that scheme since the matter was up at Atlanta has convinced the court that it would have afforded a larger measure of protection to unsecured creditors and stockholders than can be secured or realized from a foreclosure sale without some such scheme to prevent a sacrifice of the property. That scheme provided for the floating debt of the Central Railroad and its stockholders, or the greater portion of them. It did not provide for the Macon & Northern and other bonds on which the Central Company was guarantor, but those bonds had independent security, and, after exhausting such security, could have reached and subjected any surplus proceeds that might have been realized from the sale of the Central's properties and assets. The court does not mean to say that the holders of those guaranteed bonds should not have been taken into the scheme of reorganization, and been provided for on some equitable basis, but merely that, in view of the situation, and the condition of the Central's properties and affairs, it is likely to prove unfortunate for the debenture holders, the floating creditors, and the stockholders of the Central Railroad that said scheme could not be carried out. This will be the result inevitably unless the various interests concerned shall come together on some equitable plan of reorganization, which shall seek to protect and promote all interests in the order of their relation and respective rights. Individually and as a court I trust that this may be done. I have expressed my opinion about this Hollins scheme as a business man, after understanding the situation of the property which the court is called upon to administer. There is nothing connected with its approval for which the receiver should be censured or be removed.

In respect to the receiver's reports and representations as to the condition of the Central's properties and assets, which it is said were misleading, and had the effect to unduly depress the value thereof in the estimation of the public, I find that the receiver has adhered to the same method of keeping his accounts and making his reports which prevailed when the railroad was in charge of its directory, and I fail to discover that he has intentionally misstated or misrepresented the company's true condition and situation. I have gone carefully over the reports of the company since 1887, examined its assets, and the earnings and expenses, not only of

the main line, but of the leased and auxiliary lines, year by year since that date, and as the result of that examination I am of opinion that the receiver is not fairly chargeable with any failure or neglect in making correct representations as to the condition of the Central Company. He is certainly not responsible in any way for the condition in which he found its properties and assets in 1892, when he took charge of the same.

Let us now come to the specific instances of mismanagement that are brought against him. First, in reference to the purchases of lumber, which certain brokers of this city have bought at one price and billed to the Central Company or to the receiver at another and larger price. This transaction seems to have been done, or permitted to be done, by an agent—perhaps a purchasing agent—of the receiver. It was promptly disapproved by the receiver as soon as it came to his knowledge, and the agent who did it or permitted it was discharged. The receiver is compelled, like the directory of a railroad, to act largely through agents. Neither the directory of the road nor the receiver of the court is to be held responsible for the fraudulent acts or misconduct of subordinate employes in a system like this of 2,600 miles, when the principal's personal presence and actual inspection, day by day, of any agent's actions and transactions, is a physical impossibility. No management could meet such a responsibility as that. Acts of misconduct may be committed by agents here and there without blame or any fault or want of proper care on the part of the receiver. A ticket agent at a distant point, or even at the home office, may commit acts of embezzlement for a series of days. Is it to be expected that the receiver is to be held responsible for such acts because he did not discover them as soon as committed? Is the failure to promptly discover misconduct in subordinates, widely scattered, and discharging different functions, evidence of either incapacity or mismanagement? It is not claimed or pretended that the receiver in any way sanctioned the acts complained of; on the contrary, it is conceded that, upon discovering the same, he promptly dealt with the wrongdoer. All that could be demanded of him was the exercise of care in the selection of agents, and diligence in looking after them and the business intrusted to them. I suppose the receiver has thousands of agents or subordinates over this large system of 2,600 miles. It would be a physical impossibility for him to supervise the daily transactions of every agent in his employment, and it involves no just charge of mismanagement that corrupt acts or misconduct of such subordinates take place and run on for a time before being discovered. The receiver's responsibility would commence with such discovery, and he would be censurable and to be blamed if, after learning the facts, he continued to employ the wrongdoer. The receiver has not subjected himself to censure on the latter ground, and his failure to discover the transactions complained of sooner than was done does not establish want of good management. This charge against the receiver is not well taken.

The matters connected with the chert mine do not in any way involve the receiver. In order to introduce the product of this mine

into the markets along the lines of his road he has given a special freight rate, which is said to be too low. But this is a matter of business judgment, and is not shown to have been wrongly exercised. The chert is likely to prove a cheap and valuable material for paving purposes, and, if brought into demand, would add to the freight receipts of the road or roads handling it. But it is alleged that there is a company, called the Drawbar Company, the incorporators and members of which are the superintendent and other officials of the railroads under the receiver, and that said company, or some of its members, have been using the labor of the railroad company, or that in the employ of the receiver, in working and operating said chert mine. It is not alleged or shown that the receiver either knew of or consented to this use of the laborers in his employment. If it has occurred, he is not responsible therefor, so far as anything appears from the statement of counsel. If the Drawbar Company, or the members thereof, have used the laborers of the Central Railroad or of the receiver in operating or working said mine, it or they will be held responsible for the payment of proper compensation for such labor. If any officer or employé of the railroad or of the receiver has acted in this manner, the court will order his or their discharge from the employment of the receiver, as well as hold them responsible for the payment of the proper compensation for the labor employed. The court does not assume that the superintendent or any other member of said Drawbar Company has used the labor force of the receiver for private purposes. It would be unjust to them to assume that as a fact, or express any opinion on the subject, without giving them a full hearing and opportunity to answer the charge. If there is any place in the world where an individual ought not to be struck at without a hearing it is in a court of justice. What the court means to say is that, if the statement made to the effect that laborers of the receiver have been employed by said Drawbar Company or its members for their private benefit were true, said company or the members thereof engaged in such acts should and would be made responsible therefor.

It is proper, while on this subject, to say further that, if said Drawbar Company is composed of the superintendent and other officials of the railroad in the employ of the receiver, it would not be proper for the receiver to deal with said company in the way of procuring from it supplies or entering into contracts with it. Parties owing duties to the railroad by reason of their official relations thereto, and connected therewith, could not be permitted to deal, directly or indirectly, through the form of a company with the receiver, in respect to subjects or articles they might have to sell or contract about. Upon well-settled principles this could not be tolerated by the court. The dual trust relation occupied by parties in such situations would forbid such transactions. But the receiver has had no connection with the company, and, so far as appears, is in no way responsible for its organization or acts.

The next objection urged against the receiver is his relation to the South Bound Railroad, and his action in not making switching charges against that company at Savannah. Under the terms of

the contract made and entered into between the Richmond & Danville Railroad Company and the South Bound Railroad, which has been acquiesced in and practically continued in operation by the Central Railroad since the Richmond & Danville surrendered the possession thereof, in March, 1892, I am inclined to think the South Bound road, or the president thereof (who, I understand, is a different person from the receiver of the Central Railroad), could reasonably claim and demand that the Central should switch the former's cars at Savannah without charge. The contract fairly admits of this construction, and the receiver is not censurable for yielding to the demand. Neither is he to blame for the fact, if it be a fact, that during one period the South Bound brought about 17,000 bales of cotton from Augusta to Savannah, while the Central Railroad, during the same period, brought only 16,000. When the receiver discovered that the South Bound road was bringing more than its proportion or share of cotton from Augusta under the traffic arrangement existing between the two roads, he took the necessary steps to change that result, and promptly effected such change. This transaction discloses no mismanagement on the part of the receiver.

In the management of these extensive properties it is a great deal easier to look back and find faults than it is to guard in advance against mistakes. I see things in this case that I disapprove. Some things have been done that were not the best under the circumstances, but, after a careful consideration of the situation, I do not see that the receiver is to be blamed therefor. He has made some contracts which, in the light of subsequent events, it would have been better if they had not been entered into,—contracts which I would not perhaps have sanctioned; but, as far as I can see and judge, they were made in the exercise of an honest purpose and intention. There is no evidence of any corruption or intentional misconduct. There is evidence of deep interest and concern in the welfare of the interests committed to his management. If mistakes have been committed by the court in directing and authorizing certain transactions by the receiver, it would be cowardly and unjust to make the receiver the scapegoat, and put on him the blame and responsibility therefor. The court must assume its share of responsibility for whatever has been done in an improper or wrongful manner by its sanction or direction. Having carefully examined into the receiver's conduct and actions I find no corruption, no willful or intentional misconduct, and no such mismanagement as will warrant the court in directing his removal. The motion to discharge the receiver is overruled and denied. In view of the decree of sale, and its probable execution in six months, it is not perceived that any good result could or would follow a change of administration. I doubt whether any single individual in the country could take charge of the properties in question, and relieve the embarrassed situation, or do much better than the present receiver is now doing; but, aside from this, no sufficient cause is shown for discharging the receiver.

JOHN SHILLITO CO. v. McCLUNG, Surveyor of Customs.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 24.

COSTS—DOCKET FEE IN COURT OF APPEALS.

The prevailing party in an appeal to the United States circuit court of appeals is entitled to tax a docket fee of \$20.

This was a motion to retax costs in the United States circuit court of appeals.

Mortimer Matthews, for the John Shillito Co.

John W. Herron, U. S. Atty., for McClung.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

PER CURIAM. In this case the clerk taxed against the losing party, the John Shillito Company, an attorney's docket fee of \$20; and a motion has been made to retax the same, on the ground that no authority exists by law to tax a docket fee in this court to be paid to the attorney, solicitor, or proctor of the winning party. It has been the uniform practice of the supreme court of the United States to tax an attorney fee of \$20 for the prevailing party in every case where costs are given by the court. This is the construction which has been put upon section 824 of the Revised Statutes of the United States by the long practice of that court, as we have learned by inquiry of the clerk of the supreme court. We therefore adopt it, as applicable to the imposition of costs in this court. The motion to retax costs is overruled.

DEPREZ v. THOMSON-HOUSTON ELECTRIC CO.

(Circuit Court, D. Connecticut. December 17, 1894.)

No. 732.

1. COSTS—REQUIRING ADDITIONAL SECURITY—PRACTICE IN EQUITY.

Additional security for costs may be required in a suit in equity in a United States circuit court, following the equity practice in the state courts.

2. FEDERAL COURTS—FOLLOWING STATE PRACTICE IN EQUITY.

In the absence of any provision of law of the United States, or rule prescribed by the supreme court, the federal courts exercise their discretion as to following the practice of the state equity courts within the district where questions arise.

This was a suit by Marcel Deprez against the Thomson-Houston Electric Company for infringement of a patent. Complainant was a nonresident, and filed a bond for costs in the sum of \$250. After considerable testimony had been taken on both sides, defendant moved for additional security for costs.

Edmund Wetmore, for plaintiff.

C. L. Buckingham, for defendant.

TOWNSEND, District Judge. Motion by defendant for an additional security of \$7,000 for costs. The exhaustive briefs filed

by counsel show that the courts have exercised their discretion as to the propriety of following the usages and practice of the state equity courts within the district where such questions have arisen. In the absence of a provision of law of the United States, or a rule prescribed by the supreme court, a court may regulate its own practice in suits in equity in order to advance justice. *Bills v. Railroad Co.*, 13 Blatchf. 230, Fed. Cas. No. 1,409; *Cutter Co. v. Sears*, 9 Fed. 8; *Cutter Co. v. Jones*, 13 Fed. 567. I find that it has been the practice of the court in this district to follow the equity practice in the state courts, and to order an increase of security in such cases. *Stewart v. The Sun*, 36 Fed. 307; *Uhle v. Burnham*, 46 Fed. 500. In view of the circumstances disclosed by the affidavits and at the hearing, I think a bond of \$7,000 should not be required. Let an order be entered for a bond of \$2,000 in addition to the bond of \$250 already filed.

ROBB et al. v. ROELKER et al.

(Circuit Court, S. D. Ohio, W. D. February 28, 1895.)

No. 4,303.

1. ATTORNEY AND CLIENT—UNAUTHORIZED APPEARANCE—ELECTION OF REMEDIES.

R. and S. were seised, as trustees, of certain land which was leased to L., with privilege of purchase for \$10,000. One G. brought a suit against R. and S., asking that they might be declared to hold the land by way of mortgage for \$10,000, and that it might be sold, and the proceeds applied to the payment of their mortgage, and to other debts of L., including a judgment in G's favor. R. and S. were not served with process, and K. & R., without authority, appeared as attorneys for them, and consented to a decree for sale of the land. The land was sold, and the \$10,000 and interest paid to K. & R., who, however, never paid it over to R. and S. Upon discovering these facts, R. and S. brought suit against the purchasers of the land, repudiating the acts of K. & R., and praying that the sale might be set aside, and their rights in the land restored. Subsequently, they brought suit against the surviving members of the firm of K. & R. to recover the \$10,000 and interest. It seems that the two proceedings were not inconsistent, and that the bringing of the first suit was not such an election to repudiate the acts of K. & R. as to estop the plaintiffs to claim the money paid to them.

2. SAME—RATIFICATION OF UNAUTHORIZED ACTS OF ATTORNEY.

It appeared that certain proceedings taken by R. and S. against the estate of a deceased partner of the firm of K. & R. had been held, in the suit against the purchaser of the land, to be a ratification of K. & R.'s acts, although R. and S. had withdrawn such proceedings, and attempted to repudiate such ratification. *Held*, that this unsuccessful attempt could not now avail defendants, and they could not insist that R. and S. had elected not to ratify their acts.

This is an action by J. Hampden Robb and Charles E. Strong, as trustees, against Frederick G. Roelker and Ferdinand Jelke, Jr., surviving partners of the firm of Kebler, Roelker & Jelke, to recover moneys paid to the firm as attorneys for plaintiffs. The defendants have answered, and plaintiffs demur to the answers.

Harmon, Colston, Goldsmith & Hoadly, for plaintiffs.

Kittredge & Wilby, for defendants.

SAGE, District Judge. The plaintiffs were on the 13th of November, 1885, seised in fee of premises described in the petition, situate in the city of Cincinnati, and leased by them to Moritz Loth, with privilege of purchase for the sum of \$10,000. On the date above named, one Meyer Guggenheim, a judgment creditor of Loth, filed a creditor's bill in the state court; praying, among other things, that these plaintiffs might be declared to hold said lands by way of mortgage as security for the payment of the sum named as the purchase price, but which, it was averred in the bill, was in reality a loan, and that the lands might be sold, and the proceeds applied first to the payment of said \$10,000, and then to the satisfaction of said Guggenheim's judgment and other claims set up as lien claims. The plaintiffs were not served with summons in said action, personally or by publication; but on the 18th of December, 1885, Charles A. Kebler, then a partner with the defendant Frederick G. Roelker, under the firm name of Kebler & Roelker, in the practice of law at Cincinnati, without authority from or the knowledge of the plaintiffs, entered, in the name of his firm, their appearance in said action, and caused an answer, purporting to be the answer of these plaintiffs, to be filed therein. Thereafter, and prior to the 18th of May, 1887, the firm of Kebler & Roelker was dissolved, and Kebler, with the defendants herein, engaged in the practice of the law at Cincinnati under the firm name and style of Kebler, Roelker & Jelke, as successors of Kebler & Roelker. Thereafter, said firm of Kebler, Roelker & Jelke, without authority, but falsely pretending to act on behalf of these plaintiffs and in their name, took all steps in said action which were taken in their name; and a decree purporting to be made by the consent of these plaintiffs, but without their knowledge, authority, or consent, was entered in the case, whereby it was directed that said premises should be sold for the purpose of said action, and free of all claims of these plaintiffs. A sale was made accordingly, and confirmed, and there was then paid to Kebler, Roelker & Jelke, out of the proceeds, the sum of \$11,361.66; said firm, through Charles Kebler, pretending to be authorized to receive the same for and on behalf of the plaintiffs. No portion thereof has been paid to these plaintiffs, or accounted for to them. All these facts are alleged in the petition.

It is further alleged that said proceedings had by said firm were solely without authority from the plaintiffs; that they had no knowledge of the pendency of said action, nor of the proceedings therein, until after the 23d of November, 1887, on which date Kebler departed this life, leaving the defendants sole survivors of the firm. The plaintiffs pray for judgment for \$11,361.66, with interest from the 16th of June, 1887. The petition was filed on the 30th of January, 1890.

The defendants filed separate answers, presenting, however, the same defense. The first defense is that the complainants filed their bill in equity in this court against August Voss and William Stix, the purchasers of the lands sold by order of the state court, as hereinbefore set forth, and that in said bill they repudiated, as

unauthorized and fraudulent, the acts of said Kebler, professedly on their behalf, in the case wherein said sale was ordered, and claiming that the state court had no jurisdiction over them in said proceedings, and that the sales to Voss and Stix and the deeds thereunder were null and void, prayed that it should be so decreed, and these plaintiffs, as trustees as aforesaid, be declared to be the sole owners, in fee simple, of said premises, that their rights under their lease to Loth be restored, and that said lease be held and declared to be in full force and effect, and the rents accruing thereunder be ascertained, and adjudged to be a lien upon said leasehold. They allege that said suit is still pending in this court, and is now, by said plaintiffs, being prosecuted and maintained.

The plaintiffs demur to this defense, for insufficiency. The defendants' contention is that, by instituting the suit against Voss and Stix, plaintiffs elected to disavow any relations to or claim upon the law firm of which Kebler was a member, or upon the defendants as the survivors of the succeeding firm. That a party cannot occupy inconsistent positions, and that, where he has an election between two or more courses of proceeding, he will be confined to that which he first adopts, as stated in *Bigelow on Estoppel*, at page 578, is an established rule of the law of estoppel. It is subject, however, to certain qualifications. In *Coleman v. Oil Co.*, 51 Pa. St. 74, a company, having bought in shares of its own capital stock, afterwards divided them among the then stockholders pro rata. A stockholder who had, between the time of the purchase and the time of the distribution, assigned a part of his stock, sued the company for a pro rata of the shares, on the basis of the number held by him at the time of the purchase. The court held that his action was an affirmation of the purchase, and that he could not thereafter allege that the company's funds were misapplied; as to him, the distribution was an equitable one. The court said, "Whatever we might think of it in a different action, we can, in this action, regard it in no other light than a valid corporate act."

The case of *Vulcanite Co. v. Caduc*, 144 Mass. 85, 10 N. E. 483, is in point. There was an action by a corporation against its treasurer, who had misappropriated its funds, and, without authority, lent them to the National Color-Printing Company, of which he was also treasurer. The plaintiff brought an action of contract against the last-named company, and afterwards sued the treasurer for the misappropriation of its funds. The treasurer claimed that this suit was a ratification of his acts, and discharged him from liability to the plaintiff for the alleged misappropriation. The supreme court said that it might be that the National Color-Printing Company would have the right to insist that bringing the suit was, as to itself, a ratification of the loan, and an election between two remedies, but held that the principle did not apply where there is a right to resort to two parties by remedies which are not inconsistent. We quote from the decision:

"Take the case before us. The plaintiff discovers that its treasurer has misused its money, and wrongfully lent it. Why may it not properly say

to him: 'We hold you responsible for this misuse. We will reduce our damage by recovering what we can from the borrower, but shall look to you for indemnity for such damage as we finally sustain from your misconduct?' This is all that bringing a suit against the borrower, in whatever form, necessarily says or implies. There is nothing inconsistent in the two positions. There is nothing in the nature or the justice of the case which should preclude the principal from pursuing this course, which is for the interest of the agent. To hold that bringing a suit under such circumstances not only ratifies the loan, so far as the borrower is concerned, but condones the offense of the agent, and relieves him from all liability, would be carrying the doctrine of implied ratification to an unreasonable and unjust extent."

Applying that decision to this case, the plaintiffs are not estopped from prosecuting their action against the defendants. But this question is really nothing more than a moot question. On the 26th of November, 1889, before the answers to which the demurrers are interposed were filed, the case, which is made the basis of the answer to which the demurrer is filed, was dismissed by this court for the reason that prior to the commencement of that case the plaintiffs had affirmed the agency of Kebler & Roelker, by causing themselves to be made parties defendant to a petition filed in the court of common pleas of Hamilton county by the administrator of Charles A. Kebler, then deceased; setting forth, among other things, that Kebler died intestate and insolvent, and that it was necessary to sell the realty belonging to his estate, described in the petition, in order to provide means to pay debts. The plaintiffs herein, as defendants and cross petitioners in that case, set up the sale of their property under the supervision of Kebler & Roelker, as their attorneys, and alleging that the proceeds of said sale were paid to said firm of Kebler, Roelker & Jelke, and that no portion thereof had been paid or accounted for to them, prayed that it might be decreed to them out of the proceeds of the sale of the land belonging to the estate of Charles A. Kebler. Subsequently, that is to say, on May 17, 1888, the plaintiffs withdrew, by leave, their answer and cross petition, and filed a demurrer, on the ground that they were not proper parties to the case, which demurrer was sustained by the court; and they were on May 26, 1888, dismissed, with their costs. This court, however, held that by their action in that case they had recognized Kebler & Roelker and Kebler, Roelker & Jelke as their attorneys, and that they were bound by that recognition, and therefore dismissed the bill. The case was taken by appeal to the supreme court of the United States, where on the 15th of October, 1894 (155 U. S. 13, 15 Sup. Ct. 4), the dismissal was affirmed. It appears, therefore, that the first and decisive election by the plaintiffs was to recognize the sale made without their knowledge and authority, and to hold the defendants in this case responsible. That election was also an affirmance or ratification of their assumed agency. The subsequent attempt to repudiate their authority failed, and cannot avail the defendants in this action.

The demurrer will be sustained, with leave to the defendants to present an amended answer within 20 days, and apply for leave to file the same.

LEROY & C. V. AIR-LINE R. CO. et al. v. SIDELL.

(Circuit Court of Appeals, Second Circuit. February 11, 1895.)

1. CORPORATIONS—CONTRACTS OF OFFICERS—RATIFICATION.

S. entered into a contract with the L. Ry. Co. and the M. Ry. Co. by which S. undertook to build the road of the L. Ry. Co., which was to execute and deliver to S. its first mortgage bonds, at the rate of \$10,000 per mile, delivery of such bonds to be made for each five miles of road, as completed, and also to deliver to S. all its capital stock and all township local-aid bonds received by it. The M. Ry. Co. agreed to guaranty the bonds of the L. Ry. Co. as they should be issued, and was to receive all the stock not required to be delivered to townships for local-aid bonds, and was to have the right to complete the road if S. failed to do so, and in that event to receive the bonds, etc. After the road had been partially built, G., the president of the M. Ry. Co., notified S. that it must stop at P., a point some distance short of the terminus specified in the contract, and that the M. Ry. Co. would guaranty no bonds for construction beyond that point. The L. Ry. Co. notified S. that he must abide by G.'s orders. It appeared that G. signed the contract with S. in the name of the M. Ry. Co., without its seal, and without any vote of the directors authorizing it, but that the company afterwards recognized the contract, and treated the road as one being built for it; that G. had general charge, as president, of the entire system of the M. Ry. Co.; and that the company was accustomed to ratify whatever he ordered done in reference to its affairs. *Held*, that the M. Ry. Co. was responsible for the act of G. in refusing to carry out the provisions of the contract in reference to guarantying the bonds.

2. CONTRACTS—LIABILITY FOR BREACH.

Whether the M. Ry. Co. was liable, in consequence of such refusal, for the profits which would have been made by S. upon a completion of the whole road, *quaere*.

3. PRACTICE—SEVERAL JUDGMENTS IN JOINT ACTION.

S. having sued the two railway companies jointly for the damages caused by his being prevented from completing the road, for extra work, and for the value of certain township bonds not delivered, separate verdicts and judgments were rendered against the two companies, that against the M. Ry. Co. based on the breach of contract as to completion of the road, and that against the L. Ry. Co. on the other causes of action. Whether such separate recoveries, in the action against the defendants jointly, were proper, *quaere*.

4. SAME—JOINT WRIT OF ERROR ON SEVERAL JUDGMENTS.

Whether a writ of error taken by two defendants jointly, to review a several judgment against each, is correct practice, *quaere*.

In Error to the Circuit Court of the United States for the Southern District of New York.

Winslow S. Pierce (Rush Taggart and D. D. Duncan, of counsel), for plaintiffs in error.

Chas. D. Ingersoll (Albert Stickney, of counsel), for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by both defendants in the court below to review a several judgment for the plaintiff against each, entered upon the verdict of a jury. By the verdict the jury found against the defendant the Leroy & Caney Valley Air-Line Railroad Company in the sum of \$23,414, exclusive of interest, and against the defendant the Missouri Pacific

Railway Company in the sum of \$41,233, exclusive of interest; and thereupon judgment in favor of the plaintiff was entered against each defendant for the amount of the verdict against each. The action was founded on a written contract made by one Loss, and assigned by him to Sidell & Simmons, with the two companies. Under this contract, Sidell & Simmons became contractors to build a railway for the Leroy & Caney Valley Air-Line Railroad Company (hereafter called the "Leroy Company"), from a point in Wilson county, Kan., to or near Elgin, Chautauqua county, near the south line of the state. By the terms of the contract, the railroad was to be a single-track road, with grades to be not over 56 feet per mile, and curves not less than 6 degree curvature; and all work was to be subject to the approval of the engineer of the Missouri Pacific Railway Company. The Leroy Company, on its part, agreed to execute bonds to the amount of \$10,000 per mile, to be secured by a first mortgage on its property, and pay over the same and all its capital stock, together with all township local-aid bonds received by it, to the contractors, as a consideration for the construction of the railroad, the payment of first mortgage bonds to be made in full for each five miles of road, as the same should be completed, and payments of the township aid bonds to be made as soon as the conditions upon which they were voted should be complied with. The Missouri Pacific Railway Company agreed on its part to execute a guaranty upon the back of all the first mortgage bonds, as each lot thereof should be issued at the completion of each five miles of road, for the payment of the principal and interest of said bonds. The contract also required the contractors to deliver to the Missouri Pacific Railway Company all the stock of the Leroy Company received by them under the contract, except so much, not exceeding in amount \$250,000, as it might be necessary for them to deliver to townships for local aid granted by them. It reserved to the Missouri Pacific Railway Company the right to complete the railroad in case of failure of the contractors to do so seasonably, and in that event to receive in payment all first mortgage bonds, capital stock, and local-aid bonds which would otherwise be due to the contractors.

The complaint is framed upon the legal theory that both defendants were liable for extra work done by Sidell & Simmons in laying side tracks upon a portion of the railway which had been built by the contractors, and accepted by the defendants; and also for damages for a breach of the contract, whereby Sidell & Simmons were prevented from completing the unfinished part of the railroad. The complaint also alleged that the Leroy Company had refused to deliver to the contractors certain township aid bonds, those of Washington township, in the sum of \$18,000, which had been earned under the terms of the contract. Upon the trial the court ruled that the Missouri Pacific Railway Company was not liable for the claim in respect to the Washington township bonds, nor for the extra work done in the construction of side tracks, and instructed the jury that any recovery upon these items was to be included in a separate verdict against the Leroy Company. The

verdict against that company seems to have been based exclusively upon these claims. In respect to the cause of action for breach of contract whereby Sidell & Simmons were prevented from completing a part of the railroad, evidence was given upon the trial that in October, 1886, while the first 52 miles of the railroad were in process of construction, the remaining portion of the road having been located and graded in places, Mr. Gould, the president of the Missouri Pacific Railway Company, notified them that the road must stop at Peru Junction, and that the Missouri Pacific Railway Company would guaranty no bonds deliverable for construction beyond that place; that thereupon the contractors had a conference with the directors of the Leroy Company, and the result was a notification from them to the contractors that they would have to abide by the orders of Mr. Gould in reference to the completion of the road; and that thereupon, inasmuch as the contractors were to be deprived of the benefit of the guaranty of the bonds by the Missouri Pacific Railway Company, they abandoned the building of the road beyond Peru Junction. Evidence was also given to show what it would have cost the contractors to build the road to the original terminus, and of the market value of the township aid bonds which they would have received had it been completed pursuant to contract. The verdict against the Missouri Pacific Railway Company was based exclusively upon this cause of action.

We are not called upon by any exceptions taken at the trial to consider the question whether there was any liability on the part of the Missouri Pacific Railway Company to the plaintiff, under the contract, for the profits which would have inured to the contractors if the contract had been fully performed; nor the further question whether it was proper to permit a recovery against one defendant upon one or more causes of action, and against another for a different cause of action, in an action at law, where the defendants were sued for a joint liability; nor, inasmuch as there has been no motion made to dismiss the writ of error, are we called upon to consider the question whether a writ of error taken by both defendants jointly, to review a several judgment against each, is correct practice. Many of the assignments of error have not been argued or noticed in the brief of counsel for the plaintiff in error, and, in disposing of the case, we shall not deem it necessary to refer to those which have been thus ignored.

The only exceptions taken upon the trial by the defendant, aside from those respecting the admission of testimony, relate to instructions given and refused by the trial judge to the jury. The defendant excepted to that part of the instructions concerning the responsibility of the Missouri Pacific Railway Company for the act of Mr. Gould in notifying the contractors that, if the road was built beyond Peru Junction, the Missouri Pacific Railway Company would not guaranty any of the bonds deliverable therefor. The instructions were as follows:

"The first question is, if Mr. Gould, as president of the Missouri Pacific, did improperly and unjustifiably break the contract, and refuse to carry out its provisions in regard to guarantying the bonds of the Leroy Company,

and thus compel the contractors to abandon work, was such act one which he was authorized to do within the scope of the powers conferred upon him by the board of directors, and for which, therefore, the Missouri Pacific is responsible? You have heard the testimony of Mr. Hopkins, the second vice president, as to the scope of Mr. Gould's power, what he was authorized to do, what he was permitted to do by the board, and what, in the usual discharge of his duties as president, he did do in regard to the business of the Missouri Pacific, with the assent of his board. I think you will not have any difficulty in finding as a fact that, if Mr. Gould did this act, he did it within the scope of his customary powers, intrusted to him by the board of which he was the president. When the president of a corporation does, in its behalf and within the scope of its charter, an official act which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act; and when an official act is performed by the general agent of a corporation, in its behalf and for a purpose authorized by its charter and within the scope of his ordinary powers, and the corporation knowingly receives the benefit of the act, without objection, it may be presumed to have authorized or ratified the contract of its agent."

Coupled with the exception to this part of the instructions, the defendant requested the court to instruct the jury that, under the testimony, Mr. Gould was not shown to have had any authority to represent the Missouri Pacific Railway Company in the matters referred to, and that there was no proof of any knowledge by the directors of his action, inferential or otherwise, and that there was no evidence that the Missouri Pacific Railway Company violated the contract.

It is argued in support of the assignments of error based upon the instructions thus given and refused that the Missouri Pacific Railway Company was a stranger to that part of the contract which provides for the building of the railroad, its only relation to it being that of a guarantor of the bonds to be given in payment; and, therefore, that its act in refusing guaranty for the uncompleted portion of the road did not make it liable for the profits which the contractors would have made had they been permitted to complete the road. No such point, however, was brought to the attention of the trial judge. His instructions in regard to the liability of the Missouri Pacific Railway Company were challenged merely upon the ground that the act of Mr. Gould was not in law the act of the company, because it had not been proved that it was within the scope of his powers as an agent, or that the directors had knowledge of and assented to it; and, consequently, that there was no evidence of a breach of its contract by the Missouri Pacific Railway Company. Upon the questions thus raised for the consideration of the trial judge, his rulings were manifestly correct. It had been proved by the testimony of the vice president of the company that railway lines built under contracts similar to the one in suit, and which, when built, would pass at some future time into the control of the Missouri Pacific Railway Company, were treated by the directors as being built for the company, and were customarily included as its property in their annual reports; that the part of the railway which consisted of the last 12 miles actually completed had been included in the report for 1887 under the head of "New Construction"; and that in the report for 1888 the 52 miles of that road was included

in the list of railways which had been completed and turned over for operation to the company. This evidence was sufficient to justify a finding by the jury that the directors knew that the original contract for building the road had been modified, and a road accepted in lieu which did not go to the original terminus. It had also been proved by the testimony of the vice president that Mr. Gould had general charge as president of the entire system of the Missouri Pacific Railway Company; that he was accustomed twice a year to make a trip over the railway officially to look after the interests of his company; that whatever he ordered done when on such trips was ratified by the company; and that he was on one of these trips at the time when he notified the contractors that the Leroy road must stop at Peru Junction. The original contract was executed by Mr. Gould as president of the company, without the seal of the company, and there was no evidence of any resolution of the board of directors authorizing him to do so; yet the company had recognized and adopted the contract while the construction was in progress by guarantying the bonds and receiving the stock, and they had subsequently treated the road as being built for the company, and accepted it, although not built according to the original contract. Upon these facts, there being no evidence whatever to indicate that the company had ever dissented from or objected to anything which had been done by Mr. Gould, we think the trial judge would have been justified in instructing the jury that his authority to represent the company in what he did was amply proved. The president of a railway company, who is its chief executive officer, and who is allowed to enter into a building contract by parol without the corporate seal, has like authority, unless the power is withdrawn, to authorize a modification of the contract. *Indianapolis Rolling Mill v. St. Louis, etc., R. Co.*, 120 U. S. 256, 7 Sup. Ct. 542. As applied to the facts, the instructions enunciated only familiar and well-settled principles of law. One of these is that if an officer of a corporation openly exercises a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officer will be deemed rightful, and a delegated authority will be presumed. *Bank v. Dandridge*, 12 Wheat. 70; *Pennsylvania R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770. "It is not necessary, in order to constitute a general agent, that he should have done before an act the same in specie with that in question. If he has generally done things of the same general character and effect, with the assent of his principals, that will be enough." *Bank v. Norton*, 1 Hill, 502. The facts brought the case within the operation of these principles. Apparently, Mr. Gould had been intrusted with the most plenary powers in representing the company when he was making his official trips over the railway. We find no error in the instructions.

Many exceptions were taken in behalf of the defendants to the admission of testimony against their objections. The assignments of error are insufficient to require us to examine these exceptions. The assignments do not specify any particular evidence which was

improperly admitted, and merely state that the court "erred in admitting testimony produced by the plaintiff against the objections of the defendant." In view of the numerous objections of this class which appear in the record, we are not disposed to relax the rule which requires the particular errors relied upon to be specifically pointed out in the assignments of error. Rule 11 provides that, when the error alleged is to the admission or to the rejection of evidence, "the assignment of errors shall quote the full substance of the evidence admitted or rejected." 11 C. C. A. cii., 47 Fed. vi.

It is argued in the brief of counsel that the verdict is not supported by any testimony showing damages to the plaintiff. This argument proceeds upon the theory that the plaintiff was allowed to recover without evidence tending to prove what it would have cost to complete the railway conformably to the terms of the original contract, and by proof tending to show what it would have cost to complete it with modifications of grade. No such question was raised upon the trial, and there is no exception or ruling in the case which suggests that it was brought to the attention of the trial judge.

No sufficient reasons appear for a reversal of the judgment, and accordingly it is affirmed.

SALMON v. MILLS et al. (CONDON, Interpleader).

(Circuit Court of Appeals, Eighth Circuit. January 25, 1895.)

No. 545.

1. WRIT OF ERROR—WHAT ORDERS REVIEWABLE—ATTACHMENT.

S. brought an action against M., and sued out an attachment, which was levied on property alleged to belong to M. C. filed an interplea, pursuant to the local practice, claiming such property. Judgment was entered in the action in favor of S., but accompanied by an order holding the attachment proceedings open, and reserving the issue on the interplea for trial. An order was afterwards made dissolving the attachment. *Held*, that such order, which determined the rightfulness of the attachment, the only issue between the plaintiff and defendant remaining after the judgment, was a final order, and subject to review as such by the circuit court of appeals.

2. SAME—JUDGMENT.

A judgment was also entered in favor of the interpleader against the plaintiff on the issue raised by the interplea. *Held*, that such judgment was final, and subject to review as such by the circuit court of appeals.

In Error to the United States Court in the Indian Territory.
On motion to dismiss writ of error.

Nelson Case, for the motion.
George E. Nelson, opposed.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. A motion is made to dismiss the writ of error to review the order dissolving the attachment in this case, on the ground that the court has no jurisdiction, because the order appealed from was not a final decision. The plaintiff, Salmon, brought an action May 2, 1889, against the defendants,

Abraham Mills and Jackson Mills, and on May 24, 1890, recovered a final judgment against the defendants for the amount claimed. Prior to the entry of this judgment the plaintiff had caused an attachment to be levied on certain property, which he claimed to be the property of the defendants, and C. M. Condon had filed an interplea, in which he claimed to be the owner of the property. When the final judgment against the defendants was rendered an order was made holding the attachment proceedings open for any appropriate action, and reserving the issue on the interplea for trial. An order was subsequently made dissolving the attachment, and then a judgment was rendered in favor of the interpleader. After the final judgment was rendered against the defendants, the only issue undetermined between plaintiff and defendants was whether or not the plaintiff had rightfully sued out his attachment, and had thereby obtained a lien on the attached property to secure the payment of the judgment. The order dissolving the attachment finally determined this question, and left no issue for adjudication between these parties. The act creating the circuit courts of appeals provides:

"That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act unless otherwise provided by law." 26 Stat. c. 517, § 6; Supp. Rev. St. p. 903, § 6.

In *Standley v. Roberts*, 59 Fed. 836, 839, 8 C. C. A. 305, this court held that:

"An order, judgment, or decree which leaves the rights of the parties to the suit affected by it undetermined,—one which does not substantially and completely determine the rights of the parties affected by it in that suit,—is not reviewable here until a final decision is rendered, nor is an order retaining or dismissing parties defendant, who are charged to be jointly liable to the complainant in the suit, appealable. *U. S. v. Girault*, 11 How. 22, 32; *Hohorst v. Packet Co.*, 148 U. S. 263, 13 Sup. Ct. 590. But a final decision which completely determines the rights, in the suit in which it is rendered, of some of the parties who are not claimed to be jointly liable with those against whom the suit is retained, and a final decision which completely determines a collateral matter distinct from the general subject of litigation, and finally settles that controversy, is subject to review in this court by appeal or writ of error."

Withenbury v. U. S., 5 Wall. 819; *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638; *Hill v. Railroad Co.*, 140 U. S. 52, 11 Sup. Ct. 690; *Central Trust Co. v. Marietta & N. G. Ry. Co.*, 2 U. S. App. 1, 1 C. C. A. 116, 48 Fed. 850; *Grant v. Railroad Co.*, 2 U. S. App. 182, 1 C. C. A. 681, 50 Fed. 795; *Forgay v. Conrad*, 6 How. 201, 204; *Bronson v. Railroad Co.*, 2 Black, 524, 529; *Thomson v. Dear*, 7 Wall. 342, 345; *Trustees v. Greenough*, 105 U. S. 527; *Potter v. Beal*, 5 U. S. App. 49, 2 C. C. A. 60, 50 Fed. 860.

The issue between the plaintiff and the interpleader was a collateral issue, distinct from the subject of litigation between the plaintiff and the defendants. After the judgment in favor of the plaintiff and against the defendants had been rendered, the order dissolving the attachment upon the property finally determined the only issue remaining between the plaintiff and the defendants

under the statutes of Arkansas in force in the Indian Territory (Mansf. Dig. c. 9, §§ 377, 394); and it is not improbable that this was the only material issue that ever arose between the plaintiff and the defendants,—the issue that determined whether the plaintiff should have a lien upon any property by means of which he could have satisfaction of his debt. In our opinion, this was clearly a final decision, within the rule established in *Standley v. Roberts*, supra, and was subject to review in this court. The motion to dismiss the writ of error to review the order dissolving the attachment is denied. The judgment in favor of the interpleader and against the plaintiff, to the effect that the interpleader was the owner of the property, is clearly a final judgment on an issue squarely made by the pleadings between the plaintiff and the interpleader under the Arkansas statutes to which we have referred, and the motion to dismiss the writ of error to review that judgment must also be denied.

FIRST NAT. BANK OF BURLINGAME v. HANOVER NAT. BANK OF
NEW YORK.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1895.)

No. 433.

BANKING—RECEIPT OF PROCEEDS OF DISCOUNT—ESTOPPEL.

A New York bank, at the request of S., the president of a Kansas bank, discounted a note made by S. By direction of S., it placed the proceeds of the note to the credit of the Kansas bank, and telegraphed S. that it had done so. On the receipt of the telegram, S. caused the proceeds of the note to be placed to his credit in the Kansas bank, and used the same. *Held*, that these acts constituted no evidence that the Kansas bank retained or enjoyed the proceeds of the discount, so as to estop it to question the authority of its officers to charge it with liability for the note.

In Error to the Circuit Court of the United States for the District of Kansas.

Elijah Robinson, for plaintiff in error.

C. N. Sterry, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The Hanover National Bank of New York, the defendant in error, brought an action in the court below, and, after a jury trial, recovered a judgment against the First National Bank of Burlingame, Kan., the plaintiff in error, for a balance alleged to be due it on account. The writ of error was sued out to reverse this judgment. At the trial there was but a single item of the account in controversy. That was \$5,000, which the New York bank charged to the Kansas bank on December 24, 1890, on account of a promissory note for that amount made by one Sheldon, and discounted by the New York bank at his request. Sheldon was the president of the Kansas bank, and the New York bank maintained that the Kansas bank had agreed to pay this note at maturity if Sheldon did not, and that it had authorized the charge

of this item to its account in that event. The Kansas bank denied that it had ever made any such agreement or given any such authority. There was conflicting evidence upon this issue that it is unnecessary to recite. But the evidence was undisputed that the New York bank discounted this note on September 23, 1890; that by direction of Sheldon it placed the proceeds of it on its books to the credit of the Kansas bank, and telegraphed to Sheldon to that effect on the same day, and that immediately upon the receipt of that telegram by Sheldon these proceeds were placed to his credit in the Kansas bank, and were used by him. The court charged the jury:

"If you find from the evidence that there was originally a defect of authority upon the part of these parties to this transaction, and if you further find that the defendant bank retained and enjoyed the proceeds of the transaction made by Sheldon, that would constitute acquiescence, as effectual as the most formal ratification afterwards, and the defendant, if you find that to be the case, would be estopped from resisting the demand of the plaintiff here. That is a matter for you to determine from the testimony, for upon the question of authority the testimony is conflicting, and you must determine it for yourselves."

An exception was taken to this portion of the charge on the ground that there was no evidence tending to show that the defendant bank received and had the benefit of the loan in controversy. We think this exception was well taken. We have stated the only evidence the record discloses on this subject, and from that it clearly appears that the Kansas bank was used by Sheldon as a mere conduit through which to pass the proceeds of the discount from the New York bank to himself. Just as soon as he learned that the New York bank had credited the Kansas bank with this money on its books, he caused it to be charged to the Kansas bank, and credited to himself on the books of the latter, and he used it. The Kansas bank neither retained nor enjoyed the proceeds of this discount, nor did it receive any interest, commission, or other benefit from the transaction. As there was no evidence that it retained or enjoyed the proceeds of this discount for the jury to consider, the instruction that such retention and enjoyment might work an estoppel of the right of the bank to question the authority of its officers to charge it with the liability in issue obviously tended to mislead the jury. An instruction which submits a material issue, that is settled by the uncontradicted evidence in the case, to a jury, as a disputed question of fact for them to determine, is misleading and erroneous. *Smith v. U. S.*, 151 U. S. 50, 54, 14 Sup. Ct. 234. The judgment below is reversed, and the cause remanded, with instructions to grant a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. PHILLIPS et al.

(Circuit Court of Appeals, Eighth Circuit. January 2, 1895.)

No. 431.

1. APPEAL—HARMLESS ERROR—UNNECESSARY PARTY PLAINTIFF.

A husband is not a necessary party to a suit for injuries sustained by his wife before marriage, where the state statute provided that (Mansf.

Dig. Ark. § 4933) "every action must be prosecuted in the name of the party in interest," but his joinder in the suit is harmless error, and his name can be stricken from the record even after appeal.

2. RELEASE—CONSIDERATION—FRAUD.

A railroad company procured a release from an injured passenger in full settlement of all claims for personal injuries and loss of property upon the payment of a sum less in amount than the value of the property destroyed. *Held*, in an action for damages, that the court properly refused to direct a verdict for the defendant, where there was evidence tending to show that the receipt was procured by fraud, and that at the time it was signed the plaintiff was incapable of transacting any important business or exercising an intelligent judgment on any subject.

3. CONTRACTS—VALIDITY—EFFECT OF INADEQUACY OF CONSIDERATION.

Mere inadequacy of consideration is not sufficient to establish fraud or mental incapacity to enter into a valid contract, but it is a circumstance which may be considered in connection with the other facts in the case.

4. TRIAL—INSTRUCTIONS—OPINION AS TO WEIGHT OF EVIDENCE.

In an action to recover damages for personal injuries the judge charged that the testimony of the medical experts who were called to testify as to the probable duration of the plaintiff's injuries was "entitled to great weight." *Held*, that no just exception could be taken to this remark, as it was a mere expression of the opinion of the judge as to the value of the evidence, and was not imposed on the jury as an obligatory rule of law for their guidance.

5. APPEAL—OBJECTIONS NOT RAISED BELOW—JURISDICTION.

In an action to recover damages for personal injuries and loss of property, the complaint alleged that a receipt in full settlement of all claims had been procured from the plaintiff by fraud, and at a time when she was incapable of transacting any business. *Held*, that the jurisdiction of the court in determining this issue, not having been challenged upon trial of the case (on the ground that the receipt could only be avoided by a suit in equity), could not thereafter be challenged in the circuit court of appeals. *Railway Co. v. Harris*, 63 Fed. 800, followed.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

George E. Dodge and B. S. Johnson filed brief for plaintiff in error.

Oscar D. Scott filed brief for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This was an action commenced in the circuit court of the United States for the Eastern district of Arkansas by James M. Phillips and Tampa S. Phillips, husband and wife, against the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for personal injuries and loss of money and personal baggage, sustained by Mrs. Phillips while traveling as a passenger on the defendant's road. At the time of the accident the plaintiff, Tampa S. Phillips, was a widow, and her name was then Tampa S. Griffith, but before this suit was brought she intermarried with her coplaintiff, James M. Phillips. The accident occurred at or near Hope, in Arkansas, on the morning of the 1st of March, 1893. The complaint alleges the accident was due to a defective track. The plaintiffs, anticipating that the defendant would plead in bar of the action a receipt acknowledging satisfaction of the demand signed by Mrs. Phillips, averred that the receipt was obtained from her by fraud, and at a time when, by reason of

her injuries and the stimulants and opiates administered to her, she "was in a frame of mind incapable of contracting." In addition to a general denial, the answer set up in bar of the action the receipt mentioned, which reads as follows:

"Accounts Payable.

"The Missouri Pacific Railway Co., to Mrs. T. S. Griffith, Dr.

Address Pilot Point, Texas.

"1893.

"In full settlement and satisfaction of all claims and demands against the St. L., Iron Mountain and Southern Ry., and the Missouri Pacific Railway Co., leased, operated, and independent lines of railway, for personal injuries received while a passenger of said companies was on pass. train 51, which was derailed, and I received scalp wound, and both hands badly bruised, and shoulder and neck wrenched and bruised, and grip, hat, and cloak lost, and all personal property, all of which occurred near Hope, Ark., Mch. 1, '93. And I do hereby fully and forever release, discharge, and acquit said companies from any and all claims of whatever kind or character I may have on account of or arising from said accident or injuries in consideration of the sum of forty dollars, \$40.00.

"Received, Hope, Ark., March 1, 1893, of the Missouri Pacific Railway Company, forty dollars, in full of the above account.

"[Signed]

T. S. Griffith."

There was a trial to a jury, and a verdict and judgment for the plaintiff, and the defendant sued out this writ of error. The following is a brief summary of the leading facts which the plaintiff's testimony tended to establish: When the train was running rapidly, the chair car in which Mrs. Phillips was riding was derailed, and thrown over on its side. At the time of the accident Mrs. Phillips was in the wash room, making her toilet. She was thrown across the room, and fell to the floor, and was rendered insensible by the violence of the shock. The water tank in the wash room upset, and poured its contents over her, and to this circumstance she probably owes her life, for when the car turned over it took fire and burned up, and when she was revived by the water the room was full of smoke, and the fire was near enough to her to be felt. The side was now the top of the car, and her only means of escape was to break through the window on the top of the car, which, after repeated efforts, she succeeded in doing, when her cries for help were heard, and she was taken out. She was bruised and cut about the head, face, and hands, and her wounds were bleeding. She was taken to a house in the town near where the accident occurred, where she was waited upon by physicians, who dressed her wounds, and administered the usual remedies to allay pain and nervousness. She remained at the house until evening, when she was taken to the station, and put on a car to resume her journey to Texas. She was in pain, and was suffering from nervous prostration, and was more or less under the influence of the stimulants and narcotics she had taken. A witness who saw her in the car at this time testifies as follows: "She looked to be pretty well used up. I noticed her on the train. She had her head bandaged up, and both hands and arms bandaged up, and she looked to be kind of dazed or unconcerned about anything; seemed as though she was suffering, and she did say she was suffering;" and the same

witness says that he saw her the next morning, and "her face was discolored on one side, very much swollen, and looked inflamed, and one eye closed." She had two hand satchels, which, with their contents, valued at \$70, were burned, and her money, amounting to \$27, and her railroad ticket, shared the same fate. After she was put on the car in the evening to resume her journey, the door of that car was locked, and she was then approached by two or three of the defendant's agents, and what then took place is thus told by her in answer to questions propounded by the defendant:

"Q. When these gentlemen called on you to present this matter that you have signed [the receipt], did you read it? A. Not a thing. He spoke to me, as well as I remember, in this way. He says, 'You have lost your baggage; you have lost your money,' and I told him that I had, and he talked about it, and he pulled out this money and told me to sign my name; that I had received the amount of \$40.00. Q. Did he read this over to you? A. No, sir; he didn't read anything to me at all. Q. Did you read it yourself? A. No, sir, not a thing. I would not have no more known that I signed to a blank than I did to that, if that is it. Q. Didn't you know you were signing a receipt for that money? A. Yes, sir. I knew I was signing a receipt for the money, and it was very kind to give me something to go home on. Q. Was there anything said about that money being given to you to go home on? A. Nothing, only they said, 'You have no money to go on,' and I said, 'No,' and they insisted that I stay over, but I got a telegram that my father was very sick, and all I cared for was to get home. He was very ill, and my care was to get home, and I thought they were helping me home. Q. What was your condition, if you can describe it, there at the time,—mental condition? A. I do not know, sir. I couldn't tell you how I felt, but I was easy, indolent; I didn't care; was indifferent, just so I could get home; and I didn't seem to hardly be conscious of things around me."

The first error assigned is that the husband of Mrs. Phillips was an improper party to the action. It is undoubtedly true that under the Arkansas Code the husband of Mrs. Phillips was an unnecessary party to the suit. His name might have been stricken out of the complaint at any time, and can be stricken out of the record now, but its presence is not injurious to the defendant, and is a harmless error.

The court rightfully refused to give a peremptory instruction to the jury to find a verdict for the defendant. There was evidence tending to show that Mrs. Phillips' signature to the receipt was procured by fraud, and that at the time she signed it she was in a state of mind that rendered her incapable of transacting any important business, or forming or exercising a deliberate or intelligent judgment on any subject. There was a serious conflict in the evidence on these issues, but it was the province of the jury to say whether, and how far, the evidence was to be believed. When, by giving credit to the plaintiff's evidence, and discrediting that of the defendant, the plaintiff's case is made out, the court cannot withdraw the case from the consideration of the jury. It is the province of the jury to pass upon the veracity of witnesses, and, when there is a conflict, to determine whom they will believe. *Railroad Co. v. Teeter*, 11 C. C. A. 332, 63 Fed. 527; *Railway Co. v. Sharp*, 11 C. C. A. 337, 63 Fed. 532, and cases there cited.

The money and property of the plaintiff which was actually burned up exceeded in value more than double the sum paid to her by the defendant's agents, saying nothing of the personal injuries she sus-

tained, which were serious, and some of them probably permanent. While it is true that mere inadequacy of consideration is not sufficient to establish fraud or mental incapacity to enter into a valid contract, it is a circumstance which may be considered in connection with the other facts in the case. The weight to be given to it depends very largely on the degree of the inadequacy of consideration. The want of consideration may be so gross as to go a great way towards proving fraud or want of sufficient intelligence to make a contract. In *Beller v. Jones*, 22 Ark. 92, 99, the court say:

"No evidence was introduced by Jones so effective, none could be introduced more convincing, to show mental derangement or want of natural sense, as his agreement which is charged by him and admitted by Beller to have been made."

And when it is shown that one has a weak understanding, or from any cause is in a mental condition which renders him liable to imposition, his contract will be held voidable if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence. 1 Story, Eq. Jur. § 238. It is impossible to define with exactness the degree of mental weakness or unsoundness of mind that renders a party incapable of entering into a contract, and this case does not require any extensive discussion of the subject. Against the consequence of mistaken judgment or mere imprudence and folly on the part of one making a contract, the law will not relieve. Probably as good a statement of the general rule as the books contain is found in *Kelley's Heirs v. McGuire*, 15 Ark. 555, 603, where the court say:

"If a person, although not positively non compos or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract made by him under such circumstances will be set aside."

Vide *Kilgore v. Cross*, 1 McCrary, 144, 1 Fed. 578, and cases there cited.

No just exceptions can be taken to the charge of the court submitting these issues to the jury, and upon the evidence in the record we cannot disturb their verdict. Exceptions were taken to the remark of the judge that the testimony of the medical experts who were called to testify as to the probable duration of the plaintiff's injuries was "entitled to great weight." Widely different views are entertained as to the value of such evidence. The remark excepted to was a mere expression of the trial judge's opinion of its value, and was not imposed on the jury as an obligatory rule of law for their guidance. On the contrary, in the same connection the jury were told:

"But at last you are not compelled to take it as true, if you believe that it is improper, and if you believe that it is untrue. You, as jurors, are to weigh that testimony also as you weigh other testimony. * * * You are the sole judges of the testimony as to the whole case, and of the credit to be given to the testimony of any or all of the witnesses. * * * In regard to the permanency of the injury, the court will say to you that you should be careful in estimating that. * * * You are not to speculate upon that, but to be governed by the testimony in the case, and all the testimony in the case."

It is urged that the plaintiff cannot, in this action, avoid the receipt on the grounds relied upon, but that it can only be avoided by a bill in equity for that purpose. The complaint anticipated the defense based on the receipt, and alleged that it was procured from the plaintiff by fraud, and at a time when she was incapable of transacting any business. The defendant took issue on this allegation. The jurisdiction of the court to determine this issue was not challenged in the trial court, and cannot, therefore, be raised in this court. We have recently had occasion to consider this question (*Railway Co. v. Harris*, 63 Fed. 800), and content ourselves with referring to what was there said without repeating it here. We are not to be understood as intimating that, if the defendant had interposed a timely objection to the jurisdiction of the lower court to try this issue, the objection would have been of any avail.

Finding no error in the record, the judgment of the circuit court is affirmed.

BERGMAN et al. v. BLY.

(Circuit Court of Appeals, Eighth Circuit. January 2, 1895.)

No. 467.

1. LIMITATION OF ACTIONS—PAYMENT ON NOTE BY ONE OF TWO JOINT MAKERS.

Payment made on a joint and several promissory note, executed and payable in Wyoming, by one of the two makers thereof, does not operate to prevent the running of the statute of limitations of that state as to the other maker. *Cowhick v. Shingle* (Wyo.) 37 Pac. 689, followed.

2. FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES.

The construction placed upon a state statute by the supreme court of the state is obligatory on the federal courts, such construction being, in effect, a part of the text of the statute itself.

In Error to the Circuit Court of the United States for the District of Wyoming.

This was an action by Damon Gaylord Bly against Isaac Bergman and Colin Hunter on a promissory note. The court directed a verdict for plaintiff. Defendants now bring error.

A. C. Campbell (R. W. Breckons, on the brief), for plaintiffs in error.

T. F. Burke (Charles H. Potter, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought in the circuit court of the United States for the district of Wyoming, by Damon Gaylord Bly, the defendant in error, against Isaac Bergman and Colin Hunter, to recover the contents of a promissory note, of which the following is a copy:

"\$5830.00.

Cheyenne, Wyoming, October 10th, 1886.

"Twelve months after date, for value received, we jointly and severally promise to pay to the order of Angeline Bly fifty-eight hundred and thirty

00-100 dollars at the banking house of Morton E. Post & Co., with interest at one per cent. per month from date until paid, interest payable semiannually.

"Due Oct. 10-13, 1886.

Isaac Bergman.
"Colin Hunter."

The defendants answered separately. The only issue raised by the defendant Bergman's answer was that the interest on the note had been paid up to July 1, 1891, instead of January 1, 1891, as claimed by the plaintiff. The defendant Hunter alleged in his answer that he signed the note as surety for Bergman, and, among other defenses, pleaded the statute of limitations as follows:

"(1) Defendant alleges that no payment has been made upon said note by him, or with his knowledge or consent, at any time since the same was executed and delivered, and that the period of five years has elapsed since the said note became, by its terms, due and payable."

The sections of the statute of limitations of Wyoming upon which this plea rests read as follows:

"Sec. 2368. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action accrues.

"Sec. 2369. Within five years an action upon a specialty or any agreement, contract or promise in writing." * * *

"Sec. 2381. When payment has been made upon any demand founded on contract or a written acknowledgment thereof, or promise to pay the same has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited, after such payment, acknowledgment or promise."

The circuit court directed the jury to return a verdict for the plaintiff against both defendants for the amount of the note and interest thereon from January 1, 1891. Upon a consideration of the evidence, we are satisfied that this instruction, so far as relates to the defendant Bergman, was right. The only question in the case requiring serious consideration arises on the defendant Hunter's plea of the statute of limitations. The interest on the note was paid up to January 1, 1891, by Bergman, the principal in the note, and under the Wyoming statute, this payment of interest confessedly precluded the bar of the statute of limitations from attaching in Bergman's favor. Did such payment have a like effect as to the defendant Hunter? The circuit court held that it did, and this ruling is assigned for error.

The question for decision is this: Does a payment made on a joint and several promissory note, executed and payable in Wyoming, by one of the two makers thereof, operate to prevent the running of the statute of limitations of that state as to the other maker? The supreme court of that state has recently answered this question in the negative in a well-considered opinion, reviewing many of the cases on this subject. *Cowhick v. Shingle* (Wyo.) 37 Pac. 689. The court rests its decision upon its construction of the statute of limitations of the state, as well as upon the general rule of law. Counsel have with commendable diligence collected and cited to the court, and discussed at much length, the numerous decisions on both sides of this vexed question. Courts in this country and in England have discussed it pro and con so long and so often that there remains nothing new to be said on the subject. It would be an affectation of

learning, and serve no useful purpose, to repeat the reasoning on the question, or review the conflicting decisions.¹ We content ourselves with remarking that the decision of the supreme court of Wyoming, holding that the payment made on a promissory note by one of two makers jointly and severally liable thereon, does not suspend the running of the statute in favor of the other maker, be he principal or surety, is probably in harmony with the weight of authority in this country to-day, and it undoubtedly expresses the law as established, either by judicial decision or statute, in a large majority of the states of the Union. It is stated by the supreme court of Wyoming in the opinion referred to that—

"At the time of the organization of the territory of Wyoming, in 1868, the rule that one joint debtor was affected by the partial payment of his codebtor in such way as to deprive him (the former) of the benefit of the statute prevailed in only a few of the states of the Union, to wit, Connecticut, New Jersey, Rhode Island, Delaware, Georgia, Oregon, North Carolina, Missouri, and perhaps, at that date, Minnesota and one or two other states. In all the other states, and in England as well, the rule had been entirely overthrown, either by judicial decision or by legislative enactment."

And in a late case in Rhode Island (*Institution v. Ballou*, 16 R. I. 351, 16 Atl. 144) the court, after reviewing the cases in that state

¹ NOTE. Counsel for plaintiff in error cited and relied on the following cases: *Bell v. Morrison*, 1 Pet. 352; *Levy v. Cadet*, 17 Serg. & R. 126; *Walker v. Duberry*, 1 A. K. Marsh. 189; *Dickerson v. Turner*, 12 Ind. 230; *Steele v. Souder*, 20 Kan. 39 (the opinion was by Judge, now Mr. Justice, Brewer); *Glick v. Crist*, 37 Ohio St. 388; *Arbuckle v. Templeton* (Vt.) 25 Atl. 1095; *Davis v. Mann*, 43 Ill. App. 301; *McMullen v. Rafferty*, 89 N. Y. 456; *Littlefield v. Littlefield*, 91 N. Y. 203; *Littlefield v. Dingwell* (Mich.) 39 N. W. 38; *In re Sander's Estate* (Surr.) 24 N. Y. Supp. 317; *Hance v. Hair*, 25 Ohio St. 349; *Marienthal v. Mosler*, 16 Ohio St. 566; *Bank v. Sullivan*, 6 N. H. 124; *Coleman v. Fobes*, 22 Pa. St. 156; *Kallenbach v. Dickinson*, 100 Ill. 427; *Van Keuren v. Parmalee*, 2 N. Y. 523; *Shoemaker v. Benedict*, 11 N. Y. 176; *Lowther v. Chappell*, 8 Ala. 353; *Myatts v. Bell*, 41 Ala. 222; *Tate v. Clements*, 16 Fla. 339; *Bush v. Stowell*, 71 Pa. St. 208; *Steele v. Jennings*, 1 McM. 297; *Walters v. Kraft*, 23 S. C. 578; *Belote v. Wynne*, 7 Yerg. 534; *Muse v. Donelson*, 2 Humph. 166; *Schindel v. Gates*, 46 Md. 604; *Willoughby v. Irish*, 35 Minn. 63, 27 N. W. 379; *Mayberry v. Willoughby*, 5 Neb. 368.

Counsel for defendant in error cited and relied on the following cases: *Whitcomb v. Whiting*, 2 Doug. 656; *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. 67; *Allen v. O'Donald*, 28 Fed. 346; *Partlow v. Singer*, 2 Or. 307; *Burleigh v. Stott*, 8 Barn. & C. 36; *Perham v. Raynal*, 2 Bing. 306; *Wyatt v. Hodson*, 8 Bing. 309; *Sigourney v. Drury*, 14 Pick. 387; *Cox v. Bailey*, 9 Ga. 467; *Ellicott v. Nichols*, 7 Gill. 85; *Schindel v. Gates*, 46 Md. 604; *Burgoon v. Bixler*, 55 Md. 384; *Lord v. Shaler*, 3 Conn. 131; *Bound v. Lathrop*, 4 Conn. 336; *Caldwell v. Sigourney*, 19 Conn. 37; *Bissell v. Adams*, 35 Conn. 299; *Beardsly v. Hall*, 36 Conn. 270; *Merritt v. Day*, 38 N. J. Law, 32; *Turner v. Ross*, 1 R. I. 88; *Perkins v. Barstow*, 6 R. I. 505; *Institution v. Ballou*, 16 R. I. 351, 16 Atl. 144; *Green v. College*, 83 N. C. 449; *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772; *Bank v. Harris*, 96 N. C. 119, 1 S. E. 459; *Moore v. Beaman*, 111 N. C. 328, 16 S. E. 177; *Goudy v. Gillam*, 6 Rich. Law, 28; *Dinsmore v. Dinsmore*, 21 Me. 433; *Quimby v. Putnam*, 28 Me. 423; *Joslyn v. Smith*, 13 Vt. 353; *Bank v. Cotton* (Wis.) 9 N. W. 926; *Bank v. Hartfield*, 5 Ark. 551; *Biscoe v. Jenkins*, 10 Ark. 108; *Campbell v. Floyd*, 153 Pa. St. 84, 25 Atl. 1033; *Craig v. Calloway County Court*, 12 Mo. 95; *Harris v. Odeal*, 39 Mo. App. 270; *McClurg v. Howard*, 45 Mo. 365; *Koslowski v. Yesler*, 2 Wash. T. 407, 8 Pac. 493; *Brandt*, Sur. (Ed. 1876) § 120; 2 Pars. Notes & B. (Ed. 1865) 657, 658; *Ang. Lim.* (Ed. 1876) §§ 240, 248; 24 Am. & Eng. Enc. Law, p. 772, note.

which hold that the payment by one of two or more joint debtors operates to prevent the running of a statute as to all, say:

"The cases are doubtless at variance with the rule now generally prevailing in the United States, but in many of the states their present rule has been established by statute, and in some of them after contrary decisions had been made by the courts."

And in *Wood*, *Lim.* pp. 608, 609, the author, referring to the doctrine of *Whitcomb v. Whiting*, 2 Doug. 652, says:

"The judgment of the profession, as well as of the people generally, as to the wisdom of the doctrine, is best evinced by the circumstance that it has been nearly obliterated by legislative and judicial action."

We think the construction placed upon the Wyoming statute by the supreme court of the state a sound one, but we prefer to rest our decision upon the proposition that, in the present state of the authorities upon this question, it is obligatory upon this court to give effect to the statute of Wyoming as construed and expounded by the supreme court of that state. The general rule is that the laws of the several states shall be regarded as rules of decision in the courts of the United States in cases to which they apply. The judiciary act requires this, and it would be the law independently of that enactment. Under this rule, the first question which confronts a federal appellate court is, what is the local law applicable to the case? The local law which furnishes the rule of decision may consist of a statute, or of the decisions of its supreme court, or of both. The construction placed upon a state statute by the supreme court of the state is obligatory on the federal courts. The judicial interpretation of a statute becomes, in effect, a part of the text of the statute itself. It does not matter how like statutes in other states have been construed. The construction of the statute by the supreme court of the state from which the case comes is the law of that state, and furnishes the rule of decision. It not infrequently occurs that the same statute is differently interpreted, or the same question differently decided, by the supreme courts of different states. When that is the case, the federal appellate court gives effect to the local law of the state applicable to the case. It does not attempt to reconcile the conflicting decisions of the state courts, or to adopt a rule of decision different from that established by the supreme court of the state from which the case comes. It contents itself with giving effect to the local law. There are some qualifications and exceptions to these general rules, but they are founded on special facts and circumstances which have no existence in this case. The decision of the supreme court of Wyoming which we are considering antagonizes no well-settled doctrine in the law, changes no former rule of decision in the state, deprives no one of vested rights, and does not discriminate against nonresidents. On the contrary, it is well supported by reason and authority, and is in harmony with the law in most of the states of the Union. In the case of *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. 67, the court did no more than apply the rule of the local law. The court held that a payment by one of two joint obligors prevented the running of the statute of limitations as to the other, in the state of Oregon, upon the ground

"that the statute of limitations of the state never operated as a bar to the enforcement of the original demands against both the principal and the surety."

If the peremptory instruction of the court to the jury to return a verdict for the plaintiff against the defendant Hunter is based on the idea that the payments made upon the note were made by him or by his authorized agent,—as they must have been to remove the bar of the statute as to him,—it is sufficient to say that there was no evidence to warrant that conclusion. It is quite obvious, however, that that was not the ground of the instruction, but that the circuit court took the view that the payment made on the note by Bergman had the effect to keep it alive as to his surety, Hunter. It is due to the court below to say that when this case was tried in the circuit court the case of *Cowhick v. Shingle*, supra, had not been decided by the supreme court of Wyoming. The judgment of the circuit court against the plaintiff in error Bergman is affirmed, and the judgment against the plaintiff in error Hunter is reversed, and the cause, as to him, is remanded, with directions to grant a new trial.

PIERCE v. UNION PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1895.)

No. 479.

CHARITIES—HOSPITAL FOR RAILROAD EMPLOYEES—LIABILITY FOR NEGLIGENCE—
RAILWAY CO. v. ARTIST, 9 C. C. A. 14, 60 FED. 365, FOLLOWED.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

This was an action by H. C. Pierce, administrator of Ralph H. Pierce, against the Union Pacific Railway Company, to recover the amount of damages which it is claimed the estate suffered because of his death. The facts of the case are stated as follows in the brief for defendant in error:

Ralph H. Pierce, the plaintiff's intestate, on the 15th day of January, 1891, left the defendant's hospital at Ogden, Utah, and nothing was known of or could be ascertained about him until some few weeks afterwards, when his body was found in the Weber river. The distinct charge of negligence made against the defendant, and complained of by the plaintiff, is that the defendant, through its agents, servants, and employes, and those in charge and control of its hospital at Ogden, permitted said Ralph H. Pierce, while temporarily insane, to wander away from its said hospital, and that, while thus mentally unsound, he fell into the Weber river, and was drowned.

The case was tried before Judge Shiras and a jury, at Des Moines, Iowa. At the close of all the testimony in the case, the defendant filed a motion for a verdict, and the motion was sustained. A verdict was directed for the defendant, and judgment rendered thereon for defendant, and against plaintiff for the costs of the suit; and this writ of error was sued out to reverse that judgment.

Charles A. Clark, for plaintiff in error.

John H. Baldwin filed brief for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The facts in this case are the same in all essential particulars as were those in the case of *Railway Co. v. Artist*, 9 C. C. A. 14, 60 Fed. 365; and the judgment below is affirmed, with costs, on the authority of that case.

Ex parte SCOTT et al.

(Circuit Court, E. D. Virginia. March 4, 1895.)

OLEOMARGARINE—PROHIBITION OF SALE BY STATE—INTERSTATE COMMERCE.

Act Va. March 1, 1892 (Acts 1891-92, p. 840), entitled "An act to prevent the adulteration of butter and cheese, and the sale of the same, and preserve the public health," but in fact and substance prohibiting the sale of oleomargarine, is not a health law, but an interference with interstate commerce, and for that reason unconstitutional.

G. A. J. Scott and William McLean were committed for violation of the Virginia oleomargarine law, and each filed a petition for the writ of habeas corpus in this court.

Sam W. Small, for petitioners.

William H. White, for defendants.

HUGHES, District Judge. The petitioners are under arrest for trading in an article of commerce brought from another state. Their business would go to ruin if they were required to await all the proceedings in the state courts incident to appeal, and to reaching a final adjudication of their rights in the state court of final resort. This fact makes these cases cases of emergency, demanding immediate action by this court. It was in this view that I directed these writs of habeas corpus to be issued. The facts agreed between the prosecuting officers of the state and the petitioners are as follows:

"The accused (Scott) was at the time of his arrest engaged in Norfolk, Virginia, in the business of a wholesale dealer in oleomargarine, under and in compliance with the laws of the United States regulating the sale of that article. At the time of the arrest of the accused, he had in his possession for sale, and was selling, in the original, unbroken, and imported package, the article known as 'oleomargarine.' The packages containing the same were distinctly stamped with the word 'oleomargarine' in plain, Roman letters, not less than half an inch square. The said article was manufactured by Swift & Co., in the state of Illinois, and shipped by them from that state to the accused, at Norfolk, Virginia. Oleomargarine is nowhere manufactured in the state of Virginia, but is largely manufactured elsewhere, and enters extensively into the trade and commerce of this and other states of the Union. The printed copy of the regulations concerning oleomargarine under the internal revenue laws of the United States may be used as evidence in this case."

The question in these cases was before me, in the case of *Ex parte Rebman*, five years ago. 41 Fed. 867. There the state of Virginia had passed a law, which, stripped of its verbiage, was, in essence and purpose, a law forbidding the sale in this state of meats from animals slaughtered in other states. This law was held by me to be obnoxious to the provision of the national constitution giving to congress the exclusive power of regulating commerce

between the states. A dealer, in Norfolk, in canned and prepared meats, had been arrested, tried, and imprisoned for violations of this meat law of the state. Upon a writ of habeas corpus, and after a full hearing, I released Rebman. The case was appealed to the supreme court of the United States, and was there accorded a privileged hearing. Whereupon that court unanimously affirmed the decision here. *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213. In that case I said:

"Section 8 of article 1 of the constitution gives congress exclusive power to regulate commerce among the several states; and, when congress refrains from exercising that power in relation to any subject, commerce is free, and cannot be interfered with by the states. It was so held in *Brown v. Houston*, 114 U. S. 631, 5 Sup. Ct. 1091. In quite a number of subsequent cases the supreme court has held the same doctrine, in applying it to a constantly varying condition of facts."

Mr. Justice Bradley, sitting in circuit court, truly and aptly said in *Stockton v. Railroad Co.*, 32 Fed. 17:

"The power of congress is supreme over the whole subject of interstate commerce, unimpeded and unembarrassed by state lines or state laws. On this matter the country is one, and the work to be accomplished is national; and state jealousies, state prejudices, and state interests do not require to be consulted. In matters of foreign and interstate commerce, there are no states."

I went on, in the *Rebman Case*, to say as follows (but I shall now use the word "health," instead of "inspection," whenever the latter occurred):

"It is undeniable that a state of this Union, like other self-governing states, has the power to enact health laws for the public safety. It has as clear a right to this power as it has to existence. It may enact and enforce health laws adapted to secure the public safety, even though they trench upon, and more or less obstruct, the freedom of trade between the states. It is equally true, however, that health laws, to be within the sovereign prerogative of the state, and to stand superior to the cardinal provisions of the national constitution, must be essentially and really such, in character, purpose, and operation. To call a law a health law does not make it one, competent to override any tenet of constitutional law. It must be a health law in spirit and in truth. It must be a reasonable law, properly devised for preventing the evil at which it is aimed; so devised as to no more than effectuate that purpose, and as not to subserve other objects not essential to the public safety. When health laws are abused for the latter ends, and thereby affect trade between the states obstructively or injuriously, it is competent for the national courts—it is declared to be our solemn duty—to pronounce them invalid, and to forbid their enforcement. And so it seems to me that the question at bar is resolved into the inquiry, whether or not the meat law of Virginia is reasonable and necessary, is directed against a dangerous evil, has an eye single to the prevention of that evil, and provides for its prevention in a manner less injurious to the constitutional rights of the citizens of our sister states than any other that could be devised."

In my construction of the Virginia meat act, I held that the negative of the propositions just stated was true of it, and held it, therefore, to be an invalid law, as against the products of sister states. I therefore released the petitioner, who had been imprisoned under that law. When the case was before the supreme court of the United States, that court, in affirming the judgment of this court, said of the Virginia meat law:

"We are of opinion that the statute of Virginia, although avowedly enacted to protect its people against the sale of unwholesome meats, has no real or substantial relation to such an object, but, by its necessary operation, is a regulation of commerce, beyond the power of a state to establish."

The *Rebman Case* is on all fours with the two now under consideration. On March 1, 1892, the general assembly of Virginia enacted a law whose title declared it to be "An act to prevent the adulteration of butter and cheese, and the sale of the same, and preserve the public health."¹

Under this title the act went on to forbid the manufacture and sale of any compound made of substances other than such as are produced from cows' milk, and of any compound made of such other substances as were imitations or semblances of the products of cows' milk, and from coloring such other substances so as to make them similar to butter or cheese. Indeed, the very terms of the provisions of the act excluded the idea of the adulteration of butter and cheese. They referred exclusively to compounds of things other than butter and cheese. As oleomargarine is not composed in any ingredient of butter or cheese, it can be in no contingency or possibility an adulteration of these products of the cow. And so this act of Virginia, purporting to be an act to prevent the adulteration of butter and cheese, was no more nor less than an act to forbid the manufacture and sale of oleomargarine in the state. As

¹ Acts Gen. Assem. Va. 1891-92, p. 840:

An act to prevent the adulteration of butter and cheese and the sale of the same, and preserve the public health.

1. Be it enacted by the general assembly of Virginia, that no person shall manufacture out of any oleaginous substance or substances, or any compound of the same other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream of the same, or shall sell or offer for sale the same as an article of food. This provision shall not apply to pure skim milk cheese made from pure skim milk. Whoever violates the provisions of this section shall be guilty of a misdemeanor, and be punished by a fine of not less than fifty nor more than one hundred dollars for the first offence, and for each subsequent offence shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars.

2. That no person, by himself or his agents or servants, shall render or manufacture out of any animal fat or animal or vegetable oils not produced from unadulterated milk or cream from the same, any article in imitation or semblance of natural butter or cheese produced from pure, unadulterated milk or cream of the same, nor mix, compound with, or add to milk, cream or butter any acids or other deleterious substances or any animal fat or animal oils not produced from milk or cream so as to produce any article or substance or any human food in imitation or semblance of natural butter or cheese, nor sell, keep for sale, or offer for sale any article, substance or compound, made, manufactured, or produced in violation of the provisions of this section, whether such article, substance or compound shall be made or produced in this state or elsewhere. Whoever violates the provisions of this section shall be guilty of a misdemeanor, and be punished by a fine of not less than fifty nor more than one hundred dollars for the first offence, and for each subsequent offence shall be punished by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars. Nothing in this section shall impair the provisions of the first section of this act.

3. That no person shall manufacture, mix, or compound with or add to natural milk, cream or butter any animal fats or animal or vegetable oils,

to the manufacture of oleomargarine, the law was without the necessary *raison d'être*. None was manufactured in the state; none has been or is manufactured here; and, if the manufacture of it is an evil, it is one that did not exist, and as to which the act is *brutum fulmen*. Stripped of its verbiage, and of its useless inhibition of a nonexistent manufacture, the law is nothing more nor less than a prohibition of the sale in Virginia of oleomargarine imported from one of our sister states. It is in palpable conflict with the national constitution. It is a fact of common knowledge that oleomargarine has been subjected to the severest scientific scrutiny, and has been adopted by every leading government in Europe, as well as America, for use by their armies and navies. Though not originally invented by us, it is a gift of American enterprise and progressive invention to the world. It has become one of the conspicuous articles of interstate commerce, and furnishes a large income to the general government annually. Its chemical properties and preparation are such that it is adopted for the use of the armies and navies of the great nations as more desirable and safe than to run the risk of rancid butters and animated cheeses. It is entering rapidly into domestic use, and the trade in oleomargarine has become large and important. The attention of the national government has been attracted to it as a

nor shall he make or manufacture any oleaginous substance not produced from milk or cream, with the intent to sell the same for butter or cheese made from unadulterated milk or cream, or have the same in his possession, or offer the same for sale with such intent; nor shall any article, substance or compound so made or produced be sold, intentionally or otherwise, as and for butter or cheese the product of the dairy; no person shall coat, powder, or color with annatto or any coloring matter whatever, butterine or oleomargarine or any compound of the same, or any product or manufacture made in whole or in part from animal fats or animal or vegetable oils not produced from unadulterated milk or cream, whereby the said product, manufacture or compound shall resemble butter or cheese the product of the dairy, or shall have the same in his possession with the intent to sell the same, or shall sell or offer the same for sale. Whoever violates any of the provisions of this section shall be guilty of a misdemeanor, and be punished by a fine of not less than fifty nor more than one hundred dollars for the first offence, and shall be punished by a fine of not less than one hundred dollars nor more than two hundred and fifty dollars for each subsequent offence. This section shall not be construed to impair or affect the prohibition of sections one and two of this act.

4. That no keeper or proprietor of any bakery, hotel, tavern, boarding house, restaurant, saloon, lunch-counter or place of public entertainment, or any person having charge thereof or employed thereat, shall keep, use or serve therein, either as food for their guests, boarders, patrons or customers, or for cooking purposes, any article made in violation of the provisions of sections one, two and three of this act. Whoever violates the provisions of this section shall be guilty of a misdemeanor and punished by a fine of not less than fifty nor more than one hundred dollars for each offence.

5. That the authority to impose such fines, with costs, as are enumerated in sections one, two, three and four of this act shall vest in the same court that exercises jurisdiction of other criminal cases.

6. That all acts or parts of acts, so far as they conflict with the provisions of this act, are hereby repealed.

7. This act shall be in force from its passage.

Approved March 1st, 1892.

source of revenue. Its manufacture and sale have been made the subject of careful regulation by congress, and the national revenue derived from it is considerable. Manufacturers pay a tax of \$600 per annum; wholesale dealers, \$480; and retail dealers, \$48. These petitioners had paid these taxes to the United States, which were heavy, and were doing business under the imprimatur of the national government; and it was for doing that business that they were arrested, tried, and jailed in this city of Norfolk. State legislation against it is therefore regarded as invidious by the national authorities, and the right of dealing in it will not be allowed by them to be capriciously overthrown. Provincial prejudice against this now staple article of commerce is natural, but a city of the size and prospects of Norfolk as a world's entrepot ought not to be foremost in manifesting such a prejudice. My recollection is that there were no prosecutions under the meat act anywhere in the state, except in Norfolk. I regret that it has been necessary to bring such cases as those at bar before me. I regret that the necessity for doing so has arisen in Norfolk; the criminal court of Richmond having refused to entertain such prosecutions, holding the act of March 1, 1892, obnoxious to the state constitution, as I hold it to be obnoxious to the national constitution. I think it is palpably obnoxious to both.

I will enter judgment for the petitioners, and order them to be released from custody. If appeal is desired, they may be bailed to await the judgment of the supreme court at Washington. If an appeal is taken, the case will be accorded there a privileged hearing; and I will facilitate, as far as I can do so, the appeal and an early hearing.

Although unnecessary, I will append here a notice of the recent decision of the United States supreme court in the case of *Plumley v. Com.*, 15 Sup. Ct. 154. In that case the court had under review a statute of Massachusetts prohibiting the sale in that state of oleomargarine if it was got up "in imitation of yellow butter," but allowing it to be sold "in a separate and distinct form, and in such a manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." The supreme court held that, though the act would have been invalid if it had prohibited the sale of oleomargarine generally in undisguised form, yet that so far as it prohibited the coloring of oleomargarine yellow, so as to imitate butter, and thereby deceive the consumer, the law was pro tanto valid. Even in restricting its decision to the mere yellowing of oleomargarine, the court was held, by three of the justices, to have gone too far. The court were unanimous as to the invalidity of any state law which should inhibit the sale within its borders of oleomargarine, when prepared, labeled, and sold as such, without deceit or fraud. Such is the case as to the article for selling which the petitioners now before me have been prosecuted, and the case of *Plumley v. Com.* is authority and warrant for my order setting them at liberty.

UNITED STATES v. PERKINS et al.

(Circuit Court of Appeals, Second Circuit. February 11, 1895.)

No. 85.

1. CUSTOMS DUTIES—WOOD PULP—"DRY WEIGHT."

The term "dry weight," as used in paragraph 415 of the tariff act of October 1, 1890, imposing a duty of six dollars per ton dry weight on unbleached chemical wood pulp, and seven dollars per ton dry weight on bleached chemical wood pulp, does not refer to the absolute dry weight of the material immediately after desiccation in a kiln, but to the air-dry weight as understood in commerce.

2. SAME.

It seems that it is not customary to make an allowance for moisture in wood pulp where the moisture does not exceed 10 per cent. of the total weight.

This is an appeal from a decision of the United States circuit court, Southern district of New York, reversing a decision of the board of general appraisers, which affirmed the assessment of duties made by the collector of the port of New York on certain "unbleached chemical wood pulp." The tariff act of October 1, 1890, contains the following provision:

"415. Mechanically ground wood pulp, two dollars and fifty cents per ton dry weight; chemical wood pulp, unbleached, six dollars per ton dry weight; bleached, seven dollars per ton dry weight."

There is no question as to the classification of the merchandise for duty, but the importers insisted that the dutiable weight was not correctly ascertained by the customs officers. Mechanically ground wood pulp contains 50 per cent., more or less, of water. Chemical wood pulp, which is an absorptive material, is found in a condition of practically absolute dryness only immediately after desiccation in a kiln. As soon as it is exposed to the air, it begins to take in moisture, and the amount of water thus absorbed by its fibers varies with the varying hygrometric conditions of the place where it is kept. The percentage of water, under some conditions, is found to be as low as $6\frac{1}{2}$ per cent.; under other conditions it rises to 13 per cent. or over. The collector determined the dutiable weight of the importation upon the assumption that the normal amount of water in chemical wood pulp was 10 per cent. He had tests made of the several lots imported, thus ascertaining the difference between the kiln-dried weight and the actual weight as imported. Where such difference did not exceed 10 per cent., he took the actual weight as the weight for duty purposes; where such difference exceeded 10 per cent., he deducted the excess from the actual weight, and exacted duty only on the residue. The importer insisted that duty should be exacted only on the kiln-dried weight.

James T. Van Rensselaer, for the United States.
Everitt Brown, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The board of general appraisers has found in this case that "the term 'dry weight' is a commercial term, meaning 'air-dry weight'." The record before this court contains abundant testimony supporting this finding, and little, if any, to the contrary. Such finding of fact, therefore, should not be disturbed upon appeal. To the importers' further contention that the air-dry weight of their importation was determined by an arbitrary formula, not warranted by law or commercial usage, it is sufficient to say that their protest sets forth no such objection to the decision of the collector. The only ground of objection stated in that document is that "said merchandise is dutiable only on the absolute dry weight thereof." Having wholly failed to sustain the claim made in their protest, the importers were not entitled to relief, and the circuit court erred in reversing the decision of the board of appraisers. A majority of this court, moreover, are inclined to the opinion that the evidence sustains the further finding of the board of appraisers that in trade and commerce it is not customary to make an allowance for moisture in wood pulp where the moisture does not exceed 10 per cent. of the total weight, but, in view of the insufficiency of the protest, it is not necessary to pass upon that point in this case. The decision of the circuit court is reversed.

UNITED STATES v. POPPER et al

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 51.

CUSTOMS DUTIES — GLASS DISKS COLORED AND CUT IN IMITATION OF PRECIOUS STONES.

Merchandise, consisting of glass disks of various colors and sizes, colored and cut in imitation of precious stones, is dutiable under the provision of the tariff act of March 3, 1883, imposing a duty of 10 per cent. ad valorem upon "compositions of glass or paste, when not set," and is not to be classified under the provision of the same act imposing a duty of 45 per cent. ad valorem upon "articles of glass, cut, engraved, painted, colored," etc.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by Leo Popper, Edwin S. Popper, and Caleb F. Popper, copartners, trading as Leo Popper & Son, for a review of the decision of the board of general appraisers concerning certain goods imported by them. The circuit court reversed the decision of the board of general appraisers, and the United States thereupon appealed.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

Comstock & Brown (Albert Comstock, of counsel), for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The question in this case is whether merchandise, imported while the tariff act of March 3, 1883, was

in force, and consisting of glass disks of various colors and sizes, colored and cut in imitation of precious stones, and unset, should have been classified under the provision of that act imposing a duty of 45 per cent. ad valorem upon "articles of glass, cut, engraved, painted, colored," etc., or under the provision imposing a duty of 10 per cent. ad valorem upon "compositions of glass or paste, when not set." The testimony shows that such articles are sold as imitation jewelry, and are used as ornaments in the place of real gems. We think the term "compositions of glass or paste" is reasonably intelligible, without resorting to extraneous sources to ascertain its meaning. The association naturally suggests kindred compositions, such as may be either of glass in the nature of paste, or paste in the nature of glass; and the only articles which, according to the testimony, seem to fit that description, are the imitation gems of glass, commonly known as "paste." Some additional light, however, is found upon the meaning of congress in the next succeeding tariff act (October 1, 1890), in which, in lieu of the provision for a duty of 10 per centum ad valorem upon "compositions of glass or paste, when not set," a like duty is imposed upon "imitations of precious stones composed of paste or glass, not exceeding one inch in dimensions, not set." As the importations are more specifically described by the provision imposing the 10 per centum duty than by the other, it is the one under which they should have been classified. The decision of the circuit court, reversing that of the board of general appraisers, is affirmed.

OPPENHEIMER et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 11, 1895.)

No. 89.

CUSTOMS DUTIES—CLASSIFICATION—SILK VEILS IN THE PIECE.

Silk veils or veillings in the piece, with borders upon them, and clearly defined lines between the borders, indicating where they were to be cut off, *held* to be dutiable at 60 per cent. ad valorem, as "wearing apparel," under paragraph 413 of the tariff act of October 1, 1890, and not at 50 per cent. ad valorem, under paragraph 414, as "manufactures of silks not specially provided for." *Oppenheimer v. U. S.*, 61 Fed. 283, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by Oppenheimer & Terry, importers, for review of a decision of the board of United States general appraisers concerning certain importations of silk veils in the piece made by them. The decision of the board sustaining the action of the collector was affirmed by the circuit court. 61 Fed. 283. The importers appeal.

Benjamin Barker, Jr., for appellants.

Henry C. Platt, for the United States.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The goods in question are silk veils in the piece. They come in rolls several yards in length, but are ornamented with a succession of borders, each surrounding a portion of the fabric of a size suitable for a veil. A series of veils are thus marked out, defined, and designated by these borders, and, although not separated from each other at the time of importation, are adapted for no other use than as veils, and only need cutting apart to make them completed veils. The dividing line of each separate veil is plainly indicated, and the fabric can be cut only between the veils without destroying the design. They are manufactured, adapted, and intended for veils, and for nothing else.

The appellants contend that the merchandise is dutiable under paragraph 414 of the tariff act of 1890, as "manufactures of silk, not specially provided for." The collector classified them as wearing apparel, under paragraph 413, which is as follows:

"Par. 413. Laces and embroideries, handkerchiefs, neck ruffings and ruchings, clothing ready made, and *articles of wearing apparel of every description*, including knit goods, *made up or manufactured wholly or in part by the tailor seamstress or manufacturer*, composed of silk or of which silk is the component material of chief value, not specially provided for sixty per cent. ad valorem," etc.

The merchandise imported in this case is clearly within the italicized portion of this paragraph. It is made up "in part," the operation of making up having progressed so far that it is easy to identify the particular article of wearing apparel it is to be, and the materials out of which it is made being rendered, so far as the evidence shows, practically useless for any other purpose. In this respect it differs from *In re Mills*, 56 Fed. 820, where the hemstitched lawns were as well adapted for use as window curtains as they were for women's skirts and aprons. Veils are manifestly wearing apparel, and these goods, being veils which only need to be cut off from the piece in order to be ready for use, were properly classified for duty as such.

The decision of the circuit court is affirmed.

HENDERSON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 56.

CUSTOMS DUTIES—TARIFF ACT 1890 — FREE LIST — THEATRICAL PROPERTIES— PART OWNER.

Theatrical costumes imported by one of two joint owners, for their joint use in the production of a theatrical burlesque, are not subject to duty (Tariff Act 1890, par. 686), upon the ground that they were imported for another person as well as for the one arriving with them.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a protest of Wemyss Henderson against the imposing, assessing, and paying of any duty upon certain theatrical costumes

and properties brought by him on the steamer City of New York into the port of New York on May 11, 1892.

It appeared from the complainant's protest and the evidence taken by the board of appraisers that the property was owned jointly by the protestant and his brother, David Henderson, proprietors of the American Extravaganza Company, and were to be used by this company in theatrical representations. The board of appraisers found that "the goods are theatrical effects, assessed for duty under various provisions of the tariff, and claimed to be exempt from duty as professional implements, under paragraph 686, Tariff Act 1890. The articles were imported for the American Extravaganza Company, and arrived in the possession of Mr. Wemyss Henderson, who is, as the protest states, one of the proprietors, owners, and managers of the company. Paragraph 686, in exempting from duty the instruments of occupation of persons arriving in the United States, provides that this exemption shall not include articles imported for any other person or persons. The board is of the opinion that the term 'persons' arriving in the United States means individuals arriving, and that the word 'persons' is not used in a corporate sense. Otherwise a member of a firm or corporation might go abroad and purchase wearing apparel for the whole firm or corporation, and obtain exemption, under paragraph 752. We find that, in bringing in theatrical effects for his coproprietors or partners in the American Extravaganza Company, Mr. Henderson imported articles for the use of other person or persons. The protest is overruled accordingly." Upon appeal, Wheeler, J., delivered the following opinion: "These theatrical costumes were imported as well for another person as for the one arriving with them, and do not come within the words of the statute making such costumes free as implements of an occupation in some cases. Judgment affirmed." The case is now heard upon a review of the judgment of the circuit court.

A. J. Dittenhoefer, for appellant.

Theatrical costumes and properties are tools and implements of trade and occupation, within the meaning of said provision, and as such are exempt from duty. This, however, is no longer an open question. In December, 1892, this court, in the *Huntington Case*,¹ following previous decisions, held that theatrical costumes and properties were instruments of trade and occupation, and they are recognized as such in the new tariff. See paragraph 596, Tariff Law 1894. It is not essential that the articles should be used personally by the party bringing them to exempt them from duty, but it is sufficient that they are used in his business or occupation. In the *Huntington Case* the theatrical costumes were to be used, not only by Miss Huntington, but also by the members of her company, and it was argued that they were, therefore, brought over for "another person," within the meaning of the provision that tools of trade should not be exempt from duty if they were brought over for "another person or persons." Though the point was not raised in the first instance before the board of appraisers, Mr. Wilkinson, in anticipation, disposed of it as follows: "It may be contended that the articles in question were not to be worn by the actress, but that they are intended for use by other members of the company. This contention would seem to be answered by the opinion of the attorney general, which is promulgated in synopsis 8021, with the express concurrence of the department. In his opinion it is held that that portion of that paragraph applies to implements and tools intended for the actual personal use of the importer, or those following the one, in the same trade or occupation, under his personal supervision or employment;" and the objection was overruled on the spot, both in the circuit and this court, and the decision of the board affirmed. As there is no substantial difference between that case and this one, the decision should be controlling. It obviously was not the intention of congress to exempt only such tools, instruments, and implements that were to be used exclusively by the person who brought them over. Such a construction would in effect nullify the law, and lead to the absurdity of making a saw or last dutiable if the owner per-

¹ No opinion filed.

mitted his workmen to saw wood or make shoes with the tools instead of doing it himself. It is difficult to understand the distinction made by the board of appraisers between this and the Huntington Case. The board says "that it is of the opinion that the term 'persons' arriving in the United States means individuals arriving." What does this mean? If anything, it applied to Miss Huntington and the members of her company equally as well as it applies to the appellant and his brother, and yet the board held that the Huntington costumes were exempt from duty. Appellant is not to be deprived of the benefit of the exemption, for the sole reason that he is a partner with his brother in the play in which the costumes were to be used. In *Mabett v. White*, 12 N. Y. 455, the court say: "The relation subsisting between partners is of the most intimate and confidential nature. They are joint tenants of the stock and effects of the company. Their interests are joint and mutual, and each is seized per my et per tout. Each has entire possession, as well of every part as of the whole, and each of two partners has an undivided moiety of the whole, and not the undivided whole of a moiety." The appraisers, as a reason for their decision, say that a member of a firm might go abroad and purchase wearing apparel for the whole firm. As articles of wearing apparel are not tools or implements of trade, we fail to appreciate the pertinency of the illustration. The appraisers conclude by saying: "We find that, in bringing in theatrical effects for his coproprietors or partners in the American Extravaganza Company, Mr. Henderson imported articles for the use of other person or persons."

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The appellant arrived at the port of New York on the steamer City of New York, May 11, 1892, bringing with him upon the steamer for importation certain theatrical costumes and properties, owned by him and his brother as copartners, to be used in a certain play to be produced at a theatre of which he and his brother were the proprietors. The question upon this appeal is whether these importations were exempt from duty under paragraph 686 of the tariff act of 1890, which includes in the free list "professional books, implements, instruments, and tools of trade, occupation, or employment, in the actual possession at the time of the persons arriving in the United States; but this exemption shall not be construed to include machinery or other articles, imported for use in any manufacturing establishment, or for any other person or persons, or for sale." The board of general appraisers decided that the importations were not exempt from duty, but were excluded because the articles were imported as well for another person as for the one arriving with them, and the circuit court, which affirmed the decision of the board of general appraisers, was of the same opinion. We think the construction thus placed upon the statute too narrow and illiberal. The meaning of the restrictive clause, giving the language its natural import, is to exclude from the exemption such articles as are brought by the one arriving with them, not for himself, but for some one else. Its apparent purpose is to suppress a common practice, and prevent the importation free of duty of professional books, etc., which have been procured by the person arriving with them, not for himself, but as a friendly office for some other person. Except for the restrictive clause, all such enumerated articles would escape duty, if brought here by the person arriving

with them. Obviously, it was not the intention of congress to exempt only such tools, instruments, etc., as are to be used exclusively by the person who arrives with them. Such a construction would lead to the absurdity of making professional books dutiable if the owner intended to permit his students to use them, or tools in trade, if he intended to allow his workmen to use them. In the most favorable view for the appellee, the question is one of doubt, and the doubt should be resolved in favor of the appellant, "as duties are never imposed upon the citizen upon vague or doubtful interpretations." *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240. The decision of the circuit court is reversed.

WILLIAM ROGERS MANUF'G CO. v. R. W. ROGERS CO. et al.

(Circuit Court, S. D. New York. February 28, 1895.)

1. TRADE-MARK—USE OF PERSONAL NAME—CORPORATION.

The rule that the use of a personal name as a trade-mark will not be protected against its use in good faith by a defendant having the same name does not apply to the case of a corporation, which selects its own name, especially where it appears that the name was selected in order to mislead.

2. SAME.

One W. R. adopted a trade-mark for use upon silver-plated ware manufactured by him, of which the name "R." formed the characteristic and important part. The use of such trade-mark was continued by R. and by the W. R. Co., his successor, for many years; and a high and valuable reputation was acquired by the goods manufactured by R. and the W. R. Co., bearing such trade-mark. One R. W. R., who had not been engaged in the manufacture of silver-plated ware, and was not known in the trade, except as a salesman, united with others in forming a corporation to which they gave the name of R. W. R. Co. and caused silver-plated ware to be manufactured for them, bearing a mark of which the name "R." was the characteristic and important part, and which might readily be mistaken for the mark of the W. R. Co. *Held*, that the use of the name "R. W. R. Co.," as a distinctive mark for silver-plated ware, would be enjoined.

This was a suit by the William Rogers Manufacturing Company against the R. W. Rogers Company, Frederick F. Spyer, Robert W. Rogers, William A. Jameson, and Samuel J. Moore, to enjoin the infringement of complainant's trade-mark. Complainant moved for a preliminary injunction on the bill and affidavits showing the following facts:

William Rogers, for a long time prior to 1865, was engaged in the manufacture of silver-plated ware. In 1865 he associated himself with others in a copartnership under the name of the William Rogers Manufacturing Company, and in 1872 a corporation under the same name was organized by him and his associates. The silver-plated ware manufactured by Rogers, the firm, and the corporation was uniformly of high quality, and acquired a high reputation. All such ware was marked with certain trade-marks, in each of which the name "Rogers" was the characteristic and important part; and the goods came to be known in the market by such trade-marks, and as "Rogers" goods. The defendant Robert W. Rogers had been a salesman of silver-plated ware, but had never manufactured such ware, or been known to possess any special skill in its manufacture. The defendant Spyer was a dealer in silver-plated ware, chiefly of an in-

ferior quality. The defendants Jameson and Moore were officers of the Carter-Crume Company, a manufacturer of silver-plated ware. In 1894 Robert W. Rogers, Spyer, Jameson, and Moore organized the R. W. Rogers Company, and contracted with the Carter-Crume Company to manufacture for the R. W. Rogers Company silver-plated ware, of a quality inferior to that of the William Rogers Manufacturing Company's ware, which they caused to be stamped with marks in which the name "Rogers" was the characteristic and important part, and which might readily be mistaken for the marks of the William Rogers Manufacturing Company. It was charged in the bill that the sole purpose of the defendants, in associating Robert W. Rogers with them, and in giving his name to the corporation, was to mislead the public into supposing that their goods were the goods of the William Rogers Manufacturing Company.

C. E. Mitchell, for complainant.

C. H. Duell, for defendants.

LACOMBE, Circuit Judge. This case seems closely analogous to William Rogers Manufg Co. v. Rogers & Spurr Manufg Co., 11 Fed. 495, and not within the principle of William Rogers Manufg Co. v. Simpson, 54 Conn. 527, 9 Atl. 395. Although the use of a personal name as a trade-mark will not be protected against its use in good faith by a defendant who has the same name, the reason of the rule ceases, and the rule no longer applies, where the defendant, as in the case of a corporation, selects its own name; especially where it appears that such name is selected with an intention to mislead. The affidavits leave little doubt in my mind that the incorporators of defendant selected for it the name "R. W. Rogers Co.," not because the reputation of its stockholder R. W. Rogers was such that the use of his individual name would increase the chances of business success on its own merits, but because it would give a title so similar to the name in the original trade-mark that purchasers might be induced to buy defendant's goods in the belief that they were complainant's. Complainant may take a preliminary injunction against the use of the name "R. W. Rogers Co." as a distinctive mark on silver-plated goods. Should defendant decide to appeal promptly from this order, the court will entertain a motion to suspend operation of injunction pending appeal, upon defendant's stipulation to file a sworn statement of sales during such suspension.

THOMPSON et al. v. JENNINGS et al.

(Circuit Court, S. D. New York. May 25, 1894.)

1. PATENTS—SAWS—NOVELTY.

Claim 1 of patent No. 328,019, issued to Thompson and others, as assignees of Fowler, for a saw, to cut metal, with a tough pliable steel blade, highly tempered as to its teeth only, to prevent breaking of the blade by sudden twisting, is valid, having utility and novelty.

2. SAME—CONSTRUCTION OF CLAIM.

Though, in the specifications of patent No. 328,019, for a saw to cut metal, it is stated that it is possible to fix the temper line at any point in the width of the blade, but that it is preferable to fix it at the base line of the teeth, and though claim 1 is for a saw highly tempered as to the teeth, claim 2, for a saw with a soft back and high-tempered teeth,

will not be construed to cover saws in which the temper runs into the blade any distance, but only saws where the temper is practically, though not mathematically, coincident with the base line of the teeth.

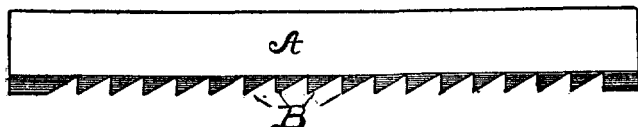
Suit by Henry G. Thompson and others against Charles E. Jennings and others for infringement of a patent for saws.

Edward H. Rogers, for complainants.

Philipp, Munson & Phelps, for defendants.

LACOMBE, Circuit Judge. Complainants, at final hearing, upon pleadings and proof, ask the usual decree for injunction and accounting, in a suit in equity brought under United States letters patent No. 328,019, issued October 13, 1885, to them, as assignees of the inventor, Thaddeus Fowler. The specification sets forth that the "invention relates to certain novel and useful improvements in saws, but more especially to that class of saws used in cutting metal and other hard substances, and has for its object to furnish a saw, which, while hard as to its teeth, so as to insure a durable cutting edge, shall be of such temper as to its body as to prevent its breakage when subjected to sudden cross strain or twist; and, with these ends in view, my invention consists in the article of manufacture hereinafter described, and then specifically designated by the claims."

The drawing annexed, and referred to in the specification, is as follows:



And the construction is thus described:

"A is the blade, having cut on the edge thereof the teeth, B, as in ordinary saws. The blade is made from tough and pliable steel, upon which the teeth may be cut and set by any ordinary process. I then proceed to harden the teeth to a high temper down to their base line, or line of junction with the body of the saw, taking care that the hard temper is confined to the teeth alone, and does not extend at all into the body of the saw. This gives, as a result, a saw whose blade is so tough and pliable as not to be broken by any bending or twisting to which it may be subjected, and which at the same time is provided with teeth of greater hardness than can be practically given to an entire saw without its breaking when subjected to a short bend or twist. The advantages gained by my invention are that the tough back upon which are the very hard teeth enables the latter to be used until worn away, and without the danger of breakage to which a saw hardened throughout to an even temper with the cutting teeth is constantly liable. While I am able so to temper the blade that the temper line may be at any point in the width of the blade, I preferably fix upon the base line of the teeth as the best and most advantageous point."

The claims are:

"(1) As a new article of manufacture, a saw as described, made from tough, pliable steel, and having the teeth thereof hardened to a high temper down to their base line, or line of juncture with the body of the blade, substantially as described.

"(2) A saw, as described, of a single piece of metal, with a soft back and high-tempered hard teeth, as specified."

The art of fractionally hardening steel tools of various kinds is old, a high temper being given to the working edge, while the rest of the tool remains untempered, and thus less liable to breakage. The class of saws to which the patent refers, viz. that used in cutting metal and other hard substances, includes several varieties, all in use before the patent was applied for. The "circular saw" is, as its name implies, a disk, with teeth upon the periphery; is mounted upon an arbor, and held in position by circular washers or clamps on each face, which cover all the central part of the disk, the teeth and a circular strip of metal sufficiently wide to permit of cutting to the required depth alone projecting beyond the clamps. It is worked by rotation. The "back saw" is a straight blade, such as is shown in the drawing, which is clamped firmly on the back throughout its entire length, the teeth and a strip of metal wide enough to admit of cutting to the required depth projecting beyond the clamps. It is operated as the ordinary hand saw is, by a to and fro motion. The "hack saw" is a straight blade like the last, but pierced at either end, and there clamped into the arms of a skeleton framework, which leaves the blade entirely free, stretched tightly between the clamping arms. It operates in the same way as the back saw. The "band saw" runs over pulleys like the belt of a sewing machine, and the teeth are continuously being thrown out of alignment as they pass onto the pulleys, and brought back into line by tension as they leave the pulleys. Two varieties of hack saws were known to the prior art. One of these was the Stubbs or English type of saw, which was tempered uniformly to such a degree that it could be filed for the purpose of sharpening its teeth, the necessary consequence of its comparatively soft condition being that the cutting edge was quickly dulled. The other was a saw, made by defendant, which was uniformly hardened to such a degree that it was not practical to file it. When it became dull it was thrown away. As a consequence of the hardening, it was brittle, and easily broken by flexure or shock. Prior to the patent, band saws appear always to have been made comparatively soft, in order to admit of sideways flexure over the pulleys. The testimony shows, however, that both circular saws and back saws had been made prior to the patent with the cutting teeth and adjacent strip hard, and the body soft, with the distinct purpose of preventing breakages, and thus strengthening the saw. Whatever break came from twist or shock of these tools when in use extended only through the hard-tempered strip, and did not fracture the entire blade. The patent is not in terms confined to back and back saws. The drawing shows the blade of a back saw without any indication of the holes at either end which are present in such blades when mounted in the skeleton frame of a hack saw.

There would seem to be no invention in the mere application, for the same purpose, to the toothed edge of such saws of the fractional tempering already in use with circular and back saws. But complainants insist that their invention goes further than this, and that, in their method of arranging the relative temper of their tool, they have disclosed a result not theretofore known to the art. In the

earlier saws the fractional tempering secured the tool against a breakage across its entire width, or rather down to its clamps,—an accident which would produce unfortunate results to other parts of the machinery. The inventor's tempering, however, presents, as he contends, the further result of a tool in which bending or twisting produced practically no break at all. Complainants' expert, referring to that part of the specification which speaks of the temper as confined to the teeth alone, and not extending at all into the body of the saw, testified:

"It follows from this that the teeth are virtually isolated from each other on the edge of the body or back of the saw. The result of the construction described is that the soft body or back may be bent transversely. When the saw is bent, as stated, the isolated or individual character of the teeth is emphasized; for, while each tooth retains its form and integrity, it falls out of line with its neighbor to the extent that the back of the saw is bent. The bases of the teeth then form a series of short straight lines, set along the curve of the bent saw. The idea is plainly to withdraw from the body or back of the saw all rigidity, and to permit each tooth to follow the general curvature of that part of the body on which the base rests, without being restrained by any rigid connection with its neighbors. The individual teeth themselves, it may be noted, being very hard, do not bend, but retain their integrity of form, notwithstanding that the body or back to which they are individually united may undergo great changes of form."

Elsewhere he says:

"The ideal saw of the patent would consist of a tough, soft, pliable body or back, with a series of hard teeth grafted or applied, so to speak, upon one of its edges, each tooth being virtually separated from its neighbors by an infinitesimal joint of soft metal."

Seemingly, this is a desirable result in hack saws, where sideways twists are not measurably prevented by the back clamps, and especially desirable in band saws, where constant sideways twists are inseparable from their operation; and there is no evidence that in either of these varieties of saw was such an arrangement of temper used before the date of the patent. To what extent the inventor understood the novel function of fractional tempering when located just where he placed it is not quite clear. If he appreciated all its advantages as thoroughly as complainants' witnesses now describe them, it is difficult to see why he did not restrict his specification of improvements to hack and band saws, to the blades of which, as his counsel admits, the advantage of such a degree of pliability seems to be confined, or why he did not point out the novel features of his invention in more intelligible language. Still, an inventor is not to be deprived of his invention because he builded better than he knew, when he discloses precisely what the concrete thing is in which he claims to have embodied it. And this he does in unmistakable language. Neither testimony nor exhibit discloses any saw in the prior art, whose high temper was confined to the teeth; and that to them it must be confined is distinctly insisted upon in the patent. Not only does the inventor repeatedly refer to "the teeth" as hard, and the body, blade, or back as soft, but in describing his process of manufacture he says:

"I then proceed to harden the teeth to a high temper down to their base line, or line of juncture with the body of the saw, taking care that the hard

temper is confined to the teeth alone, and does not extend at all into the body of the saw."

The first claim also is for a saw "as described, made from tough, pliable steel, and having the teeth thereof hardened to a high temper down to their base line or line of juncture with the body of the blade, substantially as described." Inasmuch as such a saw appears by the testimony to present features of novelty and utility not found in the prior saws, which were either tempered uniformly, or else so tempered that not only the teeth themselves, but adjacent strips of the blade were hardened, this first claim is sustained.

The complainants further contend that besides saws which, as they come from the maker's hands, present the novel feature of jointing a number of brittle sections on a flexible back, they are entitled to include within the patent saws which also have a strip of the metal adjacent to the teeth tempered as they are. Complainants' suggestion with regard to these is that when they are bent, cracks are developed which extend from the roots of one or more notches between the teeth inward as far as the hardened metal extends; that, as this bending is continued, cracks are developed running inward from all the notches, the practical result being the teeth themselves are thereby elongated, and, when thus elongated, operate in the same way as they do in saws where the tempering stops at the base line of the teeth.

In support of this contention, complainants refer to this paragraph of the specification:

"While I am able so to temper the blade that the temper line may be at any point in the width of the blade, I preferably fix upon the base line of the teeth as the best and most advantageous point."

And to the second claim:

"(2) A saw, as described, of a single piece of metal, with a soft back and high-tempered hard teeth, as specified."

The proposition that the temper line may be at any point in the width of the blade is opposed so diametrically to what the inventor has most specifically and carefully pointed out as the construction of his invention that it cannot be taken as broadly as the complainants contend for. Certainly, the second claim cannot be construed to cover saws in which the temper runs as far into the blade as it did in those already known to the art. It is easy to understand that it might be difficult to locate the temper line on every blade so that it would be mathematically coincident with the bases of the teeth, and thus the blade be bent or twisted without producing any break or crack whatever. And blades where the temper line extended some unappreciable distance into the blade beyond the bases of some or all of the teeth would, when bent, give forth the crackling noise which indicates a fracture, and might even disclose such fracture to the eye. Still, where such variance from the distinctive fractional tempering of the patent was trivial, the saw would still be in substance the saw of the patent, not the saw of the prior art, in which the tempering extended substantially into the blade. In these earlier saws the high temper extended as far inward from the base of the teeth, as the teeth themselves projected outward,

and in some instances the tempered strip was wider yet. The utmost effect that can be given to the second claim, therefore, is to hold that it covers blades where the temper line, although not mathematically, is yet practically, coincident with the base line.

As thus construed, the defendants' saws infringe neither claim of the patent. The depth of their teeth is somewhat less than $1/32$ of an inch; and the depth of high temper, measuring from the extreme points of the teeth, is $5/32$, or over.

The bill is dismissed, with costs.

PRICE v. THE BELLE OF THE COAST.

(District Court, E. D. Louisiana. December 21, 1894.)

No. 13,167.

ADMIRALTY—JURISDICTION.

Admiralty has no jurisdiction of a tort where the injury was received on the land, though the wrongful act was done on a ship.

Libel by John Price against the Belle of the Coast. Opinion on an exception to the jurisdiction.

W. W. Handlin, for libelant.

Farrar, Jonas & Kruttschnitt, for claimant.

PARLANGE, District Judge. This is an action in rem by which damages in the sum of \$2,500 are claimed. The injury complained of is stated in the libel as follows:

"Libelant * * * was ordered by the mate to get under one corner of a chain bar, and assist in carrying a large and heavy barrel of coal oil on shore; and, as libelant stepped off the end of the stage, he fell into a deep hole, unseen by him, and the end of said barrel struck him on his right shoulder, right arm and hand, and right thigh, wedging him in so that he could not get out without assistance after said barrel was pulled out. Libelant's shoulder and hand were wounded, and his thigh and spine were jammed and crushed," etc.

In the case of *The Plymouth*, 3 Wall. 33, the supreme court of the United States said:

"The origin of the wrong was on the water, but the substance and consummation of the injury on land. It is admitted by all the authorities that the jurisdiction of the admiralty over marine torts depends on locality,—the high seas or other navigable waters within admiralty cognizance. * * * The cause of the damage, in technical language, whatever else attended it, must have been there complete." Again: "The simple fact that it originated there [on navigable waters], but the whole damage done upon land, the cause of action not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction. The negligence of itself furnishes no cause of action."

See, also, the case of *The H. S. Pickands*, 42 Fed. 239, in which the court said:

"It has never been doubted since the case of *The Plymouth*, 3 Wall. 20, that, to enable us to take cognizance of a maritime tort, the injury must have been consummated, and the damage received, upon the water. The mere fact that the wrongful act was done upon a ship is insufficient. Subsequent

adjudications have in no wise tended to limit or qualify this rule. [Cases cited.]”

Viewed in the light of the above authorities, I am clear that there is no jurisdiction of the instant case in the admiralty. The exception must be sustained.

CUBAN STEAMSHIP CO., Limited, v. FITZPATRICK, Mayor, et al.

(Circuit Court, E. D. Louisiana. February 16, 1895.)

1. SHIPPING—DUTIES OF CREW—LOUISIANA CONSTITUTION AND ACT 76 OF 1880.

The constitution of Louisiana (article 255) provides that the general assembly shall pass laws to prevent sailors and others of the crew of foreign vessels from working on the wharves and levees of the city of New Orleans, provided there is no treaty between the United States and foreign ports to the contrary. Act 76 of 1880, passed in pursuance of this provision, enacts that no sailor or portion of the crew of foreign vessels shall engage in working on the wharves or levees of New Orleans beyond the end of the vessels' tackle, but provides that it shall not apply to the crews of vessels hailing from countries having treaties with the United States to the contrary, nor to contracts of which the United States courts have jurisdiction. *Held*, that such constitutional provision and statute do not prohibit the crews of foreign vessels from loading and unloading their ships, such services being an implied part of every sailor's contract of employment, and within the jurisdiction of the United States courts, in admiralty.

2. CONSTITUTIONAL LAW—FOREIGN COMMERCE — LOUISIANA CONSTITUTION AND ACT.

Held, further, that, if such constitutional provision and statute are intended to prohibit the rendering of such services by crews of foreign vessels, they are void, as regulations of commerce with foreign nations, because in contravention of the provisions of the constitution (article 1, § 8, par. 3) of the United States.

This was a suit by the Cuban Steamship Company, Limited, against the mayor and chief of police of the city of New Orleans, to enjoin said officers, their subordinates, etc., from interfering with the loading of a ship belonging to the plaintiff. Plaintiff moves for a preliminary injunction.

Farrar, Jonas & Kruttschnitt, for plaintiff.

E. A. O'Sullivan, for defendants.

PARLANGE, District Judge. Complainant, an alien corporation, domiciled in London, England, avers that it is the owner of the steamship Cayo Mono, of about 1,750 tons burden, duly registered as a British ship; that said ship is now lying in the port of New Orleans, where she has come to take on a general cargo to be transported from the United States to London and Antwerp; that she is engaged in commerce between Great Britain and the United States; that, while her officers and crew were lawfully and properly engaged in loading said ship with cargo, under the law of nations and the general rules of maritime law, the captain of the vessel was approached by a police officer belonging to the police force of the city of New Orleans, acting under instructions from the mayor of the city, and from the chief of police of the city; and that said police officer ordered said captain to desist from stowing or loading

said ship, under threat of arrest and punishment. Complainant avers that it is informed that the police officer, mayor, and chief of police claim to be acting under article 255 of the constitution of the state of Louisiana adopted in the year 1879, and also under Act No. 76 of the legislature of the state of Louisiana, approved April 7, 1880, both of which article of the state constitution and act of the legislature complainant avers to be null and void, as being a regulation of commerce with foreign nations, and therefore in contravention of paragraph 3 of section 8 of article 1 of the constitution of the United States. Complainant avers that in the treaties between the United States and Great Britain, no restrictive provisions of any nature have been imposed upon commerce between the ports of the two countries, or upon the ships plying between said ports; that a strike is now going on in the city of New Orleans by the screwmen and longshoremen who are generally engaged in the business of loading ships, and that such screwmen and longshoremen refuse to work themselves, and also refuse to permit any one else to work; that said ship is under engagements, limited as to time, and that, if complainant is not allowed to load its vessel with its own officers and crew, it will suffer irreparable damage and injury, as there is no person from whom it could recover the enormous damage that it would suffer by forcing its vessel to remain here day after day, unable to load; that said mayor and chief of police intend to harass complainant's officers and crew by daily and hourly arrests, and by numerous prosecutions, under the pretense of enforcing said void and unconstitutional legislation, and will continue to so harass said officers and crew, so as to make it impossible to load said vessel. Complainant prays for an injunction to issue to said mayor, chief of police, and all their subordinates, restraining them from interfering with the loading of said ship, or any other ship belonging to complainant, under color of said legislation averred to be null and unconstitutional.

To the rule nisi, the defendants answered that the injunction could not issue, because of article 255 of the constitution of Louisiana, and Act No. 76 of the state legislature of 1880; that said legislation does not attempt to regulate commerce, or to interfere therein, but was adopted and passed for the purpose of regulating the internal affairs of the state of Louisiana, and protecting the citizens within its territory; and that the said legislation is not in contravention of the constitution of the United States, because it is a police regulation for the maintenance of the well-being of the citizens of the state.

Article 255 of the constitution of Louisiana is not self-operating. It reads as follows:

"Art. 255. The general assembly shall pass necessary laws to prevent sailors or others of the crew of foreign vessels from working on the wharves and levees of the city of New Orleans, provided, there is no treaty between the United States and foreign powers to the contrary."

Act No. 76 of the state legislature of 1880 was apparently intended to carry out the constitutional article. Section 1 of said act provides:

"That no sailor, or portion of the crew of any foreign sea-going vessel, shall engage in working on the wharves or levee of the city of New Orleans beyond the end of the vessel's tackle."

Section 2 provides the punishment of imprisonment for the violation of section 1.

Section 3 reads:

"That the provisions of this act shall not apply to the officers, sailors or others of the crew of foreign vessels hailing from countries having any treaty, or treaties with the United States to the contrary, nor to any contract, or contracts of which the United States courts have jurisdiction."

The mere reading of section 3 of Act No. 76 of 1880, immediately prompts the inquiry whether, regardless of any question of conflict with the constitution of the United States, the state statute affords the police authorities any warrant to prevent the crews of foreign vessels from loading and unloading their own ships in the port of New Orleans. Does the state statute, which the defendants plead as their warrant, command or authorize them to make the threatened arrests? In ascertaining the purpose and scope of Act No. 76 of 1880, we are materially assisted by the language of Act No. 73 of the legislature of 1874, entitled "An act to prohibit the unlawful employment of sailors at work upon the levees or banks of the rivers in this state, and to punish violations of this act." The act of 1874 does not confine its operation to the wharves and levees of New Orleans, and is directed against officers or stevedores who employ sailors "at work on the levees of the state of Louisiana not strictly belonging to and included in regular sailor's duty, as defined and prescribed by the maritime law governing the employment and duty of sailors." It is perfectly plain that the work which this act intended to prohibit sailors from performing, was work other than loading and unloading their own vessels, because it specifically exempts from its operation work "included in regular sailor's duty, as defined and prescribed by the maritime law." Of course, whether loading and unloading their own ships in a foreign port, are among the regular duties of sailors, is not a debatable question. What the other work intended to be prohibited was, it is idle to inquire.

Act No. 76 of 1880 is exactly on the same lines as Act No. 73 of 1874, so far as concerns the work which it was intended to prohibit. Section 3 of said act, providing that the statute should not apply to "any contract or contracts of which the United States courts have jurisdiction," was an amendment to the original bill by the senate judiciary committee. The amendment was meant to say, and does say, precisely what the language of the act of 1874 expressed when it excepted from its operation work "strictly belonging to and included in regular sailor's duty, as defined by the maritime law governing the employment and duty of sailors." In the matter at bar, an express contract requiring complainant's sailors to work cargo when required, has been proven. An extract from the shipping articles is on file. But, even if there were no express contract, loading and unloading cargo in a foreign port are implied conditions of every sailor's employment. Fland. Mar. Law (Ed. 1852) p. 411, § 502; Judge Peters, in the case of *The v.66F.no.1*—5

Happy Return, 1 Pet. Adm. 254, Fed. Cas. No. 13,697; Maude & P. Merch. Shipp. pp. 177, 178; Justice Story, in *Cloutman v. Tunison*, 1 Sumn. 373, Fed. Cas. No. 2,907. It is perfectly apparent that Act No. 76 of 1880 did not attempt to prevent sailors of foreign vessels from loading and unloading their ships, but, on the contrary, specially excepts them. The act, regardless of any question of conflict with the constitution of the United States, affords the defendants no authority or warrant whatever to consummate the threatened arrest of complainant's sailors.

If this view is erroneous, and if the state statute does not except sailors of foreign vessels when loading and unloading their own vessels, then the question arises whether the statute could stand as against the provisions of the constitution of the United States, appealed to by complainant. The power to regulate commerce with foreign nations being exclusively vested in congress, can a state enact a law discriminating as between foreign and domestic vessels, and declaring that the crews of foreign vessels loading or unloading their own vessels in a port of the state shall be imprisoned? Is it true, that, while a state cannot prevent a foreign vessel from entering its ports, it has the power to imprison its officers and crew if the ship unloads or reloads a single parcel of cargo? If this be so, the right to enter an American port is an utterly barren one, for the whole object of the enterprise is not to enter the port with cargo, but to land the cargo. The contention amounts to saying that the states have the right to absolutely cut off trade and commerce with foreign nations.

In *Leisy v. Hardin*, 135 U. S. 108, 10 Sup. Ct. 681, the supreme court of the United States said:

"The power vested in congress 'to regulate commerce with foreign nations and among the several states and with the Indian tribes' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed by the constitution. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered;" citing *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419.

In the case of *Leisy v. Hardin*, just cited, which arose from an interference with interstate commerce, the supreme court cited *Brown v. Maryland*, *supra*, which arose from an interference with foreign commerce; and, as to its applicability, the supreme court said that Chief Justice Marshall had laid down that the principles expounded in *Brown v. Maryland* applied equally to importations from a sister state, and the court added:

"Manifestly, this must be so, for the same public policy applied to commerce among the states as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other."

Brown v. Maryland, *supra*, was a case in which a state had made it a penal offense for an importer to sell a package of goods in the form in which it was imported, without having paid a license to the

state. In that case, far less was contended for on the part of the state than is contended for here. It was not contended that the state could prevent the landing of the package. Chief Justice Marshall said:

"What, then, is the just extent of a power to regulate commerce with foreign nations and among the several states? * * * The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. * * * If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic * * * should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. * * * It must be considered as a component part of the power to regulate commerce."

The reasoning applies with still greater force when the right claimed is to prohibit foreign vessels from even unloading or loading a cargo. See, also, *Story, Const. § 1068*.

In *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, the supreme court of the United States held that a state has no power to prohibit an interstate railway from bringing into its borders, from another state, an article of commerce; even though the sale of the article within the state is prohibited by the penal laws of the state.

In the *Original Package Cases* (*Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725) far less was contended for on behalf of the state than is here claimed. It was virtually admitted that a state could not prohibit the importation of an article of commerce into, and the delivery of the same within its territory, but it was claimed that the state could prohibit its sale by the importer. The supreme court held substantially that the state could neither prohibit the importation nor the sale of the article in its original condition, by the importer.

The power of congress to regulate commerce extends to the persons who conduct navigation as well as the instruments used. *Cooley v. Wardens*, 12 How. 316. See *Story, Const. § 1061*. Chief Justice Marshall, in *Gibbons v. Ogden*, says: "To regulate commerce is to prescribe the rule by which commerce is to be governed." And see *Justice Miller's Lectures*, p. 449. Commerce embraces transportation by land and water, and all the means and appliances necessarily employed in carrying it on. *Railroad Co. v. Fuller*, 17 Wall. 568; *Gibbons v. Ogden*, 9 Wheat. 193; *South Carolina v. Georgia*, 93 U. S. 10; *Railroad Co. v. Husen*, 95 U. S. 470; *Gloucester Ferry Co. v. State*, 114 U. S. 196, 5 Sup. Ct. 826; also *Justice Miller's Lectures*, p. 447.

That the right to prohibit the sailors of foreign vessels from loading and unloading their ships is a police regulation, seems to be a self-refuting proposition. The intention of the regulation was not to preserve the life, health, morals, peace, or safety of the citizens of the state; nor was it to protect any other right coming even remotely under the police power. At the hearing, counsel for de-

fendants stated that he raised no question as to the fact that defendants are municipal officers. Nor could any contention on that point have been successfully made.

In *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, the supreme court maintained an injunction against a state board, comprising the governor, secretary of state, and treasurer. Justice Lamar, as the organ of the court, stated that two classes of actions against state officers have appeared in the decisions of the supreme court, viz.:

"The first class is where a suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. [Citing cases.] The other class is where the suit is brought against defendants, who, claiming to act as officers of the state and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants unlawfully taken by them in behalf of the state, or for compensation in damages, or in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon defendant the performance of a plain legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the state. [Citing cases.] * * * The general doctrine of *Osborn v. Bank*, 9 Wheat. 738, that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would violate rights which had been guaranteed by the constitution, and would work irreparable damage and injury, * * * has never been departed from. On the contrary, the principles of that case have been recognized and enforced in a very large number of cases, notably in those we have referred to as belonging to the second class of cases above mentioned."

The language of Justice Lamar was reiterated by the supreme court in *Reagan v. Trust Co.*, 154 U. S. 388, 14 Sup. Ct. 1047, in which an injunction against the attorney general of Texas, restraining him from prosecuting under the Texas railroad commission act, was sustained. In that case the supreme court cited the language used in *Cunningham v. Railroad Co.*, 109 U. S. 446, 452, 3 Sup. Ct. 292, 609:

"Another class of cases is where an individual is sued in tort for some act injurious to another, in regard to person or property, to which his defense is that he acted under the orders of the government. In these cases he is not sued as or because he is an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him. [Citing cases.]"

The court then went on to say:

"Nor can it be said in such a case that relief is attainable only in the courts of the state. For it may be laid down as a general proposition that, wherever a citizen of a state can go into the courts of a state to defend his property against the illegal act of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts."

It is clear that Act No. 76 of 1880 does not authorize the contemplated arrests, and, if it does, it is null, as being in contravention

of the federal constitution. The defendants are absolutely without warrant or authority to make the arrests, and the preliminary injunction must issue.

WASHBURN & MOEN MANUF'G CO. v. RELIANCE MARINE INS. CO.

(Circuit Court, D. Massachusetts. March 1, 1895.)

No. 356.

MARINE INSURANCE—ACTION ON POLICY—ALLEGATION OF TOTAL LOSS.

A declaration alleging a total loss, and claiming recovery therefor, also alleged abandonment to the insurer, and that the loss amounted to more than one-half of the whole value declared in the policy, but did not allege that the loss amounted to less than the whole value. *Held*, that the allegations of abandonment and amount of loss were merely immaterial, and not ground for a demurrer, assigning as causes for demurrer only that the declaration was double, repugnant, ambiguous, and multifarious, and that such demurrer did not present the question whether, under a declaration for a total loss, plaintiff could recover for a constructive total loss.

This was an action by the Washburn & Moen Manufacturing Company against the Reliance Marine Insurance Company on a policy of insurance. Defendant demurred to the declaration.

The declaration contained two counts, as follows:

First Count. And the plaintiff says the defendant company made to it a policy of insurance, in the sum of forty-eight thousand eight hundred dollars (\$48,800), on the cargo of wire on board the schooner Benjamin Hale, valued at said sum; said insurance being against the perils of the sea, and other perils therein mentioned, at and from Boston to Galveston or Velasco, Texas. A copy of said policy is hereto annexed, marked "A," and made a part of this declaration. That while the said schooner Benjamin Hale was proceeding on said voyage, with said cargo on board, she struck a rock, filled with water, and sank, and the said cargo of wire became totally lost, by perils insured against. That while the said schooner, with the said cargo of wire on board, was in peril, the said plaintiff duly abandoned the said cargo to the said defendant company, on April 29, 1893, being the date when the plaintiff first heard of said loss. That the loss of the said cargo by perils insured against amounted to more than one-half of the whole value of said cargo, as declared in said policy, and that the plaintiff is entitled to recover a total loss. The defendant company had due notice and proof of loss of said cargo April 29, 1893. The defendant company was bound, by the terms of said policy, to pay the plaintiff the sum of forty-eight thousand eight hundred dollars (\$48,800) within thirty (30) days from said date, and the defendant company owes the plaintiff the said sum of money.

Second Count. And the plaintiff duly demanded said sum of the defendant company on May 29, 1893, and the said defendant company owes the plaintiff, for interest to the date of the writ, the sum of nine hundred and seventy-six dollars (\$976).

The demurrer was as follows:

And now comes the defendant in the above-entitled case, and demurring to the plaintiff's declaration, as amended, says that the said declaration and the matters therein contained, in manner and form as the same are stated and set forth, are not sufficient in law for the plaintiff to have his action against the defendant, for that the first count in said declaration is double, repugnant, ambiguous, and multifarious, in that it does not clearly state whether the plaintiff claims to recover of the defendant by reason of an absolute and actual total loss, or by reason of a constructive total loss, of the goods insured; and also for that if the plaintiff intends by said first count to recover against the defendant for a constructive total loss, by reason of the loss of more than half of the whole value of said cargo, and of the abandonment

thereof, as the plaintiff says in said first count, and as the defendant is advised and believes, then it appears by said first count, and by the terms of the policy set forth therein, that the plaintiff is not legally liable for such constructive total loss of the cargo insured, or otherwise; and also for that it appears by the policy set forth in said first count that the plaintiff is entitled to recover thereunder only for an actual total loss and destruction of all the goods insured, or for the actual total loss and destruction of a part of said goods, and neither such actual total loss and destruction of the whole, nor such actual total loss and destruction of a part, is properly averred in said first count.

And, demurring to the second count in said declaration, the defendant says that the same is not sufficient in law, for that the interest claimed in said second count is due only upon the obligation declared on in said first count and is wholly dependent thereon; wherefore, unless the said first count is sustained, the second falls with it.

Wherefore, for want of a sufficient declaration, the defendant prays judgment.

Eugene P. Carver, for plaintiff.

Lowell, Stimson & Lowell, for defendant.

PUTNAM, Circuit Judge. The court has scrutinized this record anxiously, hoping to be able to dispose of the point which the defendant has sought to raise, but it is unable to do so. The causes of demurrer assigned are that certain portions of the declaration are double, repugnant, ambiguous, and multifarious. The difficulty the court finds is that the parts to which the demurrer relates are merely inconsequential and immaterial, and therefore cannot, in the view of the law, result in duplicity, repugnancy, ambiguity, or multifariousness. The declaration alleges that the cargo of wire became a total loss, by the perils insured against, and also that the plaintiff is entitled to recover for a total loss. The latter allegation has a proper relation to the first. Interjected between these is one that the cargo was abandoned, and also an allegation as follows: "That the loss of the said cargo, by perils insured against, amounted to more than one-half of the whole value of said cargo, as declared in said policy." If, in lieu of this, it had been alleged that the loss amounted to more than one-half of, but less than, the whole value; that there had been an abandonment; and that, therefore, the plaintiff was entitled to recover a total loss, under the policy, —the case might have been other than it is. As there has been no cause of demurrer assigned for mere immateriality, the demurrer cannot be sustained. Any views which the court might now express touching the claim that, under the allegation of a total loss, the plaintiff cannot recover for a constructive total loss, would not relate to any issue now before us, and would not, therefore, be binding at the trial on the judge who may preside at that time. Therefore, while, according to the rules of the common law, under a declaration for a total loss a claim for a constructive total loss can be recovered, the court would not be justified in now passing on the question, as it arises under the statutes of Massachusetts. So far as the demurrer is concerned, the second count follows the first.

It may be that by a special answer, or otherwise, the defendant can compel the plaintiff to meet the issue which it seeks to raise in advance of the trial of the facts; but the court cannot take cog-

nizance of the attempt to do so, as the case now stands. Demurrer overruled; defendant to answer on or before the 11th day of March next; costs to abide the result.

THE BRINTON.

FISHER et al. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 39.

SHIPPING—LIABILITY FOR TORT—DRAGGING SUNKEN VESSEL.

After the sinking of a sloop by collision with a tug in a narrow channel, the tug, having rescued and landed the crew of the sloop, and returned to the place of collision, seeing the broken mast, boom, and sails of the sloop floating, made fast to them, and towed them several hundred feet, not intending to move the hull; but it also was dragged along the bottom by the wire shrouds, and thereby badly broken. *Held*, that the tug was liable for the damage thus done, her removal of the sloop not being justifiable as the abatement of a public nuisance, or for the protection of the sloop herself, or for the safety of navigation generally.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Peter Fisher and A. W. Stinemire, owners of the sloop Marietta, against the tug Brinton (the Pennsylvania Railroad Company, claimant), for damages to the sloop. The district court dismissed the libel. Libelants appeal.

For decision on libel against the tug for damages for collision with the sloop, see 59 Fed. 714.

Wing, Shoudy & Putnam and Charles C. Burlingame, for appellants.

Robinson, Biddle & Ward and Henry Galbraith Ward, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The libel in this cause was filed to recover damages for injuries occasioned to the sloop Marietta, the property of the libelants, in consequence of being dragged upon the bottom of the Arthur Kill by the tug Brinton, under the following circumstances: About half-past 11 on the night of September 5, 1893, the sloop, while bound up the Arthur Kill, was run into and sunk by the Brinton. The channel there was about 600 feet wide, and the sloop sunk on the New Jersey side of the channel, in about 18 feet of water. The Brinton rescued those on board the sloop, and landed them at Erastina, Staten Island. She then returned to meet a tow of loaded boats belonging to her owner, the Pennsylvania Railroad Company. When the Brinton reached the place of collision, those in charge of her saw the broken mast of the sloop, with the boom and sails, floating in the water. Thereupon, they fastened the Brinton's line to the broken mast, and towed the sloop a distance of several hundred feet, dragging the hull on the bottom of the channel. The Brinton's master did not intend to move the sloop,

but intended only to remove the mast and sails, doubtless with a view of saving them for the owners of the sloop, as well as to get them out of the track of vessels; but the wire shrouds attached to the broken mast and to the hull were not disconnected, and the hull followed the mast. The hull was badly broken by the stones with which it came in contact. The answer of the owner of the Brinton alleges that the moving of the sloop was done with the greatest care, and was necessary both for her own safety and for the safety of lives and property on other vessels which constantly passed through the Kills; and that the sloop where she lay was a dangerous obstruction to navigation, and was liable to injure the tows of the owner of the Brinton, and to be injured by them.

The district court dismissed the libel, apparently upon the ground that the Brinton was justified in removing the sloop, as a dangerous obstruction to navigation, and did so in a proper manner. Upon this appeal it is urged for the appellee that the removal of the sloop was justifiable, as the abatement of a public nuisance.

It is to be observed that those in charge of the Brinton did not intend to move the hull of the sloop, and their acts were not done with the purpose of abating a nuisance. It is also to be remarked that the libelants, whose vessel had been accidentally sunk, did not have any opportunity to attempt to remove her themselves, and could not, in so short a time, procure any appliances for doing so. Passing these facts, and without adverting to the question whether, under such circumstances, the libelants could be deemed guilty of maintaining a nuisance, it suffices to dispose of the defense that neither the Brinton, her tow, nor any other property of the corporation owning the Brinton, was endangered by the wreck. There was ample room on either side of the channel for vessels or tows to pass in safety; and, however dangerous the wreck might prove to those who were not aware of the obstruction, the appellee was not one of them, and its agents, aware of the situation, could have taken all necessary precautions to avoid peril to any of the vessels of the appellee. Notice to the master of the Brinton was notice to the corporation, to the extent that he could have imparted the necessary information to its other vessels and tows. It is not pretended that any danger was to be apprehended by the Brinton herself, nor was there any to the tow which she was about to meet, because the master of the Brinton could have informed those in charge of the tow of the location of the wreck, even if he did not accompany the tow, as it was apparently his purpose to do. Moreover, it is manifest from the testimony of the Brinton's master that the powerful tugs and heavy barges of the appellee, if they had come in contact with the hull of the sloop, would have crushed it without material injury to themselves; and it is doubtless for this reason that the Brinton's justification is placed, in part, upon the necessity of removing the sloop in order to protect the sloop from injury.

The opinion of the earlier authorities that any person may abate a public nuisance is not approved by the weight of modern authority. The better doctrine is stated by Campbell, C. J., in *Dimes v. Petley*, 15 Q. B. 276, as follows:

"It is fully settled by the recent cases that, if there be a nuisance in a public highway, a private individual cannot, of his own authority, abate it, unless it does him a special injury, and then only to the extent necessary to enable him to exercise his right of passing over the highway. And we clearly think he cannot justify doing any damages to the property of individuals who have placed the nuisance there, if, avoiding it, he could have passed on with reasonable convenience."

The authorities are collected in 16 Am. & Eng. Enc. Law, p. 991, and their result, we think, is correctly stated in the text (page 994), in substance, as expressed by Chief Justice Campbell. See, also, *Railroad v. Ward*, 2 Black, 485, and *Irwin v. Dixon*, 9 How. 10.

So far as the defense rests upon the necessity of the Brinton's acts in order to save the sloop herself from harm, it cannot be maintained, in the absence of clear proof, that what was done was in fact necessary, and was beneficial to the libelants. It does not suffice that it may possibly have been so. The libelants were entitled to an opportunity to judge for themselves whether their own property was in danger, and what means should be taken to preserve it. He who, by voluntarily intermeddling with the property of another, injures it, unless he can escape liability by a legal justification, must assume the burden of establishing that his act could not have entailed loss upon the owner. He cannot substitute his judgment, however honest and well meant, for that of the owner, and exonerate himself from the direct and immediate consequences of his act, by proving the existence of conjectural perils which might have visited an equal or greater loss upon the owner. This little sloop might have rested where she sunk for many days before another vessel should have passed over the precise spot. The next day, before the libelants knew she had been moved, they had contracted with a wrecking company to raise her. In the meantime they could have placed a buoy and light over the wreck. Although it is possible they would have suffered a greater loss than they did, if their property had not been interfered with, from the nature of the circumstances this is merely a matter of conjecture.

The justification based upon the theory that the removal of the wreck was essential to the safety of navigators generally is not warranted by the facts. The plea of necessity for the injury or destruction of another's property may be, under very special circumstances, a good justification. As an illustration, the destruction of property to prevent the spread of a conflagration in a city is lawful, when the act is done in good faith, and under an apparent necessity. *Hale v. Lawrence*, 23 N. J. Law, 590; *Beach v. Trudgain*, 2 Grat. 219; *Surocco v. Geary*, 3 Cal. 69. In such a case the danger is immediate, and there is no other practical alternative. In the present case the wreck could have been guarded temporarily, and then buoyed, and, if necessary, lighted.

We can find no ground upon which to relieve the Brinton from responsibility.

The decree of the district court is reversed, and the cause remanded, with instructions to decree for the libelants for such damages as they may have sustained, with costs, and costs of this court.

THE MASCOT.

NEWTOWN CREEK TOWING CO. v. McLAIN.

(Circuit Court of Appeals, Second Circuit. December 3, 1894.)

No. 13.

COLLISION OF TUG WITH CANAL BOAT AT DOCK—OVERTAKING VESSEL.

The steam tug Mascot, with a boat in tow, lashed on her port side, was very slowly approaching a drawbridge at a safe distance from the dock where the libellant's canal boat was unloading, and at a safe distance from the canal boat, when, owing to an unforeseen, sudden, and unnecessary sheer of an overtaking vessel on her port side, her tow was violently struck, and she was shoved to the starboard, and brought in contact with the libellant's boat. The tug could have taken a course originally further out in the channel, and further away from the dock, but the course she did take was the usual one, and the distance from the dock the usual distance for vessels approaching the draw. *Held*, that the tug was not bound to anticipate any such occurrence as took place; that the sole cause of the accident was the negligence of another vessel; that the decree of the district court holding the tug liable should be reversed, and the libel dismissed.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Bernard McLain against the steam tug Mascot (Newtown Creek Towing Company, claimant), for damages by collision to libellant's canal boat Elizabeth. The district court rendered a decree for libellant. Claimant appealed.

On the hearing in the district court the following opinion was filed (Brown, District Judge):

On the morning of the 8th of March, 1892, the libellant's canal boat, the Elizabeth, while lying alongside the dock on the southerly side of Newtown creek, about 200 feet below the first bridge, waiting to discharge her cargo of coal, was run into by the steam tug Mascot, which had come up the creek shortly before with a boat in tow on her port side, and was proceeding quite slowly, waiting for the draw to open in response to her signals. She was passing about 25 feet from the Elizabeth when another tugboat, the Mischief, which had come up the creek a very little astern and outside of her, and which had a large boat in tow on her port side, took a sheer to starboard, and, running against the Mascot, pushed the latter over sideways, so as to collide with the Elizabeth. The Mascot's witnesses accordingly throw the blame upon the Mischief and her tow; while the Mischief's witnesses, who were called for the claimants, testify that the sheer was caused, not by their fault, but by a mistake of the tow alongside in putting her wheel to port instead of to starboard, as ordered. The witnesses from that tow were not called, and were not present. No doubt the Mascot would not have collided with the Elizabeth had the former not been struck by the Mischief and her tow. But I am not satisfied with the sufficiency of the explanation offered. Involuntarily and without necessity going so near a canal boat rightfully moored at a usual landing place, I think the Mascot took the risk of such incidents of navigation as those above mentioned, so far at least as respects any injury to a boat properly moored. There was no need of her going so near, as is proved by the fact that the Mischief was coming up 50 feet further out. The testimony is contradictory whether the Mischief was partly lapping as she came along, or wholly astern. But the sheer of the Mischief was seen some little time before she struck the Mascot's tow, and the blow did her tow no damage. It is plain, therefore, that she approached the Mascot quite gradually, and I am not satisfied that the Mascot was necessarily shoved over to such an extent as alleged. The Mascot might have backed. Her pilot says she did not back because backing would have brought his bow against the

Elizabeth. His bow would, indeed, have swung somewhat to starboard in backing; but all the evidence shows that the Mascot was moving very slowly, and I do not credit the contention that backing in such a situation by the Mascot would have caused her to swing so rapidly that her bows would have struck the Elizabeth before she had got away, had she been as much as 25 feet distant from the Elizabeth. I must hold the Mascot, therefore, liable, both for her unnecessary near approach to the Elizabeth and for not doing what she might have done to prevent the collision. An order of reference may be taken if the damage is not agreed upon.

Alexander & Ash, for appellant.

Hyland & Zabriskie, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This case turns wholly upon questions of fact, and we are unable to agree with the learned district judge in his view of the facts. We are unable to discover in the evidence anything which indicates a want of vigilance or prudent navigation on the part of the Mascot. She was proceeding with a boat in tow lashed on her port side, very slowly approaching the drawbridge, at a safe distance from the dock where the libellant's canal boat was unloading, and at a safe distance from the canal boat, when, owing to an unforeseen, sudden, and unnecessary sheer of an overtaking vessel on her port side, her tow was violently struck, and she was shoved to the starboard, and brought in contact with the libellant's boat. Undoubtedly, she could have taken a course originally further out in the channel, and further away from the dock; but the course she did take was the usual one, and the distance from the dock the usual distance for vessels approaching the draw as she was. She was not bound to anticipate any such occurrence as took place. The sole cause of the accident was the negligence of another vessel. The decree is reversed, and the cause remitted to the district court, with instructions to dismiss the libel, with costs of that court and of this appeal.

THE SHACKAMAXON.

THE CITY OF COLUMBIA.

STARIN'S CITY, RIVER & HARBOR TRANSP. CO. v. OLD DOMINION STEAMSHIP CO.

STARIN v. SAME.

(Circuit Court of Appeals, Second Circuit. February 14, 1895.)

Nos. 63 and 64.

COLLISION BETWEEN STEAMERS—CROSSING COURSES.

A ferryboat in New York harbor, crossing from Ellis Island to the barge office, east of the Battery, and a steamship coming up from sea, discovered each other when about half a mile apart. The steamship blew one whistle, and ported her wheel, and on seeing that the ferryboat did not reply, or change her course or speed, stopped and reversed her engines; but the vessels collided, the steamship striking the starboard side of the ferryboat abaft the wheel. *Held* that, as the vessels were on crossing courses

when they discovered each other, the ferryboat then having the other on the starboard bow, and failing afterwards to pay any attention to her movements, was solely in fault, the steamship having done all in her power to avoid collision after having reason to suppose that the ferryboat would not avoid her.

Appeals from the District Court of the United States for the Eastern District of New York.

These were libels for a collision between the steamship City of Columbia and the steam ferryboat Shackamaxon,—the first by the Old Dominion Steamship Company, owner of the steamship, against the ferryboat (Starin's City, River & Harbor Transportation Company, claimant); the second by John H. Starin, owner of the ferryboat, against the steamship (the Old Dominion Steamship Company, claimant). The district court found the ferryboat in fault, and rendered a decree against her on the first libel, and dismissed the second libel. The claimant and owner of the ferryboat appealed.

At the time of the collision, the weather was clear. It was daylight, and the tide was flood. The steamship had come in from sea, on one of her regular trips from Norfolk, Va., and was proceeding up the bay, at a speed of about 12 miles an hour, to her pier, at the foot of Beach street, New York City. The ferryboat was on one of her regular trips from Ellis Island to the barge office at the Battery. After leaving her slip, on the southerly side of the island, and passing to the southeast, beyond the easterly line of the anchorage grounds, her general course was about east. As she came out from among the vessels anchored off the island, she was discovered by the steamship, which was coming up the channel, and then half a mile below. The steamship blew a signal of one whistle, and ported her wheel. The ferryboat did not answer the signal, and kept on her course, at full speed. Thereupon, the steamship's engines were stopped and reversed, but the vessels came together, the stem of the steamship striking the ferryboat on her starboard side, abaft the wheel, and both were damaged.

The steamship claimed that it was the duty of the ferryboat to keep out of the way, and that she failed in this duty, by reason of her omission to keep a proper lookout. The ferryboat claimed that the steamship was an overtaking vessel, and was bound, therefore, to avoid the ferryboat.

The opinion rendered on the hearing in the district court was as follows (Benedict, District Judge.):

"In my opinion, the collision between the steamship City of Columbia and the ferryboat Shackamaxon, which gave rise to these actions, was caused by the neglect of those on board the Shackamaxon to observe the course of the City of Columbia as she came up the bay. They acted on the assumption that the City of Columbia was continuing on a course which would carry her under their stern, when, if they had given proper attention, they would have observed that the City of Columbia had hauled back into the stream, and would have avoided her. For this neglect the ferryboat Shackamaxon must be held liable in the first action, and the libel in the second action must be dismissed, with costs."

Goodrich, Deady & Goodrich, for appellants.

Frank D. Sturges, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The decrees of the district court in these causes, adjudging the Shackamaxon solely in fault for the collision, apparently proceeded upon the ground that the courses on which the vessels were proceeding when they discovered one another, and were about half a mile apart, were crossing courses, and the Shackamaxon had the Columbia on her starboard bow, and that from

that time the Shackamaxon failed to pay any attention to the movements of the Columbia, and wholly disregarded her obligation to avoid her. There is nothing in the record which warrants us in disturbing this conclusion. The evidence is that the Columbia did all in her power to avoid collision after she had sufficient reason to suppose that the Shackamaxon would not fulfill the obligation resting upon her. The decrees are affirmed, with interest to the appellee, and costs of the district court and of this court, with instructions to the district court accordingly.

THE LORD O'NEILL.

THE PEERLESS v. EASTON & McMAHON TRANSP. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 101.

COLLISION—RESPONSIBILITY OF VESSEL IN GREATER FAULT.

The tug P. was proceeding up Chesapeake Bay with four barges in tow. The night was dark but clear, and all the lights of tug and tow were burning brightly. The steamship L., which was proceeding down the bay at full speed, at a distance of nearly or quite half a mile to the westward of the tug, when nearly abreast of the tug, suddenly, and without apparent reason, changed her course, and ran into and sank the first barge. Before the steamer's change of course there was no reason to apprehend a collision, and, after such change, there was no way of avoiding it. The tug, on observing the steamer's change of course, sounded a danger signal. The only fault attributed to the tug was her failure to give the passing signal, which her captain testified he omitted because he did not think the steamer was within half a mile of him. *Held*, that the gross and culpable negligence of the steamer was the proximate cause of the injury, and that she should be charged with the whole damage, the omission of the tug to give the passing signal being so slight a fault, under the circumstances, and contributing so little to the disaster, as not to be entitled to consideration.

Appeal from the District Court of the United States for the District of Maryland.

This was a libel by the Easton & McMahon Transportation Company against the steamship Lord O'Neill and the steam tug Peerless, to recover for the loss of libellant's barge. The district court found both vessels in fault, and ordered the damages to be divided. The claimants of the Peerless appeal.

Robert H. Smith, for appellant.

Henry Stockbridge, Jr., for Easton & McMahon Transp. Co.

J. Wilson Leakin, for the Lord O'Neill.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. The steam tug Peerless, having in tow four barges laden with coal, was proceeding up the Chesapeake Bay on the night of the 6th of July, 1893, when at a point abreast of the mouth of the Potomac river, at about half past 9 o'clock, the British steamship Lord O'Neill, going down the bay, col-

lided with and sank the barge Mamie A. Brady, one of the barges in tow, the owner of which has libeled both tug and steamship. The court below, holding both to be at fault, has adjudged that the damages be divided, and from this decree the owners of the Peerless have appealed. There has been no appeal on the part of the steamship. In the opinion of the district judge, "the steamship was evidently grossly in fault." The only fault alleged against the tug was her failure to sound the passing signal as required by rule 6 of regulations prescribed by the supervising inspectors of that department, which is as follows:

"The signals, by blowing of the steam-whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting 'head and head,' or nearly so, but at all times when passing or meeting at a distance within half a mile of each other, and whether passing to the starboard or port."

In cases of collision, where there is conflict of testimony, the opinion of the district judge upon questions of fact should be, and nearly always is, controlling, for he has had the advantage of seeing the witnesses face to face; and where, as in the case before us, the district judge is uncommonly careful, learned, and conscientious, it is with regret that we find ourselves compelled to a different conclusion. Inasmuch as the testimony of one important witness was taken in the circuit court of appeals, subsequent to his decree, it may be that his judgment would have been different had this witness been examined before him. Be that as it may, we cannot find in the record sufficient proof of fault upon the part of the tug Peerless to render it liable for one-half of the damages, while we do find such manifest, culpable, and inexcusable negligence on the part of the steamship as to render it responsible for the entire loss. The testimony shows that the tug was moving at the rate of about three miles an hour against the tide, the barges being towed with a hawser astern the Peerless, the Mamie A. Brady being the leading barge in the tow, the Roselle, the Wister, and the Frank Thomson following in the order named, in a straight line. The length of the hawser between the Peerless and the Brady was about 420 feet, the other barges following and being from 300 to 350 feet apart. It is satisfactorily established that the night, though dark, was clear, and a good night for seeing lights, and that all the lights upon the tug boat and the barges were burning brightly. The master and lookout on the tug, and the masters of all the barges, all agree substantially that they saw the masthead and red lights of the steamship a long way off, and well on to their port bows. The master and lookout of the tug, and the master of the second barge, testify that, if the steamship had not changed her course, she would have passed them at least a half mile to the westward. From the testimony of the masters of the other barges, it would appear that the distance was not so great. However that may be, the conclusion is irresistible that, up to the time when the steamship was nearly abreast the tug, she was at such a distance to westward that if she had kept her course there would have been no danger of collision, for all the witnesses agree that up to that

time her port light only was visible. Had she been approaching the tug head on, or nearly so, some of the witnesses on the tug or barges would have seen both port and starboard lights. They were watching her from the time she was three miles off until she came about abreast of the tug, and all that time she showed only her red light.

Two witnesses only were examined in behalf of the steamship,—the pilot and the third mate. The lookout was not produced. The pilot was over 70 years of age, and very deaf. The mate was 22 years old. It is impossible to gather from their testimony any intelligible explanation of the cause of the collision. In contradiction of all the other witnesses, they claim that the night was hazy and rainy, and that just before the collision a squall came up, shutting out all lights. If this were true, then the steamship could not be acquitted of gross negligence in going at full speed along a route where vessels of all kinds were frequently passing and repassing; but the overwhelming weight of the testimony seems to be against this contention, and we are compelled to give preferable credence to the witnesses examined in behalf of the tug. From their evidence certain leading facts seem to be established. They are: First, that with respect to lights no fault is imputable to tug or tow; second, that the steamship, from the time she was first observed until she was nearly abreast of the tug, was moving on a course which, if continued, would have carried her well off to the westward of the tug and tow, at a distance from them of from 300 yards to a half mile; third, that, when nearly abreast the tug, the steamship, going at the rate of nine and one-half knots an hour, about her full speed, for some unaccountable and inexplicable reason, changed her course abruptly and rapidly, and moved down on the barge, striking her with her starboard bow; fourth, that prior to that sudden change of course there was no reason to apprehend collision, and after such change there was no means of avoiding it; fifth, that after the change of course, the tug did all that could be done by blowing a danger signal and stopping.

The only fault charged against the tug is the failure to blow the passing signal, as required by rule 6, when passing "head and head," or when vessels pass within half a mile of each other. The master of the tug says that he did not give this signal, because he did not consider the steamship to be within a half-mile distance. The lookout on the tug gives like testimony as to the distance, and Williams, the master of the second barge, says that "if the steamship had not changed her course she would have passed them at least a half mile." Inasmuch as the steamship likewise failed to blow the passing signal, it may be assumed that she did not consider herself within the half-mile distance. If the testimony on this point is sufficient to raise a doubt as to whether rule 6 was applicable, this would eliminate every possible ground upon which the tug could be held liable. "Where a fault is charged against one vessel in relation to which the testimony is doubtful, and there is undisputed testimony as to the fault of the other, which is flagrant, the former vessel will not be charged with contributory neg-

ligence." *The Manistee*, 7 Biss. 35, Fed. Cas. No. 9,028. But we will not let our decision rest upon so narrow a margin. If it be true, as found by the district judge, that the steamship was "grossly in fault," and if it be true, as we find, that the immediate cause of the injury was the inexplicable and culpable change of course by the steamship after she came abreast of the tug, the omission to blow the passing signal bears so little proportion to the flagrant faults of the steamship, and contributed so little to the disaster, that it is not entitled to consideration. The proximate cause of the injury is the first and main question to be determined in fixing and apportioning the liability, and finding, as we do, that the immediate cause of the collision was the change of course after the tug was passed, the misconduct of the steamship is not alleviated by proof of some omission to do an act which had no direct connection with such misconduct. Where fault is clearly shown on one side, full proof should be required to shield from liability the party guilty of such fault, and it should appear that the alleged contributory negligence had, or probably might have had, something to do with the act which produced the injury. The object in requiring the whistle to be blown by vessels approaching each other within a certain distance is obviously to notify of the approach, and to give notice as to which side they will pass. If that knowledge is obtained in any other way, the office of the signal is accomplished. In the case before us the steamship had passed the tug at a safe distance. The collision was due, and solely due, to her failure to observe the two bright white lights, which, by the exigency of section 4233 of the Revised Statutes (rule 6), a towing vessel is required to carry vertically at her masthead, and the lights upon the barges, all of which, according to the testimony, were burning brightly, and to the sudden change of course upon the part of the steamship. The blowing of the passing signal by the tug could not have informed, and was not intended to inform, the steamship that the tug had the barges in tow. It could not have prevented the change of course or checked the speed of the steamship, which was the primary and immediate cause of the collision, and therefore did not contribute to it. In *Perkins v. Hercules*, 1 Fed. 925; *The Margaret v. The C. Whiting*, 3 Fed. 870; *The Buckeye*, 9 Fed. 666,—it was held that the failure of the sail vessels to show lighted torches, as required by section 4234 of the Revised Statutes, did not relieve the steam vessels colliding with them, after sunset, from liability. See, also, *The Farragut*, 10 Wall. 334. The facts in this case readily distinguish it from *The Connecticut*, 103 U. S. 710, and *The Manistoba*, 122 U. S. 97, 7 Sup. Ct. 1158, cited in support of the decree of the district court. It is therefore ordered that the said decree be reversed, and the case remanded to the district court, with instructions to enter a judgment against the steamship *Lord O'Neill* for the entire loss occasioned by the collision, and for the costs.

WILSON v. SMITH.

(Circuit Court, E. D. Pennsylvania. January 22, 1895.)

No. 44.

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—EXECUTORS.

The citizenship of parties which determines the right to remove a cause to a federal court is that of the parties as persons, and not an official citizenship, acquired in a representative capacity.

2. SAME—FORM OF ACTION.

The right to remove a cause from a state to a federal court cannot be defeated by the fact that the form in which the suit has been brought, under a state statute, is one in which the federal court cannot entertain it, if, in any form, the federal court would have jurisdiction; but its disposition, under the forms of federal procedure, will be determined by the essential character of the case.

Sur Motion to Remand to State Court.

On December 5, 1894, the plaintiff, James H. Wilson, filed a statement of demand upon the defendant, Thomas B. Smith, executor of the last will and testament of Samuel Harlan, Jr., deceased, in the court of common pleas No. 2 of Philadelphia county, Pa. He sought to recover of the defendant the sum of \$4,000, with interest thereon from February 12, 1883, upon a cause of action based upon the following clause in the will of the said Samuel Harlan, Jr.: "To my nephew James H. Wilson, son of my deceased sister Harriett, I give \$4,000." The said bequest was further confirmed by the language of a codicil attached to the said will, which will was duly probated in the city of Wilmington, Del., the alleged domicile of the testator, on the 12th day of February, 1883, and letters testamentary were issued to the said Thomas B. Smith, executor. It was further averred that on May 28, 1883, the said will was duly registered in the office of the register of wills for the county of Philadelphia, and ancillary letters were issued thereon, under and in pursuance of the act of assembly of Pennsylvania of March 15, 1832, to the said Thomas B. Smith, and security was entered in the sum of \$174,000. By virtue of the authority thus given, the said defendant possessed himself of assets of the said decedent to an amount exceeding the sum of \$75,000. Plaintiff averred that the defendant never filed any account or inventory and appraisement in said jurisdiction of the estate which had thus come into his hands, and, although said estate was more than sufficient to pay the legacy above mentioned, yet he had never paid the same or any part thereof to said plaintiff, although frequently asked so to do. On December 5, 1894, a rule to plead was filed, and on the 14th of same month the defendant filed a petition and bond to remove the suit to the circuit court of the United States for the Eastern district of Pennsylvania under the act of August 13, 1888.

Curtis & Lister, for the motion.

It has been uniformly held that under the judiciary act of 1789 and succeeding acts (except that of 1875), relating to the removal of causes from the state into the federal courts, no cause could be removed into the latter of which they had not original jurisdiction. *Smith v. Rines*, 2 Sumn. 338, Fed. Cas. No. 13,100; *Gaines v. Fuentes*, 92 U. S. 10. So under the acts of March 3, 1887, and Aug. 13, 1888. *Reed v. Reed*, 31 Fed. 49; *In re Cilley*, 58 Fed. 977. The right of removal on the ground of adverse citizenship is limited by the latter act to suits of a civil nature at common law and in equity. The suit removed is a special action, brought to recover a legacy, under the act of assembly of the state of Pennsylvania approved February 24, 1834 (P. L. p. 70, § 50). *Van Nordon v. Morton*, 99 U. S. 378. An action at common law cannot be maintained to recover a general legacy. The remedy is solely in equity. *Jones v. Tanner*, 7 Barn. & C. 542. The defendant, for the purposes of this suit, is a citizen of Pennsylvania.

R. L. Ashhurst, opposed.

The citizenship of executors or administrators is determined by the state in which they are citizens, and not by the state in which they take out letters. *Amory v. Amory*, 95 U. S. 186; *Geyer v. Insurance Co.*, 50 N. H. 224; *Coal Co. v. Blachford*, 11 Wall. 172. The right of removal is not affected by the circumstance that the action in the state court is based upon a statute of the state. *Gaines v. Fuentes*, 92 U. S. 10; *Fuller v. Wright*, 23 Fed. 833; *Searl v. School Dist.*, 124 U. S. 197, 8 Sup. Ct. 460.

DALLAS, Circuit Judge. This case was originally brought in a court of Pennsylvania by a citizen of that state. The defendant, a citizen of Delaware, caused its removal to this court. The plaintiff insists that it should be remanded, and upon two grounds, with reference to which his motion to that end will be decided.

1. It is asserted that the defendant, who is sued as executor, "having come into this state, and having taken out ancillary letters, is, for the purpose of this suit, a citizen of Pennsylvania, and there is no diverse citizenship as required by the act." This proposition is in conflict with the law as settled by the highest authority. "Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to the parties as persons. A petition for removal must, therefore, state the personal citizenship of the parties, and not their official citizenship, if there can be such a thing." *Amory v. Amory*, 95 U. S. 187.

2. It is further contended that, notwithstanding the diverse citizenship of the parties, this suit is one of which a circuit court of the United States has not jurisdiction. It is an action, in common-law form, for the recovery of a legacy. It was brought in conformity with a statute of the state of Pennsylvania which authorizes such actions. Act Feb. 24, 1834 (P. L. p. 83, § 50); *Purd. Dig.* p. 449, pl. 215. Without this statute, a proceeding in accordance with chancery methods would have been the only available one in the state court. It, however, only provided a new form of remedy; the tribunal remained the same, and its jurisdiction was not extended or altered. In Pennsylvania the same courts administer both law and equity, and whether any particular case is of the one class or the other is not a question of jurisdiction, but of form merely. *Adams v. Beach*, 1 Phila. 101. Accordingly, those courts have held that cases under this particular statute are, substantially, suits in equity. *Seibert v. Butz*, 9 Watts, 494; *Dunlop v. Bard*, 2 Pen. & W. 309. The subject-matter of the present litigation is within this court's jurisdiction in equity, but not at law; and inasmuch as here the distinction between equity and law cannot (as in the Pennsylvania courts) be disregarded, nor the principles and remedies peculiar to either system be applied under the other, it is contended that this cause has been transferred to a court which, as a court of equity, cannot entertain it, because it is an action at law, and which, as a court of law, cannot take cognizance of it, for want of jurisdiction. This contention involves the acceptance of a consequence, which, as I ventured to suggest upon the argument, seems to be inadmissible. That a state, by simply prescribing a peculiar form of procedure for its own courts, may, in

any case, divest the rightful jurisdiction of those of the United States, is a doctrine to which I am wholly unable to assent, and which does not appear to be supported by any precedent or authority. The act of congress of 1888 (25 Stat. 433) provides that any suit of a civil nature, at law or in equity, may be removed, wherever the sum in dispute amounts to \$2,000, and the controversy is between citizens of different states; and the right thus accorded pertains to all proceedings of a civil nature, of whatever form, provided they are suits at law or in equity. Any case which in the state court was either the one or the other of those becomes, upon its proper removal to a circuit court of the United States, cognizable by it. *Fuller v. Wright*, 23 Fed. 833; *In re Cilley*, 58 Fed. 987; *Clark v. Smith*, 13 Pet. 203; *Parker v. Overman*, 18 How. 141; *Thompson v. Railroad Co.*, 6 Wall. 138; *Searl v. School Dist.*, 124 U. S. 197, 8 Sup. Ct. 460. Whether the jurisdiction of this court is upon its law side or its equity side will be determined "by the essential character of the case," but the right of removal is not affected by any such question. That right exists if, upon either side, the requisite jurisdiction exists. Where a cause brought here by removal cannot be entertained upon the one side, it must be assigned to the other; but it is not to be remitted to the state court if, upon either side, the federal court is competent to retain and decide it. *Van Norden v. Morton*, 99 U. S. 378. In the cases in which the right of removal has been denied or questioned, the proceedings in the state courts have been, in their nature, not civil suits, either at law or in equity, or else some independent condition of the statute (ex gr. as to the sum in dispute) has been lacking. *Gaines v. Fuentes*, 92 U. S. 10; *In re Cilley*, 58 Fed. 977; *Dey v. Railway Co.*, 45 Fed. 82; *In re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141. The motion to remand is denied.

LITTLE ROCK JUNCTION RY. v. BURKE.

(Circuit Court of Appeals, Eighth Circuit. January 23, 1895.)

No. 403.

1. FEDERAL COURTS—JURISDICTION—SETTING ASIDE DECREE OF STATE COURT.

The federal courts have no jurisdiction of a suit to set aside a decree of a state court, on the ground that such decree is utterly void when tested by an inspection of the record, since in such case a motion, appeal, or bill of review, in the court which made the decree, is the proper and sufficient remedy.

2. SAME.

It seems that such courts may have jurisdiction of a suit to set aside such a decree on grounds outside the record, and proved by extrinsic evidence.

3. SAME—SUIT TO QUIET TITLE.

Though the federal courts have jurisdiction, in a proper case, to entertain a bill to quiet title or remove a cloud on title, such jurisdiction does not extend to cases where the cloud consists of a judgment or decree of a state court, and proceedings taken in execution of the same, which judgment or decree is alleged to be void on its face.

4. SAME.

Suit was brought in a court of the state of Arkansas, pursuant to the statute of that state, by P. county, to establish and foreclose a tax lien on certain lands of B. The statute required an order to be made and published requiring claimants of lands affected by such a suit to appear and show cause why the same should not be sold, and provided that, upon proof of publication and failure of claimants to appear, a decree pro confesso might be entered. Such a decree was made against B.'s lands, which were sold and conveyed to one S., who sold to the L. Ry. Co. B. subsequently brought a suit in the federal court to set aside such conveyances and the decree of the state court, as clouds on his title, upon the ground that the state court acquired no jurisdiction of B. It appeared by the record of the suit in the state court, which was the only evidence offered, that the affidavit of publication of notice filed in such record was not verified. *Held*, that the suit was one to set aside the decree of the state court for defects apparent on the face of the record, and that the federal court had no jurisdiction to entertain it.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

John Burke, the appellee, claiming to be the owner by inheritance of the south part of lot 6 in block 1 of Pope's addition to the city of Little Rock, Ark., filed a complaint against the Little Rock Junction Railway, hereafter termed the "Railway Company," to establish his title thereto, and to recover the premises from the possession of the defendant. The bill averred, in substance, that the railway company was in possession of the land under a conveyance from E. S. Stiewell; that said Stiewell claimed to have purchased the property at a sale for overdue taxes, which sale had been made in obedience to a decree of the Pulaski chancery court, a state court of Arkansas, having full chancery powers; that the title thus acquired by the railway company from E. S. Stiewell, its grantor, was unfounded and void, for the reason that said Pulaski chancery court never in fact acquired jurisdiction over the appellee in the suit to condemn and sell the property for overdue taxes. The tax suit in question was brought under the provisions of an act of the legislature of the state of Arkansas entitled "An act to enforce the payment of overdue taxes," approved on March 12, 1881, and an amendatory act approved March 22, 1881. Laws Ark. 1881, pp. 63-72, 159-161. The second, third, fourth, and fifth sections of said act, which are most material to the present case, are as follows:

"Sec. 2. On the filing of such complaint, the clerk of the court shall enter on the record an order, which may be in the following form: 'State of Arkansas, on Relation of —, Plaintiff, vs. Certain Lands on which Taxes are Alleged to be Due, Defendant. Now, on this day came said plaintiff, and files here in court his complaint, in which he sets forth that there are certain taxes due on the following lands: [Here insert a description of the land.] Now, therefore, all persons having any right or interest in said lands, or any of them, are required to appear in this court within forty days from this date, then and there to show cause, if any they can, why a lien shall not be declared on said lands for unpaid taxes, and why said lands shall not be sold for non-payment thereof.'

"Sec. 3. The clerk of said court shall at once cause a copy of said order to be published for two insertions in some newspaper published in the county; and if there is no newspaper published in the county, he shall cause a copy of said order to be posted at the door of the court house of the county, or of the room in which the court is held; and such publication shall be taken to be notice to all the world of the contents of the complaint filed as aforesaid, and of the proceedings had under it.

"Sec. 4. That any person who can show that he has any interest in any of the lands mentioned in the said order, may appear in the court in which such complaint is filed, or before the clerk thereof in vacation, and file an answer, showing why the prayer of such complaint shall not be granted; * * * *

"Sec. 5. At the end of the forty days mentioned in section 2 of this act, the clerk shall enter upon the record a decree pro confesso, covering all lands

named in the complaint, regarding which no answer has been filed, which order may be in the following form: 'State of Arkansas, on the Relation of ——— Plaintiff, vs. Certain Lands on which Taxes are Alleged to be Due, Defendant. It appearing that the order herein made, requiring the owners of the lands in this suit to appear and show cause, if any they could, why a lien should not be declared on certain lands named in the complaint herein, has been duly published in the manner required by statute, and that no answer has been put in as to the following tracts or parcels of land, that is to say: [Here describe the lands.] It is now, therefore, ordered that the complaint be taken as true and confessed as to said lands above described.'"

Other provisions of said act authorized said court, if no cause to the contrary was shown, to fix a lien upon the lands for the amount of all the taxes, penalties, and costs ascertained to be due thereon, and to direct a judicial sale of the lands for the payment thereof if the sum ascertained to be due was not paid within 20 days from the date of the decree. The bill in the present case charged that the order made by the clerk in said proceeding on the filing of the complaint was not published, as required by the statute aforesaid; that there was no record in said cause showing that said order was ever published; that no proof of the publication of said order was made by the editor, proprietor, or chief accountant of any newspaper, or by any other person authorized to make such proof; that there was no record in said court showing that such proof was ever made; that said order was not in fact published as required by law; and that all of the proceedings of the Pulaski chancery court in said tax suit were coram non judge and void. The defendants denied all of the material allegations of the bill touching the jurisdiction of the chancery court, and averred that said court acquired full jurisdiction of the case and of all persons having any interest in the property. The defendants also pleaded, in substance, that the case made by the bill of complaint was not a case of which the federal circuit court sitting in equity could properly take cognizance. The circuit court rendered a decree in favor of the complainant, whereby it adjudged that his title was not divested by the sale under the aforesaid decree. It also decreed that he be restored to the possession of the property, and that he recover of the railway company the sum of \$2,467 for the rents and profits of the land. To reverse said decree, the railway company has prosecuted an appeal to this court.

George E. Dodge and B. S. Johnson filed brief for appellant.

P. C. Dooley filed brief for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is manifest from an examination of the record in the case at bar that the circuit court found and decided that the decree of the Pulaski chancery court condemning the land in controversy to be sold for the nonpayment of taxes was utterly void for want of jurisdiction; and that issue as to the validity of the decree of the chancery court appears to have been tried and determined by the circuit court solely upon an inspection of the record in the tax suit. No evidence seems to have been offered for the purpose of impeaching the decree in question, except the record in the suit to foreclose the tax lien. For the purpose of showing that the Pulaski chancery court had acted without jurisdiction, and that its decree was a nullity, the complainant below, who is now the appellee, offered the following documentary evidence, to wit: The bill of complaint in the tax suit; the warning order that was entered therein on the filing of the bill pursuant to section 2 of the act of March 12, 1881, *supra*; the decree *pro confesso* that was entered in said proceed-

ing; the final decree therein; and a paper produced by the clerk of the chancery court, that purported to be the proof of publication of the warning order, which paper was in the following form, to wit:

"Notice of Delinquent Lands.

"In the Pulaski Chancery Court, at the March Term Thereof, A. D. 1881.

"Pulaski County, Plaintiff, vs. Certain Lands upon which Taxes are Alleged to be Due.

"Comes the plaintiff, the county of Pulaski, by P. C. Dooley, Esq., its solicitor, and files here in court its complaint, which sets forth that there are certain taxes due on the following lands, to wit: * * * ; S. pt. being ¼ lot 6, block one, Pope's addition. Now, therefore, all persons having any right or interest in said lands or city lots, or any of them, are required to appear in this court within forty days from this date, then and there to show cause, if any they can, why a lien shall not be declared on said lands for unpaid taxes, and why said lands shall not be sold for nonpayment thereof.

"A true copy from the record.

J. W. Callaway, Clerk.

"June 11, 1881.

"State of Arkansas, County of Pulaski—ss.: I, J. O. Blakeney, do solemnly swear that I am principal accountant of the Arkansas Democrat, a daily newspaper printed in said county, and that I was such principal accountant at the dates of publication hereinafter stated, and that said newspaper had a bona fide circulation in such county at said dates and had been regularly published in said county for the period of one month next before the date of the first publication of the advertisement hereto annexed, and that the said advertisement was published in said newspaper two times, for two days consecutively, the first insertion therein having been made on the 13th day of June, 1881, and the last on the 14th day of June, 1881.

"J. O. Blakeney, Princ. Acc't.

"Sworn to and subscribed before me, this _____ day of _____, 188—.

"_____, Notary Public.

* * * * *

"In testimony that the above and foregoing writing is a true copy of the matter therein recited, as appears from the original paper purporting to be proof of publication in the case mentioned in the caption, and which paper is now in my custody, I have hereto set my hand, and affixed the seal of said court, at my office in the city of Little Rock, this 16th day of February, 1893.

"[Seal.]

I. J. Hicks, Clerk."

In addition to the documentary proof aforesaid, no extrinsic evidence was produced by the complainant which tended to show that the warning order was not in fact published or posted as section 3 of the act of March 12, 1881, required, but the case was submitted to the circuit court for decision, on the evident assumption that the defect in the proof of publication was such as to demonstrate the utter invalidity of the decree of the chancery court. It is a proposition which admits of no controversy that the Pulaski chancery court acquired no jurisdiction to condemn the land in question to be sold for taxes, and that its decree in that behalf was of no effect, and conveyed no title to the purchaser thereunder, if the warning order was not in fact published in the mode prescribed by the statute. It was held in *Gregory v. Bartlett*, 55 Ark. 33, 17 S. W. 344, that a lawful publication of the warning order prescribed by the act of March 12, 1881, *supra*, is necessary to confer jurisdiction in a suit under that act to enforce a lien for overdue taxes, and that a publication of the order in the mode prescribed by law is unavailing to confer jurisdiction if the clerk of the court neglects

to enter the warning order of record before the same is published. The doctrine of that case has recently been cited and approved by the supreme court of the United States in *Dick v. Foraker*, 155 U. S. 404, 15 Sup. Ct. 124. These decisions, however, do not decide the proposition, which appears to have been maintained in the circuit court, that the decree of the Pulaski chancery court in the tax suit is void upon the face of the record. In that suit the record discloses that the warning order was duly entered; the decree pro confesso recites that the warning order had "been duly published in the manner required by statute more than forty days before this date"; and the final decree contains the same recital, in substance, and a further finding by the court "that proof of publication, of which notice, verified and proved as required by law, was filed as required by law." No other portion of the record showed affirmatively, or by necessary intendment, that the recital as to the due publication of the warning order was in fact false. For aught that appears on the face of the record in the tax suit, the warning order may have been published precisely as the statute requires, and proof of that fact may have been made to the satisfaction of the chancery court. The contention of the complainant in the circuit court seems to have been that the decree of the chancery court was void upon the face of the record, and assailable in any collateral proceeding, because the proof of publication aforesaid, which was on file in the case, was not verified, and because a general statute of the state of Arkansas declares that "the affidavit of any editor, publisher or proprietor, or the principal accountant of any newspaper, authorized by this act to publish legal advertisements, to the effect that a legal advertisement has been published in his paper for the length of time and number of insertions it has been published, with a printed copy of such advertisement appended thereto, subscribed before any officer of this state authorized to administer oaths, shall be the evidence of the publication thereof as therein set forth." Mansf. Dig. § 4359. In other words, it seems to have been claimed and decided that a decree rendered in a suit founded on the act of March 12, 1881, *supra*, is utterly void, if the record does not contain the statutory evidence of publication above indicated, and that decrees rendered in such suits are not entitled to the benefit of any of those presumptions which ordinarily attend and support the judgments of courts of superior jurisdiction when the record does not affirmatively show that no jurisdiction was in fact acquired.

We have been thus particular in describing the character of the testimony that was offered and the nature of the issue that appears to have been tried and determined in the circuit court, for the purpose of showing that the trial of the case clearly resolved itself into a review of the proceedings of the Pulaski chancery court for matters apparent on the face of the record. It is manifest that the evidence offered to impeach the decree in the suit to foreclose the tax lien was such testimony as would have been admissible to support a bill of review, or a motion in the nature of a bill of review, to vacate the decree, had the complainant seen fit to commence a

proceeding of that kind in the Pulaski chancery court. It is also obvious, we think, that if the decree of the chancery court is in fact void on the ground that was and is relied upon to establish its invalidity,—that is to say, for want of jurisdiction apparent on the face of the record,—then the complainant could have obtained as full relief by a bill of review filed in the chancery court as by an original bill filed in the federal circuit court. In addition to the consideration that a bill of review would have furnished an adequate remedy, it must be also borne in mind that the remedy by appeal was originally open to the complainant if he had seen fit to prosecute an appeal. Moreover, it is a general rule that, unless restrained by the terms of an express statute, a court of superior jurisdiction has power at any time to vacate its own judgments when it appears from an inspection of its record that a particular judgment or decree is utterly void for want of jurisdiction either over the person or the subject-matter. This is an inherent power, which all courts of superior jurisdiction possess as a necessary part of the machinery for administering justice, and as a means of preventing their orders and decrees from becoming instruments of injustice. Black, Judgm. §§ 297, 307, and cases there cited.

Inasmuch, then, as the case at bar was essentially a suit to annul the decree of the Pulaski chancery court and the proceedings that had been taken thereunder, for the alleged reason that the decree was utterly void when tested by an inspection of the record, it becomes important and necessary to inquire whether the circuit court could properly entertain jurisdiction of a suit of that nature. It may be admitted that the federal circuit courts have power to entertain suits to enjoin persons from asserting any right or title under a judgment or decree of a state court of co-ordinate jurisdiction that is alleged to have been obtained by fraud or collusion. *Gaines v. Fuentes*, 92 U. S. 10; *U. S. v. Norsch*, 42 Fed. 417. Possibly, a bill in equity to obtain the same relief may be entertained in any case where it is shown by proper averments that the judgment of a state court which is apparently regular and valid, and for that reason is not subject to collateral attack, for some reason not disclosed by the record is in fact invalid and of no effect. A complaint alleging such facts would furnish a proper foundation for an original suit in equity because additional issues would be raised and new facts would be brought upon the record as the basis for independent judicial action. But a complaint or a petition which seeks to impeach a decree, without the aid of extrinsic evidence, for want of jurisdiction apparent upon the face of the record, simply imposes upon the court to which it is addressed the duty of re-examining questions that have once been tried and decided, and for that reason a proceeding of that nature cannot be regarded as a new action, but is rather a continuation of the original suit. The case of *Barrow v. Hunton*, 99 U. S. 80, 82, furnishes an apt illustration of the distinction which exists between a suit to impeach a judgment which is apparently valid, by evidence dehors the record, and a proceeding to vacate a judgment for matters disclosed upon the face of the record. In that case, *Hunton* had obtained a final

judgment by default in a state court of Louisiana in an attachment suit. Subsequently, the judgment debtor filed a complaint against Hunton in the state court to nullify the judgment, on the ground that he had not been lawfully served with process. Hunton caused the proceeding to nullify the judgment to be removed to the circuit court of the United States, where the question arose whether the federal court could lawfully entertain jurisdiction of the proceeding. With reference to that question, Mr. Justice Bradley, in delivering the opinion of the supreme court of the United States, said:

"The question presented with regard to the jurisdiction of the circuit court is whether the proceeding to procure [the] nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise, the circuit courts of the United States would become invested with power to control the proceedings in the state courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; and according to the doctrine laid down in *Gaines v. Fuentes*, 92 U. S. 10, the case might be within the cognizance of the federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."

In that case it was held that as the proceeding in question merely involved a review of the action of the state court, as disclosed by its record, the state court was the proper tribunal to dispose of the proceeding, and that it could not be entertained by the federal court. In some other cases it has been ruled that, as between state courts of co-ordinate jurisdiction, one of such courts has no power to annul and enjoin the judgments or decrees of another. *Plunkett v. Black*, 117 Ind. 14, 19 N. E. 537; *Grattan v. Matteson*, 51 Iowa, 622, 2 N. W. 432.

We think, therefore, that it may be accepted as a general rule, in the absence of any statutory provisions on the subject, that the proper forum in which to seek relief, otherwise than by an appeal or writ of error, against a judgment or decree which is alleged to be void on the face of the record, is in the court by which such judgment or decree was rendered, and that other courts of co-ordinate jurisdiction have no authority to grant relief in such cases. But, whatever may be the correct rule in this respect as between state courts of equal authority, it is manifestly true, we think, that, owing to the peculiar relations which exist between state and federal courts of co-ordinate jurisdiction, the federal circuit court ought not to review, modify, or annul a judgment or decree of a state court, unless such review is sought on a state of facts not disclosed by the

record of the state court, which, for that reason, has not undergone judicial examination. The sufficiency of the service, whether by publication or otherwise, to support a final adjudication, and every other matter apparent upon the face of the record, are supposed to have received due consideration by the court rendering a judgment or decree before the same was entered. Therefore, when a suit is instituted to nullify a decree for matters disclosed by the record, and for no other reason, the proceeding is not a new suit, but is essentially in the nature either of an appeal from the original adjudication or a bill of review. The federal courts should remit proceedings such as these to the judicial tribunal of the state which made the record that is to be reviewed or impeached.

We have not overlooked the fact that in the case at bar the bill prays that the complainant's title may be quieted against the claims of the Little Rock Junction Railway, and that he may be restored to the possession of the premises now wrongfully withheld from him by the defendant. Neither has it escaped our observation that the complaint was filed after the alleged void decree of the chancery court was fully executed, and after the defendant had acquired a title thereunder. It might be argued with some force that the circumstance last mentioned was of sufficient weight to authorize the circuit court to review the proceedings of the chancery court, and to afford relief, if it appeared that the complainant was without means of redress for the alleged wrong in the state court by which the supposed void decree was rendered. But such was not the fact. As we have heretofore sufficiently shown, the remedy by a bill of review or by an appeal was at one time open to the complainant, and no reason is perceived why the relief obtainable by a bill of review would not have been as effectual as the decree rendered by the circuit court. Moreover, as the present action was brought and prosecuted upon the theory that the decree of the chancery court is utterly void when tried by the record, it follows that the remedy by ejectment was also open to the complainant, for no doctrine is better established than that a sale under a decree that was rendered without jurisdiction confers no title, and that such a decree is open to impeachment in any collateral proceeding when the want of jurisdiction is apparent upon the face of the record. *Galpin v. Page*, 18 Wall. 350; *Coit v. Haven*, 30 Conn. 190; *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711; *Frankel v. Satterfield* (Del. Super.) 19 Atl. 898; *Furgeson v. Jones* (Or.) 20 Pac. 842; *Black*, Judgm. §§ 278, 407, and cases there cited.

Forasmuch, then, as the injury complained of was subject to redress in the modes above indicated, we are constrained to hold that the federal court ought not to have intervened, as it did, notwithstanding the fact that the decree complained of had already been executed. The federal circuit courts sitting in equity have an undoubted right, in certain cases, to entertain a bill to quiet title or to remove a cloud upon a title, for this has been from time immemorial one of the well-known functions of a court of equity where the remedy at law is inadequate, either because the complainant is in possession, or because his title is of an equitable

nature, or because the land the title whereof is affected is vacant and unoccupied. This court has several times recognized the jurisdiction in question, and attempted to define its limits. *Bigelow v. Chatterton*, 10 U. S. App. 267, 2 C. C. A. 402, and 51 Fed. 614; *Sanders v. Devereux*, 8 C. C. A. 629, 633, 60 Fed. 311; *Frey v. Willoughby*, 11 C. C. A. 463, 63 Fed. 865. But we think that this jurisdiction does not extend, and ought not to be extended, to cases where the cloud upon a title consists of a judgment or decree of a state court, and proceedings that have been taken in execution of the same, which are alleged to be utterly void, and on that account require the introduction of no evidence to establish their invalidity other than the record of the state court. Because the federal courts have power to entertain a bill to quiet title, it does not follow that, under the guise of administering such relief, they will review the proceedings of a state court, and vacate the judgment of a state court which is obviously void when tested by the record, or that they will undo what may have been done by virtue of proceedings taken under such a judgment, so long as it is possible for the complainants to have such judgment and the proceedings taken thereunder vacated by a proper application addressed to the state court. For these reasons, our conclusion is that the facts proven at the trial were not of such a character as are essential to support an original bill in the federal courts.

The decree of the circuit court is therefore reversed, and the cause is remanded, with directions to the circuit court to vacate its decree and to dismiss the bill of complaint, without prejudice to the appellee's right to take such action in the state court as he may deem proper.

SANBORN, Circuit Judge (concurring). I concur in the result in this case on the following grounds: A bill in equity cannot be maintained in the national courts to recover possession of real property in cases in which there is no impediment to an action of ejectment. *Sanders v. Devereux*, *supra*. The only evidence produced by the appellee in this case to impeach the tax judgment on which the appellant's title rested was that which appeared on the face of the files and records of the Pulaski county chancery court, and the only contention on which he relied to overthrow that judgment was that these files and records disclosed the fact that that court never had jurisdiction to render the judgment. If this position was sound, the appellee could have maintained ejectment to recover the property in question, inasmuch as the appellant was in possession, and for that reason the bill should have been dismissed. If, on the other hand, the files and records of the Pulaski county chancery court did not disclose its want of jurisdiction, and hence the invalidity of the tax judgment, then there was no evidence in the court below to sustain the claim of its invalidity, and the bill should have been dismissed for that reason.

SEARCY COUNTY v. THOMPSON.

(Circuit Court of Appeals, Eighth Circuit. January 21, 1895.)

No. 497.

PRACTICE—QUESTIONS REVIEWABLE ON ERROR—GENERAL FINDING.

An action was submitted to the court, jury trial being waived. No exceptions to the admission or rejection of evidence were taken, no ruling was asked in the nature of a demurrer to evidence, nor was the court asked to make special findings of fact; but the defendant requested the court to make certain rulings, upon the whole case, as to the right of the plaintiff to a recovery. The court found generally for the plaintiff, and the defendant excepted to the refusal of the court to adopt the conclusions submitted by it. *Held*, that the exceptions presented nothing which the appellate court could review. Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action by W. H. Thompson against Searcy county, Ark., to recover upon certain county warrants.

Eben W. Kimball and A. Y. Barr, filed brief for plaintiff in error.

H. M. Hill (U. M. Rose, W. E. Hemingway, and G. B. Rose, on brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case was before this court on a previous occasion, and is reported in 12 U. S. App. 618, 6 C. C. A. 674, and 57 Fed. 1030. After the case was remanded by this court for a new trial, Searcy county, the plaintiff in error, filed an amended answer, wherein it alleged, in substance, that the warrants sued upon were issued in pursuance of a fraudulent and unlawful agreement between the county and McCabe & Greenhaw, who were the contractors for building a courthouse for the county, whereby the price for doing the work was fixed at a sum known to be three times in excess of its actual value, to cover a known depreciation in the value of county warrants that were to be issued and received in payment for building the courthouse. A stipulation was filed, waiving a jury, and the case was subsequently tried before the court—resulting in a judgment in favor of Thompson, who was the plaintiff, for the sum of \$23,500. The bill of exceptions in the present record contains a statement of the substance of the testimony that was adduced at the trial. It also shows that the trial court elected to make a general, rather than a special, finding, which finding is as follows:

"The case was then argued and submitted to the court, and the court found for the plaintiff, upon all of the warrants sued on and rendered judgment against the defendant for the sum of twenty-three thousand five hundred dollars and costs, from which judgment the defendant claimed an appeal; and time was allowed the defendant, for sixty days from this date, to prepare and file its bill of exceptions herein."

No exceptions were taken in the course of the trial, either to the admission or exclusion of testimony. Neither did the defendant ask an instruction in the nature of a demurrer to the evidence,—

that, on the proof offered, the plaintiff was not entitled to recover. Such being the condition of the record, we are confronted at the outset with the inquiry whether the record presents any question which this court can review.

Section 700 of the Revised Statutes, which was enacted on March 3, 1865 (13 Stat. 501), provides that:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

In one of the earliest cases involving a construction of this statute, *Dirst v. Morris*, 14 Wall. 484, 491, Mr. Justice Bradley, in delivering the opinion of the supreme court of the United States, said:

"But, as the law stands, if the jury is waived, and the court chooses to find generally for one side or the other, the losing party has no redress, on error, except for the wrongful admission or rejection of evidence."

In a subsequent case, in which a jury had been waived pursuant to the provisions of the aforesaid statute, the supreme court had occasion to consider whether it could review the action of the circuit court in refusing certain instructions that had been asked by the defendant. With reference to that question, the court said:

"Requests that the court would adopt certain conclusions of law were also presented by the defendants, in the nature of prayers for instruction, as in cases where the issues of fact are tried by a jury, which were refused by the circuit court, and the defendants also excepted to such refusals. None of these exceptions have respect to the rulings of the court in admitting or rejecting evidence, nor to any other ruling of the circuit court which can properly be denominated a ruling in the progress of the trial, as every one of the refusals excepted to appertain to some request made to affect or control the final conclusion of the court as to the plaintiff's right to recover. Such requests or prayers for instruction, in the opinion of the court, are not the proper subjects of exception in cases where a jury is waived, and the issues of fact are submitted to the determination of the court." *Insurance Co. v. Folsom*, 18 Wall. 237, 253.

In the case of *Cooper v. Omohundro*, 19 Wall. 65, 69, which was also a case that had been tried by the court without the intervention of a jury, it appeared that five instructions had been asked by the defendant which were refused by the circuit court, and the refusal of the same was assigned for error. One of these instructions was in the following form:

"(5) That, upon the whole case, judgment should be for the defendant."

Concerning the alleged errors, Mr. Justice Clifford, in delivering the opinion of the supreme court, said:

"Beyond all doubt, the only effect of the exception to the refusal of the court to grant the fifth request, if the exception is admitted to be well taken, will be to require the court here to review the finding of the circuit court in a case where the finding is general, and where it is unaccompanied by any authorized statement of the facts, which it is plain this court cannot do, for the reasons

given in the opinion of the court in the case of *Insurance Co. v. Folsom*, decided at the present term. Our decision in that case was, that in a case where issues of fact are submitted to the circuit court, and the finding is general, nothing is open to review by the losing party, under a writ of error, except the rulings of the circuit court in the progress of the trial, and that the phrase, 'rulings of the court in the progress of the trial,' does not include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general finding, which certainly disposes of the exceptions to the refusals of the circuit court to decide and rule as requested in the first four prayers presented by the defendant, as it is clear that those exceptions seek to review certain conclusions of the circuit court which are necessarily embodied in the general finding of the circuit court."

In the case of *Martinton v. Fairbanks*, 112 U. S. 670, 675, 676, 5 Sup. Ct. 321, the following statement is found with reference to the act of March 3, 1865, which is now under consideration. The court said:

"Prior to the enactment of the act of March 3, 1865 (now sections 649, 700, Rev. St. U. S.), it was held by this court that 'when the case is submitted to the judge to find the facts, without the intervention of a jury, he acts as a referee by consent of the parties, and no bill of exceptions will lie to his reception or rejection of testimony nor to his judgment on the law,' * * * and that 'no exception can be taken where there is no jury, and where the question of law is decided in delivering the final judgment of the court.' * * * Section 4 of the act of March 3, 1865, was passed to allow the parties, where, a jury being waived, the case was tried by the court, a review of such rulings of the court in the progress of the trial as were excepted to at the time and duly presented by bill of exceptions, and also a review of the judgment of the court upon the question whether the facts specially found by the court were sufficient to support its judgment. In other respects the old law remained unchanged. In the present case the bill of exceptions presents no ruling of the court made in the progress of the trial, and there is no special finding of facts. The general finding is conclusive of the issues of fact against the plaintiff in error, and there is no question of law presented by the record of which we can take cognizance."

Again, in *Stanley v. Supervisors of Albany*, 121 U. S. 535, 547, 7 Sup. Ct. 1234, it was said by Mr. Justice Field, in delivering the opinion of the supreme court, that:

"Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here. It matters not how convincing the argument that upon the evidence the findings should have been different."

It is also well settled that "a special finding of facts," in the sense in which that phrase is used in the statute, is not a mere report of all the evidence adduced at the trial, but consists of a statement of the ultimate conclusions of the trial court upon issues of fact raised by the pleadings. *Norris v. Jackson*, 9 Wall. 125; *Burr v. Des Moines Co.*, 1 Wall. 99, 102.

The decisions in *Insurance Co. v. Folsom* and *Cooper v. Omohundro*, supra, were cited and approved in the late case of *Lehnen v. Dickson*, 148 U. S. 71, 73, 13 Sup. Ct. 481; and, so far as we are aware, the doctrine enunciated in those cases has never been criticised or overruled by the supreme court. It is true, however, as has been suggested, that in the case of *Clement v. Insurance Co.*, 7 Blatchf. 51, Fed. Cas. No. 2,882, Judge Blatchford, while circuit judge, gave expression to some views which seem to be at variance with the ruling of the supreme court in the cases heretofore cited.

But it is to be noted that the case of *Clement v. Insurance Co.* was decided by Judge Blatchford some two years prior to the decisions in *Dirst v. Morris* and in *Insurance Co. v. Folsom*, so that at the present time the decision in question cannot be regarded as authoritative. It becomes necessary, therefore, to apply the doctrine above stated to the case at bar. The plaintiff in error asked two instructions which were refused, and, on account thereof, exceptions were saved to the action of the circuit court. These instructions were as follows:

"(1) The plaintiff is entitled to recover for the building of this courthouse only the legal, ordinary, and customary price for such a building, estimating a dollar in county warrants at par with lawful currency of the United States, if at the time of letting the contract the contractor and the county judge understood that the price bid was in excess of the real cost of the building, and the contract was let with the understanding that county warrants were and would be at a discount, and the price fixed in the contract was put larger than the customary price for such work in order to enable the contractor to dispose of the warrants at a discount, and from the proceeds obtain enough to realize the actual value of such a contract. * * * (3) Upon the whole case, the judgment should be for the plaintiff for the amount only which such a courthouse was worth to build, at customary prices, in cash, deducting therefrom the amount already paid by the county for such building."

It will be observed that the last of these instructions is the counterpart of an instruction that was asked and refused in the case of *Cooper v. Omohundro*, supra, with reference to which the supreme court in that case remarked that the only effect of the exception to the refusal of the request, if the exception was well taken, would be to require the supreme court to review the general finding of the circuit court, which it was plain it could not do in the absence of any special finding. What was thus said is strictly applicable to the case in hand. Instruction No. 3, above quoted, having been asked by the plaintiff below, is not in the nature of a demurrer to the evidence, and cannot be treated as such. It is an instruction which would obviously compel this court to pass upon every contested issue of law and fact disclosed by the record, if we concede that the action of the circuit court in refusing the request is a matter that can be reviewed here. We conclude, therefore, that the alleged error in refusing the request is not subject to consideration by this court.

With reference to the first instruction above quoted, it is sufficient to say that the action of the circuit court in refusing that request cannot be reviewed here, for the following reasons: That instruction was evidently offered for the purpose of affecting or controlling the final conclusion of the circuit court, embodied in its general finding, as to the plaintiff's right to recover, and as was said in the case of *Insurance Co. v. Folsom*, with reference to similar instructions, "such requests or prayers for instruction * * * are not the proper subjects of exception in cases where a jury is waived, and the issues of fact are submitted to the determination of the court." Furthermore, this request was founded upon a hypothetical state of facts, which may or may not have been established by the testimony. It is impossible for an appellate court, which has no power to review the testimony, to say that an error was committed in the refusal of

the instruction, unless the record shows that a state of facts was found to exist which rendered such an instruction applicable. It may have been that the circuit court found and determined that the evidence did not establish the supposed facts recited in the instruction, and that the case did not require a decision upon the question of law which was presented by the instruction. If that was the view entertained, this court cannot say that an error was committed in refusing the request; for by waiving a jury the trial judge became invested with an exclusive power to ascertain the facts, and we cannot interfere, either directly or indirectly, with his action in that behalf. In all cases where a jury is waived, and the finding is general, the construction that has heretofore been placed on the act of March 3, 1865, will necessarily preclude a party from assigning error on account of the refusal of an instruction which is asked with reference to some supposed phase of the testimony, and is merely calculated to affect or to control the final conclusion of the court as to the party's right to recover. In this respect the practice in the federal court differs, no doubt, from the practice which obtains in many, if not all, of the state courts, but at this day it is a practice which is too well settled by judicial decisions to be disregarded. To obviate the difficulty which is encountered in the present case, and has heretofore been encountered in other cases of a like character, the parties to suits at law pending in the federal courts, which are to be tried without the intervention of a jury, should make a seasonable application to the trial court to find the facts specially. Though the circuit courts of the United States are not bound by the act of March 3, 1865, to make a special finding of the facts when a jury is waived, yet we apprehend that it will rarely happen that a trial judge will refuse to make a special finding, when requested to do so, especially if counsel will take the trouble to prepare and submit such a finding for the inspection and approval of the trial judge. We can conceive of no reason that will be likely to induce trial judges to refuse to sign a special finding when it conforms to their view of the facts. When the facts of a case are found specially, and the finding is duly incorporated into the record by a bill of exceptions, it is made the duty of a federal appellate court, by the act of March 3, 1865, to determine whether the facts found are sufficient to support the judgment; and it will generally happen, we think, that the right to thus determine whether the special finding is adequate to support the judgment will enable an appellate court, where the special finding is properly prepared, to consider and to decide all of those questions of law pertinent to the case which are ordinarily presented, or attempted to be presented, in the form of instructions. The result is that, because the present record fails to disclose any error committed during the course of the trial which this court can review, the judgment of the circuit court must be, and it is hereby, affirmed.

SANBORN, Circuit Judge (dissenting). I am of the opinion that, in an action at law, any ruling of the trial court, during the progress of the trial, which would have been subject to review in this court

if the trial had been before a jury, is reviewable here, in a case in which a jury has been waived, and the court has made a general finding upon the facts, under section 649, Rev. St. Section 649, after providing for a waiver of a jury, declares that:

"The finding of the court upon the facts * * * shall have the same effect as the verdict of a jury."

Section 700 provides that:

"When an issue of fact in any civil cause in the circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal."

In *Clement v. Insurance Co.*, 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882, Judge Blatchford (afterward Mr. Justice Blatchford, of the supreme court), in a careful, exhaustive, and well-considered opinion, said upon this subject:

"The trial is to proceed in all respects as if before a jury, except that there is to be no charge to a jury, and, instead of a verdict by a jury, there is to be a finding by the court on the facts, which finding, if general, is to have the same effect as the general verdict of a jury, and, if special, is to have the same effect as the special verdict of a jury. The rulings of the court in admitting or rejecting evidence are to be made and excepted to as on a trial before a jury. When the evidence is concluded, the respective parties are to propound to the court the propositions of law which they respectively conceive to arise therefrom, as on a trial before a jury, except that a proposition of law, instead of running to the effect that, if the jury find thus and so, the law on such a state of fact is thus and so, will run that, if the court find thus and so, the law on such a state of fact is thus and so. The court must pass on such a proposition of law, when it tries an issue of fact, just as it must pass on a proposition of law, when made at a like stage of the trial, on a trial before a jury. * * * And such ruling, being, within the fourth section of the act of 1865, a ruling of the court, in the cause, in the progress of the trial, and being excepted to at the time, may, under that section, when duly presented by a bill of exceptions, be reviewed by the supreme court upon a writ of error, or upon appeal."

Speaking of a question of law which the counsel in that case desired to obtain a ruling upon, he said:

"Now, the proper and effectual way to raise this point is to have it appear by the record that the defendants requested the court to rule, as matter of law, that if it should find that McCoy had notice in Cincinnati, as early as the 5th of August, 1857, of the loss of the tobacco, and that McCoy was the agent of the plaintiffs to transport the tobacco to New York, and that the plaintiffs had put it into McCoy's custody, to be retained therein at least until it reached Cincinnati, then McCoy was bound to communicate notice of the loss, by telegraph, to the consignees at New York, as soon as he had notice of it himself, and that, if it should find that McCoy did not communicate such notice by telegraph, the plaintiffs could not recover. This would be the mode adopted to raise the point on a trial before a jury, and there is no reason why it should not be adopted on a trial by the court without a jury."

Speaking of the last clause of section 700, Rev. St., he said:

"But there is a further provision in the fourth section of the act of 1865, namely, that 'when the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment.' A losing party in a case can always have the substantial benefit of this provision, without a special finding on the facts, by requesting the court to rule, as matter of law, that unless every one of such and such facts is found by it

to exist, or unless a particular fact is found to exist, his adversary cannot have a general finding in his favor."

In 1869, in *Norris v. Jackson*, 9 Wall. 125, Mr. Justice Miller, in delivering the opinion of the supreme court, said that:

"Whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In case of a general verdict, which includes, or may include, as it generally does, mixed questions of law and fact, it concludes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law."

It may be remarked, in passing, that this is exactly the effect of a verdict of a jury. The verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law, and there seems to me to be nothing in this opinion which holds that the general finding of the court concludes anything more.

In *Dirst v. Morris*, 14 Wall. 484, 490, Mr. Justice Bradley, in delivering the opinion of the supreme court, said:

"This court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of the evidence, and there was no special finding of the facts. Had there been a jury, the defendant might have called upon the court for instructions, and thus raised the questions of law which he deemed material. Or, had the law which authorizes the waiver of a jury allowed the parties to require a special finding of the facts, then the legal questions could have been raised and presented here upon such findings as upon a special verdict. But, as the law stands, if a jury is waived, and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence."

The last sentence quoted is obiter dictum. No request was made in that case for any declaration of law at the close of the evidence.

In 1873, in *Insurance Co. v. Folsom*, 18 Wall. 237, Mr. Justice Clifford, in delivering an opinion of the supreme court in a case where the trial court had been requested, at the close of the evidence, to make certain declarations of law, said, at page 253:

"Requests that the court would adopt certain conclusions of law were also presented by the defendants, in the nature of prayers for instruction, as in cases where the issues of fact are tried by a jury, which were refused by the circuit court, and the defendants also excepted to such refusals. None of these exceptions have respect to the rulings of the court in admitting or rejecting evidence, nor to any other ruling of the circuit court which can properly be denominated a ruling in the progress of the trial, as every one of the refusals excepted to appertain to some request made to affect or control the final conclusion of the court as to the plaintiff's right to recover. Such requests or prayers for instruction, in the opinion of the court, are not the proper subjects of exception in cases where a jury is waived, and the issues of fact are submitted to the determination of the court."

He cites in support of this declaration *Dirst v. Morris*, *supra*, and undoubtedly rests it upon the obiter dictum in that case to which we have referred. At page 250 of the opinion he concludes a general discussion of the rules that should govern the trial of a case by the court without a jury with the declaration that:

"Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial."

In *Cooper v. Omohundro*, 19 Wall. 65, a case in which, at the close of the evidence, the plaintiff requested the circuit court to make certain declarations of law, the supreme court refused to consider the questions presented by these requests; and Mr. Justice Clifford, in delivering the opinion, cited *Insurance Co. v. Folsom*, supra, and said:

"Our decision in that case was, that in a case where issues of fact are submitted to the circuit court, and the finding is general, nothing is open to review by the losing party, under a writ of error, except the rulings of the circuit court in the progress of the trial; and the phrase, 'rulings of the court in progress of the trial,' does not include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general finding."

In *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321,—a case in which no request for any declaration of law was made before the close of the trial,—Mr. Justice Woods, in delivering the opinion of the supreme court, said:

"Upon the issues of fact raised by the pleadings in this case, there was a general finding for the plaintiff. The defendant contends that the evidence submitted to the court did not justify this general finding. But, if the finding depends upon the weighing of conflicting evidence, it was a decision on the facts, the revision of which is forbidden to this court by section 1011. If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented that question by a request for a definite ruling upon that point. * * * The court below having made a general finding, which, by the statute, has the same effect as the verdict of a jury, the plaintiff in error can resort to no other means of redress than those open to it had the case been tried by a jury, and a general verdict rendered." Pages 672 and 674, 112 U. S., and page 321, 5 Sup. Ct.

In 1892, in *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, Mr. Justice Brewer, in delivering the opinion of the supreme court, said, at page 72, 148 U. S., and page 481, 13 Sup. Ct.:

"Sections 648 and 649 of the Revised Statutes, while committing generally the trial of issues of fact to a jury, authorize parties to waive a jury, and submit such trial to the court; adding that 'the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.' But the verdict of a jury settles all questions of fact. As said by Mr. Justice Blatchford in *Lancaster v. Collins*, 115 U. S. 222, 225, 6 Sup. Ct. 33: 'This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered. The finding of the court, to have the same effect, must be equally conclusive, and equally remove from examination in this court the testimony given on the trial. We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury.'"

And at page 78, 148 U. S., and page 481, 13 Sup. Ct., he said:

"But even if we waive all these objections, and take this statement [a statement of the court below] as intended for and equivalent to a special finding of facts, or regard the declaration of law asked by the defendant, that the court declares the law to be that under the evidence the plaintiff is not entitled to recover, as bringing properly before us the question whether there was any evidence to sustain the general finding for the plaintiff, and thus enter into an examination of the testimony, still we see no error in the conclusion of the court based thereon."

In *St. Louis v. W. U. Tel. Co.*, 148 U. S. 92, 96, 13 Sup. Ct. 485, which was decided in 1893, Mr. Justice Brewer said:

"It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law that the plaintiff was entitled to judgment for the sum claimed, which instruction was refused, and exception taken; and this, as was held in *Norris v. Jackson*, 9 Wall. 125, presents a question of law for our consideration."

This is the last expression of the supreme court to which our attention has been called, and it clearly overrules the declaration in *Dirst v. Morris*, that only rulings upon the admission or rejection of evidence can be reviewed. It must be conceded that the authorities on this question are not as clear and uniform as might be desired. The two opinions of Mr. Justice Clifford in *Insurance Co. v. Folsom* and *Cooper v. Omohundro* seem to rest upon the obiter dictum in *Dirst v. Morris*, and lead logically to the conclusion there expressed. Between that conclusion, that rulings upon the admission and rejection of evidence alone may be reviewed, and the conclusion to which I have arrived, that any ruling of the court made during the progress of the trial, and before the finding is filed, is reviewable in the appellate court if it would have been subject to review had the trial been before a jury, there seems to me to be no secure middle ground. If we depart from both these rules, it will be difficult, and I think impossible, to draw the line by any rule so that the courts and the gentlemen of the bar may know what requests for declarations of law are, and what are not, reviewable in this court. For this reason, and because the statute provides that the general finding of the court shall have the same effect as the verdict of a jury, and that the rulings of the court in the progress of the trial of a cause may be reviewed upon a writ of error, and because I think both the earlier and later decisions of the supreme court point to this result, I have been forced to the conclusion that the true test for determining whether or not a ruling of the trial court may be reviewed when a jury has been waived is whether it would have been subject to review if the trial had been by jury. As the statute declares the general finding shall have the same effect as the verdict of a jury, I think it ought not to be given any greater or other effect. *Trust Co. v. Wood*, 8 C. C. A. 658, 60 Fed. 346, 348; *Clement v. Insurance Co.*, supra; *St. Louis v. W. U. Tel. Co.*, supra. Tested by this rule, the application of the plaintiff for a declaration of law, "that upon the whole case the finding of the court should be for the plaintiff for the amount of the warrants sued on, without deduction of any kind," presented the question whether or not, if all the evidence adduced by the defendant was admitted to be true, the plaintiff was entitled to a judgment for the amount he claimed. This application had the same effect that a request to the court to instruct the jury peremptorily to find for the plaintiff for the amount of the warrants would have had, if the trial had been before a jury. Nor does it appear to me that there is any greater difficulty in reviewing and deciding this question in a case tried before the court than there would have been if the trial had been by jury. There is in this record a bill of exceptions which declares that it contains all the evidence. It is not necessary to pass upon the weight or suffi-

ciency of the evidence to determine this question of law. It is to be decided like the question which arises upon a request for a peremptory instruction to the jury, on the concession that the evidence for the defendant must prevail on all disputed material issues. Indeed, this application is, both in form and in substance, substantially the same as that which Mr. Justice Brewer declared in *St. Louis v. W. U. Tel. Co.*, *supra*, properly presented a question for the consideration of the supreme court. Nor can I persuade myself that this court ought to escape from reviewing the questions presented by the other declarations made and refused by the court on the ground that there may have been no evidence in the case to which they were applicable. All the evidence is before us, in this bill of exceptions. If there was any evidence tending to show the state of facts set forth in these declarations, the respective parties to this action were entitled to have them given, if they were the law; and I see no reason why it is not as much the duty of this court to inspect the record, and see whether or not there was any such evidence, as it would have been if the trial had been by jury. A cursory inspection of the record discloses evidence tending to show the facts set forth in these various requests, and I have been forced to the conclusion that the questions of law they present should have been reviewed by this court.

CAMFIELD et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1895.)

No. 517.

INCLOSURE OF PUBLIC LAND—ACT OF FEBRUARY 25, 1885.

The act of February 25, 1885, to prevent unlawful occupancy of the public land (23 Stat. c. 149), provides that all inclosures of public lands, to any of which lands the person making the inclosure had no bona fide claim or title at the time the inclosure was made, are unlawful. Defendant had acquired from the owners the right to use all the odd-numbered sections in two certain townships, and outside thereof, immediately adjoining the even-numbered sections lying within and on the margin of such townships, and erected on said odd-numbered sections a fence which inclosed the whole of such two townships, the even-numbered sections of which were government land. *Held*, that such inclosure was unlawful, although defendant had made gates at the section lines to give access to the government land, and without regard to any public advantages alleged to result from defendant's act. 59 Fed. 562, affirmed.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a suit by the United States against Daniel A. Camfield and William Drury, under the act of February 25, 1885 (23 Stat. c. 149), to compel the removal of an inclosure of public land. The circuit court entered a decree for the complainant, after sustaining exceptions to the answer as insufficient. 59 Fed. 562. Defendants appeal.

This was a bill filed by the United States against Daniel A. Camfield and William Drury, the appellants, in the circuit court of the United States for

the district of Colorado, under the provisions of an act of congress approved on February 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands." 23 Stat. 321, c. 149. The first section of said act is as follows: "That all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected or constructed by any person, party, association or corporation, to any of which land included within the inclosure, the person, party, association or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited." By section 2 of said act it is made the duty of the district attorney of the United States for the proper district, when complaint is made to him by affidavit by any citizen of the United States, that section 1 of the act is being violated, to institute a civil suit, in the name of the United States, in the proper United States district or circuit court, against the person or persons charged with making the unlawful inclosure complained of. By said section, jurisdiction is also conferred upon any United States district or circuit court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of the act. It is also made the duty of said courts, in case any inclosure shall be found to be unlawful, to make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the parties complained of within five days after they are ordered to do so.

The bill in the present case charged, in substance, that the defendants, Daniel A. Camfield and William Drury, with intent to encroach and intrude upon the lands of the United States in an illegal manner, and to monopolize the use of the same for their own special benefit, did, on or about the 1st of January, 1893, build, construct, erect and maintain a fence which inclosed and included about 20,000 acres of the public domain of the United States, and that the effect of such inclosure was to exclude the United States and all other persons, except the defendants, therefrom; that the lands thus wrongfully inclosed consisted of all of the even-numbered sections in townships numbers 7 and 8 north of range 63 west of the sixth principal meridian. The bill of complaint further averred that said townships 7 and 8 lie within the limits of the grant made by the government to the Union Pacific Railroad Company; that the defendants had acquired from said railroad company the right to use all the odd-numbered sections of land which lie within said townships 7 and 8 and outside thereof immediately adjacent to the even-numbered sections lying within and on the margin of said townships, and that in building the fence complained of the defendants had constructed it entirely on odd-numbered sections either within or without townships 7 and 8 so as to completely inclose all of the government lands aforesaid, but without locating the fence on any part of the public domain so inclosed. The subjoined diagram of one township will serve to illustrate the manner in which the fence was constructed so as to inclose the even-numbered sections. The fence is indicated by the dotted lines.

The defendants admitted by their answer that they had constructed a fence so as to inclose all of the even-numbered sections in townships 7 and 8, substantially as set out above in the plaintiff's complaint, save and except that at each section line a swinging gate had been placed, to afford access to so much of the public domain as was inclosed by the aforesaid fence. By their answer the defendants sought to justify the erection of the fence in question on the ground that they owned all the odd-numbered sections in townships 7 and 8, and that they were engaged in building large reservoirs for

Diagram.

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

the purpose of irrigating the land by them owned, and much other land in that vicinity. They averred that in carrying out such irrigation scheme they found it necessary to fence their lands in townships 7 and 8 in the manner above described. They also denied that they had any intention of monopolizing the even-numbered sections inclosed by said fence, or to exclude the public therefrom. They further averred, in substance, that the work in which they were engaged was of great importance and utility, and would redound to the great advantage of the United States and its citizens. The answer was excepted to on the ground that it was insufficient to constitute a defense to the bill. This exception was sustained, and as the defendants declined to plead further a decree was entered in favor of the government, from which decree the defendants have appealed.

James W. McCreery (A. C. Patton, H. E. Churchill, and C. W. Bates, on the brief), for appellants.

Henry V. Johnson, U. S. Atty.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Section 1 of the act of February 25, 1885, *supra*, declared, in effect, that it should thereafter be deemed unlawful for any person, association, or corporation to make or maintain an inclosure which embraced within its limits any public land of the United States,

to which the person making or maintaining the inclosure had no claim or color of title, and to which he asserted no right under a claim made in good faith, with a view to the entry thereof at the proper land office under the general laws of the United States. The statute in question is general in its terms, and it contains no exceptions. It was within the power of congress to enact such a law; and, having enacted it, it is not within the province of the judiciary to inquire or to decide whether the measure was politic or impolitic, wise or unwise. The answer filed by the defendants admitted, in substance, that the defendants had caused an inclosure to be made which embraced within its limits more than 20,000 acres of the public domain. This admission brought them within the inhibitions of the law. It matters not what their intent may have been in making the inclosure. The courts charged with the enforcement of the law cannot say that the construction of a dam for purposes of irrigation is a work of such great utility and importance that, in the execution of the same, the plain mandate of the statute may be disregarded. In support of their contention that the answer disclosed a good defense to the bill, we have been referred by counsel for the appellants to the case of *U. S. v. Douglas-Willan Sartoris Co.*, 3 Wyo. 288, 22 Pac. 92; but we cannot concur in the views expressed by the majority of the court in that case. We think that the defendants admitted that they had been guilty of a violation of the act of February 25, 1885, and that the facts pleaded by way of excuse do not amount to a justification of the unlawful act in question. The decree of the circuit court of the United States for the district of Colorado is therefore affirmed.

BENSIEK et al. v. THOMAS et al.

(Circuit Court of Appeals, Eighth Circuit. February 11, 1895.)

No. 450.

1. CORPORATIONS—VALIDITY OF CONTRACTS WITH OFFICERS.

The S. Co. was in urgent need of funds to complete certain smelting works, which were necessary in order that it might commence business, but was without money or credit. In these circumstances, the board of directors authorized the president to negotiate a loan of \$18,000, secured by a mortgage of the company's real estate. The day after such authority was given, the president informed the board that he had negotiated a loan of \$18,000 at 20 per cent. commission, to be secured by mortgage of the company's property, and this proposition was accepted by the board. The mortgage was executed, and the money, amounting to \$14,400, was paid to the company, and used by it, with the knowledge of the stockholders, in paying off mechanics' liens, and completing and setting in operation the smelting works. The loan was in truth made by the president and another director, but this fact was not communicated to the board of directors. *Held*, that the action of the president and director in negotiating with themselves for a loan to the company, and exacting a commission of 20 per cent. without informing the board of directors that they were the interested parties, was a breach of their duty as officers of the corporation, and the transaction might have been rescinded by the corporation, upon refunding the money received by it.

2. SAME—ULTRA VIRES—ESTOPPEL.

At the time when the board of directors voted to obtain the loan, and when the mortgage was given, a by-law of the corporation was in force, requiring the action of two-thirds of the stockholders to authorize the incurring of a debt in excess of funds in the treasury, and prohibiting the incurring of debts in excess of 75 per cent. of the value of unsold stock in the treasury. *Held* that, though the loan was obtained in violation of the by-law, the corporation, having received and used the money, with the knowledge of the stockholders, was estopped to deny the authority of the directors to borrow it, and was liable for the amount actually received, with interest.

3. SAME.

When an act done by a private corporation is not per se illegal nor *malum prohibitum*, but is simply ultra vires, and is not a matter of public concern, but merely affects the interests of the stockholders, the latter may so act as to deprive themselves of the right to challenge its validity.

Appeal from the Circuit Court of the United States for the District of Colorado.

George W. Lubke (Hugo Muench, on the brief), for appellants.
R. H. Gilmore, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case comes before us on appeal from a decree of the circuit court of the United States for the district of Colorado, canceling the lien of a mortgage on certain property belonging to the St. Louis-Colorado Smelting & Mining Company, which is situated in Pitkin county, Colo. The bill of complaint on which the decree in question was obtained was filed by the appellees James M. Thomas, Miriam A. Thomas, and Flora L. Bannerman, who were stockholders of the St. Louis-Colorado Smelting & Mining Company, against the appellants, John C. Bensiek, Leonard C. Wenzel, Martin V. Medart, and Walter L. Graydon, who were acting at the time as directors of the company, and against Edward C. Boehmer, its assistant secretary. The corporation, which, for brevity, will be hereafter spoken of as the "smelting company," was at first made a defendant to the bill; but at a later date, and before the trial, it was substituted as a party complainant. The bill thus filed charged generally that the several defendants above named had entered into a conspiracy to wrong and injure the corporation and the majority of its shareholders; that they had concocted a scheme to obtain the full control and management of the company's smelting works, mines, buildings, and water power in the state of Colorado, with a view of so managing the same as to secure to themselves, as individuals, the title to all of the company's property, and to thereby cheat and defraud the corporation and a large number of its stockholders. The bill described at considerable length the various steps that had been taken by the defendants to carry out the alleged fraudulent scheme; and, among other things, it averred that they had unlawfully caused two deeds of trust, in the nature of mortgages, to be placed upon the company's property in Colorado, and that after the execution

of such mortgages the defendants, as directors, had done everything within their power to diminish the earnings of the company, and to depreciate the value of its property, for the purpose of preventing the shareholders from paying said mortgages, and with a view of acquiring all of the corporate property at a foreclosure sale thereunder. One of these mortgages was executed on the 10th day of June, 1891, by John C. Bensiek, as president of the smelting company, and by Leonard C. Wenzel, as its secretary, to secure a note of the company in the sum of \$18,000, which was dated June 10, 1891, and was made payable one year after date. The other mortgage was executed by the same officers on October 22, 1891, to secure the company's note of that date for \$10,000, which was made payable on June 10, 1892. On the final hearing of the case the circuit court affirmed and upheld the validity of the last-mentioned mortgage, in the sum of \$10,000; but it found and decided that the first of the above-described mortgages, in the sum of \$18,000, was not a valid lien on the company's property. It accordingly decreed that "the defendants * * * be * * * enjoined, barred, and estopped from advertising or selling, or attempting to sell, the said premises, or any part thereof, for the purpose of paying the said \$18,000 note"; that said mortgage in the sum of \$18,000 be "canceled and discharged of record, * * * but without prejudice * * * to any right of the owners and holders of said note of \$18,000 to demand payment and collect the same by any lawful proceeding, as they may be advised, except by recourse to said deed of trust hereinbefore mentioned." This was the substance of the relief granted by the circuit court. As to all other matters and things alleged in the complaint, the court found adversely to the complainants, and dismissed their bill. From the decree aforesaid both parties at the time prayed an appeal, which was allowed; but as the complainants below failed to prosecute their appeal, either by filing an assignment of errors or by giving bond, this court cannot review the action of the circuit court, in so far as it was adverse to the complainants, in refusing to grant them all of the relief prayed for. *The Stephen Morgan*, 94 U. S. 599; *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 527; rule 11 of this court (11 C. C. A. cii.¹). The chief question, therefore, which we have to consider on this appeal, is whether the circuit court erred in canceling the mortgage of June 10, 1891, which was given to secure the smelting company's note for \$18,000, and in refusing to allow the holders of that note a lien upon the company's property for any portion of that sum. The consideration of this question involves a statement, somewhat in detail, of the circumstances under which the mortgage in question was executed.

It appears from the testimony that the smelting company was formed in July, 1889, under the laws of the state of Illinois, for the purpose of engaging in the business of mining and smelting ores in the state of Colorado. It was organized with a large nominal capital, but with very little actual capital. The few individuals—

some six or seven in number—who originally acted as promoters of the corporation each subscribed and paid for 1 share of its capital stock, the shares being of the par value of \$10 each. The residue of the capital stock, 299,994 shares, was issued to James M. Thomas, one of the appellees, in exchange for certain unimproved mining property in the state of Colorado, which the company, it seems, agreed to purchase from him at a valuation of \$2,999,930. On the same day that the bulk of the capital stock was thus issued to Thomas, he reassigned 200,000 shares thereof to a trustee of the company, to be sold from time to time, as the board of directors might order, for the purpose of raising a working capital for the corporation. With the proceeds of the stock so held in trust, and termed "treasury stock," land was subsequently acquired by the company in Pitkin and Eagle counties, Colo., whereon to erect smelting works, and a contract was made with said James M. Thomas to erect the smelting works for the sum of \$23,000. This sum was paid to him, he agreeing, for that price, to complete the works, and to deliver them to the company free of mechanics' liens. The purchase of these lands, the payment thus made to Thomas, and some other expenses of the company, appear to have practically exhausted its resources. Thomas failed to complete the works pursuant to his agreement with the company, and on or about June 1, 1891, he announced his inability to further proceed with the work unless additional funds were provided by the company. He admits that he reported to the board of directors about the 1st of June, 1891, that it would be necessary, in his judgment, to raise \$20,000 to pay off existing mechanics' liens upon the unfinished smelting works, and to complete the same, and to provide the requisite means to put them in successful operation. At that time the company was destitute of money or credit. Its only resource consisted of some 68,000 shares of treasury stock that remained unsold, but it was unsalable in any market, and could not be utilized as a security for borrowing money. Such, in brief, were the conditions that existed when the mortgage of June 10, 1891, was executed. The minutes of the proceedings of the board of directors of the smelting company show that at a meeting of the board held on June 9, 1891, the following resolution was adopted:

"Moved, that the president be authorized to negotiate a loan of eighteen thousand dollars, giving deed of trust upon the company's property in Colorado as security for same; the money so obtained to be used in paying debts of the company, and to pay expenses of operating smelter."

The minutes also show that at a meeting of the board held on the succeeding day, June 10, 1891, the following action was taken:

"The president reported that he had made a loan of eighteen thousand dollars at a commission of twenty per cent., commission being deducted at once, and giving deed of trust on company's property in Colorado, as per previous resolution of the board. Moved by W. L. Graydon, and seconded by D. P. Kane, that the action of the president be approved. Carried."

There is some controversy as to whether the board of directors of the smelting company, at a lawful meeting of that body, ever authorized the execution of a deed of trust in the manner indicated

by the aforesaid resolution of June 9, 1891, and as to whether the loan was reported to the directors, and approved at a lawful meeting of that body held on June 10, 1891. One member of the board, and perhaps two, who are represented as having been present at these meetings, testified very positively that no meeting of the board was held either on June 9 or 10, 1891, and that no resolution was passed, at any meeting of the board, authorizing the execution of a deed of trust on the company's property to secure a note for \$18,000, or any other sum, and that no report was ever made by the president to the board of directors that such a loan had been consummated, or that such an incumbrance was to be executed. On the other hand, three members of the board, besides the secretary who kept the minutes of these meetings, are equally positive that the meetings were duly held as represented, and that the foregoing extracts from the record book of the corporation correctly report the action taken by the directors at such meetings. We have given careful attention to all of the evidence bearing upon this issue of fact, and, without entering into a critical review of the same, it will suffice to say that, in view of all the testimony, we feel satisfied that the meetings in question were lawfully held on the days above indicated, and that the minutes of the proceedings were kept with substantial accuracy. We believe that the board did in fact authorize President Bensiek to negotiate a loan for \$18,000, and to secure the same by executing a deed of trust in the nature of a mortgage on the company's Colorado property; that the president reported to the board that the loan had been secured, and the amount of the commission that had been charged for the same; and that his action in that behalf was approved in the manner above shown. It must be presumed that the record book of the corporation, which purports to show the action taken by its board of directors, was properly kept, and that it speaks the truth. The burden of proof rests upon those who seek to impeach the record, and in this instance we are constrained to hold that the evidence offered by the appellees was insufficient to overcome the foregoing presumptions. We find, however, and that fact does not seem to be denied, that no report was made to the board as to the source from which the money had been derived. The president of the company, Mr. Bensiek, says, in substance, that as the company was badly in need of funds, and compelled to borrow them at any cost, he did not suppose it to be at all material where the money was obtained, and that he did not report the fact to the company that it had been advanced by himself and Wenzel. It is highly probable, we think, that the directors supposed that the president of the company had pledged his personal credit to obtain the loan, as they well knew that the company was destitute of credit to borrow so large a sum as \$18,000. At the same time, it is doubtless true that the directors were ignorant of the fact until some time either in the month of November or December, 1891, that two of their own number, John C. Bensiek and Adam Wenzel, had advanced the greater part of the money to purchase the company's note and deed of trust. The validity of the incumbrance of June 10,

1891, which was executed under the circumstances aforesaid, and was purchased by two of the directors, Bensiek and Wenzel, is challenged by the appellees on two principal grounds. In the first place, it is said that the authority conferred by the resolution of June 9, 1891, to negotiate a loan in behalf of the company did not authorize the president of the company to negotiate with himself to advance the money, or to negotiate in that behalf with himself and his codirector, Wenzel. For this reason it is urged that the deed of trust is void. In the second place, it is contended that by reason of a by-law of the corporation the directors had no power to authorize the execution of the deed of trust. The by-law referred to is as follows:

"No debt or liability shall be contracted or incurred for the company, except by order of the board of directors. But, whenever it shall be deemed advisable to contract debts in excess of the funds actually in the treasury, the same shall first be authorized by a vote of two-thirds of all the stock, at any general stockholders' meeting, or special meeting called for the purpose: provided, that in no case shall such debts exceed seventy-five per cent. of the value of the stock remaining unsold in the treasury, and such stock shall stand pledged for such debt."

It will be more convenient to consider the last of these objections first. Referring, then, to the by-law, it will be observed that it does not restrict the power of the directors in the matter of giving security for borrowed money, whether such security consists of a mortgage or other security. It merely prohibits the directors from contracting an indebtedness to an amount exceeding 75 per cent. of the value of the stock remaining unsold in the treasury. The smelting company is an Illinois corporation, and under the laws of that state the power to mortgage property as security for an indebtedness, when not expressly denied to a corporation, is regarded as existing as an incident to its power to acquire and hold real estate; and such power, under the laws of that state, may be exercised by the directors or other governing body, unless it is expressly withheld by the charter or by-laws. *Horticultural Society v. Paddock*, 80 Ill. 263. The only effect of the by-law, therefore, is to restrict the power of the directors in the matter of contracting an indebtedness. To the extent that the directors could contract a debt, and bind the corporation to pay the same, they could undoubtedly pledge the corporate property, by a deed of trust or otherwise, as a security for its payment. The point to be considered, therefore, is whether the money advanced by Bensiek and Wenzel was advanced under such circumstances that the company is bound to repay it. If it was so advanced, then, notwithstanding the objection based on the by-law, the deed of trust is a valid security for whatever sum is recoverable from the corporation.

We think it clear that, upon the state of facts disclosed by the record, the amount of money actually advanced by Bensiek and Wenzel on the security of the smelting company's note and deed of trust is recoverable from the company; and this without reference to the question whether the sum of \$18,000 authorized to be borrowed by the directors was or was not in excess of 75 per cent. of the value of unsold stock in the company's treasury. The com-

pany actually received from Bensiek and Wenzel the sum of \$14,400, and expended the same in paying its outstanding indebtedness which existed when the loan was authorized, and in completing its smelting plant which Thomas, one of the appellees, had left in an unfinished condition, and was unable to complete. The evidence contained in the record leaves no room for doubt, and the fact is not seriously denied by the appellees, that during the months of June and July, 1891, there was paid into the hands of the assistant treasurer of the company, by Bensiek and Wenzel, the sum of \$14,400, and that this sum was used by the company to liquidate its debts, to complete its smelting plant, and to put the same in operation. Of this amount, the sum of \$10,000 appears to have been used in discharging attachment and mechanics' liens against the company's property. Furthermore, all of the shareholders of the company who took an active interest in its affairs appear to have known that these lien claims were being paid with money that had been borrowed from some one by authority of the board of directors. Under these circumstances, it is clear, we think, that the smelting company is not in a position to plead "want of authority" on the part of its board of directors to borrow the money in question, as a defense to a suit by the lenders to recover it. When an act done by a private corporation is not per se illegal, or *malum prohibitum*, but is simply *ultra vires*, and is not a matter of public concern, but merely affects the interests of the stockholders, the latter may so act as to deprive themselves of the right to challenge its validity. Thus, in the case of *Kent v. Mining Co.*, 78 N. Y. 159, a corporation had issued preferred stock to certain of its shareholders in lieu of common stock theretofore held. Although the issuance of such preferred stock was unauthorized, being in violation of a by-law of the company, yet it was held that holders of common stock who were acquainted with the issue of such preferred stock, and had suffered it to be issued and sold on the market without taking any steps to arrest the proceeding, were estopped from maintaining an action against the corporation to have the same canceled. In the case of the *Sheldon Hat-Blocking Co. v. Eickemeyer Hat-Blocking Machine Co.*, 90 N. Y. 607, the trustees of a manufacturing company had assigned and transferred all of the property of the company in settlement of a judgment against it. All of the stockholders had knowledge of the assignment of the corporate property at or about the time it was made. It was held that although the trustees had acted without authority in making the assignment, yet as the shareholders had taken no action to arrest the transfer, and as the act was simply *ultra vires*, they were estopped from maintaining a suit to set the assignment aside. In the case of *Plank-Road Co. v. Murray*, 15 Ill. 336, the facts were that the directors of the company had borrowed money without authority, and had given a mortgage upon the company's property to secure it. It was held that, inasmuch as the company had received the money, and used it, it was estopped from questioning the authority of the officers who had made the loan. Also, in *Troup's Case*, 29 Beav. 353, 357, it was decided by the master of

the rolls that, when the directors of a company have no power to borrow money, a person lending money to the company cannot enforce payment of it against the company, unless it has been bona fide applied to the purposes of the company, but that, if so applied, a recovery against the company may be had. We conclude, therefore, that because the smelting company received the money that was advanced by Bensiek and Wenzel under the authority conferred by the directors to negotiate a loan, and appropriated the same to the payment of its debts and to the completion of its smelting works, the money so advanced is recoverable from the company, and that the by-law above quoted does not preclude such a recovery, or impair the validity of the deed of trust as a security for the sum of money actually advanced. A corporation should not be permitted to allege want of authority on the part of its directors to borrow money, when it has received a sum of money actually borrowed, and has used it to pay its debts, with full knowledge of the fact on the part of all of its directors, and many of its shareholders. A corporation, as well as an individual, is at least bound to act honestly; and it should not be allowed to say that an act done by its officers was unauthorized, when it has accepted the benefits accruing therefrom, and does not offer to restore what it has received.

It remains for us to determine whether the objection to the deed of trust first above mentioned is well founded; that is to say, whether Bensiek's failure to report to the directors that he and Wenzel were the persons who proposed to take the loan for \$18,000 renders the deed of trust voidable and unenforceable in their hands. This objection is entitled to more weight than the one last considered. It is elementary law that an agent authorized to act for a principal in a given negotiation cannot deal with himself. He cannot, when authorized to buy property or borrow money, sell his own property, or loan his own funds, without communicating the fact to his principal. An agent cannot unite his personal and representative characters in the same transaction. This doctrine applies to all persons who occupy a fiduciary relation, and it is especially applicable to the officers of a corporation, when acting for and in behalf of the company. They cannot use their official position to benefit themselves individually. In short, an officer of a corporation is not qualified to act for his company in any transaction wherein the corporation is dealing with the officer. There are many cases, as might be expected, in which this wholesome doctrine has been enforced, from among which the following authorities may be selected as an example: *Mallory v. Wheeler Co.*, 61 Conn. 131, 23 Atl. 708; *Davis v. Mining Co.*, 55 Cal. 359; *Railway Co. v. Poor*, 59 Me. 277; *Ogden v. Murray*, 39 N. Y. 202; *Smith v. Association*, 78 Cal. 289, 20 Pac. 677; *Koehler v. Iron Co.*, 2 Black, 715, 721; *Claffin v. Bank*, 25 N. Y. 293. It must be conceded, therefore, that when the smelting company discovered that two of its own officers had taken the loan of \$18,000, secured by a deed of trust on its property, and had received a commission of 20 per cent. on the amount of the loan, it had the right to treat that

transaction as voidable, and to rescind the agreement to borrow the money on such terms, if it thought proper to do so. It is undoubtedly true, we think, that, when the money in question was advanced by Bensiek and Wenzel, it could not have been obtained from any other source on the security that the company had to offer, and that, if these directors had not come to the rescue of the company, it would have failed to procure the necessary funds either to pay its existing debts or to complete its smelting works. The evidence does not warrant the inference that either of these directors intended to defraud the company in the transaction, or to gain any advantage over the remaining shareholders. It is most probable, we think, that their motive in advancing the money to the company, in which they had at the time a large interest, was to help it out of its financial difficulties, and that the large commission charged for the loan was due to the precarious character of the security on which the loan was made. But these concessions cannot be accepted as a sufficient excuse for the failure of these directors to report to the board that they had themselves decided to advance the money to the company for a commission of 20 per cent., and that the deed of trust was to be executed for their benefit. The board was entitled to this information before it acted upon the proposed loan. Besides, it was the duty of both of the directors who proposed to furnish the money to disclose the source from which it was derived, before the board was asked to accept the proposal. We conclude, therefore, that, when the company discovered that the money had been advanced by two of the directors, it was entitled to repudiate the agreement to pay a commission of 20 per cent. for the loan, and that it was also entitled to have the deed of trust canceled and discharged, on refunding to the lenders the amount of money that it had actually received, and that had been expended for the company's benefit. Notwithstanding the fact that the transaction between these directors and the company was voidable on the ground heretofore stated, it would be highly unjust and inequitable to annul the deed of trust without requiring the smelting company, as a condition precedent to such relief, to restore what it has received on the strength of that security. A suitor who seeks equity in a court of chancery must do equity. This is a rule of universal application which may well be applied in the present case to accomplish the ends of justice. *Sturgis v. Champneys*, 5 Mylne & C. 97, 101; *Comstock v. Johnson*, 46 N. Y. 615; *Pom. Eq. Jur.* (2d Ed.) §§ 385, 386. A court of equity cannot overlook the fact that some nine or ten thousand dollars of the money advanced on the security of the deed of trust was expended by the company in paying claims that were liens on its property, and that the balance was consumed in completing its smelting works, and thereby enhancing the value of its property. To the extent that the money advanced by Bensiek and Wenzel was used in discharging existing liens upon the company's property, they would undoubtedly have been entitled to a decree subrogating them to the rights of the lien claimants whose debts they had paid, if they had filed a cross bill demanding such

relief. But, be this as it may, we are persuaded that the circumstances under which the money in question was advanced did not warrant an unconditional decree canceling the deed of trust of June 10, 1891, and relegating the appellant Bensiek to the position of an unsecured creditor. That portion of the decree, therefore, which canceled and discharged said deed of trust, and perpetually enjoined the appellants from causing a sale to be made thereunder, does not meet with our approval, and must be reversed. In lieu of that provision of the decree, the circuit court should enter a modified order, adjudging that said deed of trust be canceled and discharged of record, and that the defendants be enjoined from enforcing the same, by a sale or otherwise, provided, the complainants below shall, within 60 days from the entry of the modified decree, pay into the registry of the circuit court, for the benefit of the defendants, John C. Bensiek and Adam Wenzel, the owners of said deed of trust, the sum of \$14,400, together with interest thereon at the rate of 6 per cent. per annum, from August 1, 1891, until such payment shall be made, and that, in case said complainants fail to pay into court said sum of money and interest within the time limited aforesaid, the defendant John C. Bensiek and Adam Wenzel, the owners of said deed of trust, be thereafter at liberty to proceed with the enforcement of said deed of trust for the amount of money actually advanced thereon, and no more, to wit, for the sum of \$14,400, and interest at the rate of 6 per cent. per annum from August 1, 1891, in such mode and manner as they may see fit to pursue. We are furthermore of the opinion that so much of the decree of the circuit court as assessed all of the costs of the litigation against the appellants should also be reversed, and that the costs in the circuit court should be divided, each party to the suit paying the costs by it occasioned and incurred. The decree of the circuit court is accordingly reversed in the respects above indicated, and the cause is remanded to the circuit court for further proceedings therein in accordance with the directions heretofore given.

METHVEN et al. v. STATEN ISLAND LIGHT, HEAT & POWER CO.

In re ROEBLING.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

ASSIGNMENT OF CHOSES IN ACTION—PRIORITIES—NOTICE TO DEBTOR.

Where two assignments of a chose in action, for valuable consideration, are made to different persons, the assignee who first gives notice of his claim to the debtor has the prior right, though the assignment to him is later in date than that to the other assignee.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from so much of a final decree in this cause as adjudges the lien of the Atlantic Trust Company upon a fund in the custody of the court, part of the assets of the Staten Island Light, Heat & Power Company, a prior lien to that of Anton G. Methfessel. The suit is a creditor's suit, in which a receiver of all the property of the Staten Island Light, Heat & Power

Company was appointed, January 11, 1893. The fund consists of moneys earned by that company by furnishing light to the village of Port Richmond, pursuant to a contract between the company and the village, of the date of December 12, 1889. After the suit was brought, the receiver collected the earnings from the village. Methfessel and the Atlantic Trust Company intervened in the cause, each claiming priority by virtue of their respective liens upon the fund.

Samuel M. Hitchcock, for appellant Methfessel.

Sullivan & Cromwell (Edward B. Hill, of counsel), for Atlantic Trust Co., respondent.

Before BROWN, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The single question is whether the Atlantic Trust Company or Methfessel acquired the first lien upon the fund in controversy. The only facts in the record which it is necessary to refer to are these: The lighting company, February 8, 1890, executed a deed of trust, by which, among other things, it assigned all the moneys to become due and payable from the village under the contract to the trust company. September 12, 1892, the lighting company, by an instrument in writing, assigned to Methfessel all its interest in the contract to the extent of \$2,000, as collateral security for a loan of that amount, made at the time by Methfessel to the light company. At the same time the lighting company delivered to Methfessel the original contract. Methfessel was not informed of the prior assignment to the trust company. About January 1, 1893, Methfessel notified the board of trustees of the village of the assignment to him. Shortly thereafter he attended a meeting of the board, exhibited to them his assignment and the original contract, and notified them of his claim to the earnings which had then accrued. The board promised to protect his claim. So far as appears by the record, no notice was ever given by the trust company to the board of trustees or other authorities of the village of its assignment from the light company.

The question which of different assignees of a chose in action by express assignment from the same person—the one whose assignment is prior in time, or the one who first gives notice to the debtor—will have the prior right, is one in respect to which there is much conflict of authority. See Story, Eq. Jur. (13th Ed.) § 1047; Pom. Eq. Jur. § 693. The authorities are collected in the notes of these commentators, and it will not be useful to recapitulate them. In England, since the cases of *Dearle v. Hall*, 3 Russ. 1, and *Loweridge v. Cooper*, Id. 30, it has been the settled doctrine that the assignee who first gives notice to the debtor obtains priority. This is in obedience to the general principle which requires that all transfers of property must be rendered as complete as the nature of the action will permit, in order to make them valid as against subsequent bona fide purchasers for valuable consideration without notice. Many of the adjudications in this country adopt that doctrine. On the other hand, the courts of this

state, as well as of many other states, hold otherwise, and pronounce in favor of the priority of the assignee who is prior in point of time, whether he has given notice to the debtor or not. It is said by Mr. Bispham:

"The rule that, in order to protect the title of an equitable assignee as against a subsequent assignee, notice of the assignment should be given, is one that is based upon sound principle, and would seem, for many obvious reasons, to commend itself for adoption." Bisp. Eq. § 169.

As we understand the judgments of the supreme court of the United States in *Judson v. Corcoran*, 17 How. 612, and *Spain v. Hamilton's Adm'r*, 1 Wall. 604, they approve the doctrine of *Dearle v. Hall* and *Loveridge v. Cooper*. These cases are cited, and impliedly followed, by the supreme court in each opinion. In *Judson v. Corcoran* the court said:

"It is certainly true, as a general rule, as above stated, that a purchaser of a chose in action or of an equitable title must abide by the case of the person from whom he buys, and will only be entitled to the remedies of the seller. Yet there may be cases in which a purchaser, by sustaining the character of a bona fide assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser who alone had made inquiry, and given notice to the debtor or to a trustee holding the fund (as in this instance), would be preferred over the prior purchaser who neglected to give notice of his assignment, and warn others not to buy."

In *Loveridge v. Cooper*, the court used this language:

"But in order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment of the assignee before such notice."

Whatever view we might otherwise be disposed to take of the question, we are concluded by the authority of these judgments. As the question is one of general jurisprudence, this court is not controlled by the decisions of the highest court of the state, but is to give to them such weight and consideration as their high authority deserve.

The assignment to Methfessel was of part only of the debt due from the village of Port Richmond, and, within the case of *Mandeville v. Welch*, 5 Wheat. 277, and some others which might be cited, might not have been obligatory upon the village, had not the board of trustees consented to recognize it, and protect him. Under the circumstances, the partial assignment was fully operative. *Ex parte Alderson*, 1 Madd. 53; *Yeates v. Groves*, 1 Ves. Jr. 280; *Lett v. Morris*, 4 Sim. 607; *Bourne v. Cabot*, 3 Metc. (Mass.) 305. For these reasons the decree of the circuit court is reversed.

KANSAS CITY, FT. S. & M. R. CO. v. COOK.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 209.

1. RAILROAD COMPANIES—DUTY TOWARD TRESPASSERS—NEGLIGENCE.

The K. Ry. Co. had yards for making up and switching trains, on both sides of the M. river, between which trains were carried on steam ferry-

boats operated by the railway company, and on which no persons except passengers on the railway trains were permitted to travel. C., for purposes of curiosity only, and having been told by friends that he could cross the river without charge on the railway company's boats, crossed the river, and, having seen what he wanted to see, boarded another boat to return. Being discovered by an officer of the boat before it started. C. was told that he could not cross on the boat, and must leave it and the company's premises. The only way to get off the premises was by crossing the railway yard. This course was pointed out by the officer of the boat to C., in reply to his inquiry, and he set out to cross the yard, which was filled with tracks and switches. While doing so, he was struck by an engine and injured. There was a conflict of evidence as to whether a bell was rung on the engine, but it appeared that, after C. was discovered, nothing could have been done to avert the accident. *Held* that, C. being a trespasser, the railway company owed him no duty, except to refrain from wanton or reckless injury to him, and was not responsible for the injury suffered.

2. SAME—CONTRIBUTORY NEGLIGENCE.

C., after leaving the boat, walked for some distance along a track, without looking behind him to see if a train or engine were approaching him from his rear. *Held*, that under the circumstances of the place, where cars and engines were obviously likely to be moving in either direction at any time, such omission was, in itself, contributory negligence on C.'s part.

In Error to the Circuit Court of the United States for the Western Division of the Western District of Tennessee.

This writ of error was sued out by the Kansas City, Ft. Scott & Memphis Railroad Company, against which company the appellee, Jesse H. Cook, recovered a judgment for damages sustained by being run over by a locomotive engine while running backward in its private switching yards in the village of West Memphis, state of Arkansas. The suit was begun in a state court at Memphis, Tenn., from which the railway company, as a nonresident corporation, removed the suit to the circuit court of the United States for the Western division of the Western district of Tennessee. West Memphis is a small village, of from two to three hundred inhabitants, and is immediately on the west bank of the Mississippi river and opposite the city of Memphis. The cars of the appellant company coming from the west and northwest are transferred by a railway ferry from West Memphis to the east bank of the river. On both banks of the river were inclined railway tracks, by means of which its trains were loaded on or discharged from the steam ferry. These inclined tracks connected with switching yards on both sides of the river, where trains arriving and departing were made up, and where continual switching was going on. The steam ferry was owned and operated exclusively by the railway company, and did not engage in any other business than that of transferring railway trains from one side of the river to the other. The officers of the boats were prohibited from carrying passengers other than those in the company's cars, and its servants and employés. There was a regular steam passenger ferry operated between Memphis and West Memphis for the accommodation of the general public. The defendant in error, a farmer, from the state of Mississippi, and a stranger, was, while visiting friends in Memphis, informed by them that he could pass over the river on railway transfer boats without charge, and from the west side get a better view of a great railway bridge in course of construction across the Mississippi. Acting upon this information, and wholly from motives of curiosity, he, together with some chance acquaintances, went aboard one of the transfer boats, and crossed to West Memphis. His presence on the boat seems to have been unobserved, as no questions were asked him or fare or permit demanded. He then made his way through the yards of the company to a point from which he could examine the railroad bridge. When ready to return, his friends having returned by way of the uncompleted bridge, he made his way back through the switching yard, and down the incline, and onto the transfer boat. He found thereon a passenger train about to be

transferred to Memphis. He was asked by the conductor of the train if he had come down on the train, to which he replied that he had not. Shortly afterwards he was approached by one of the officers of the boat, who asked him if he had come across on the boat, who, on being told that he had not, said that the boat did not take passengers, and that he could not return that way. He then asked what he must do, and was told that he would have to get off and go to the depot, where he would find a ferryboat which would take him across. He offered to pay to cross, but was told again that that boat did not take passengers across. Cook then says he asked the officer to show him the way he must go, and that the officer took his arm, and told him that he must get off, and must go up the railroad track. The west bank of the river is a low bottom, and subject to overflow. The railroad company, for its own uses, had made an embankment, which was entirely occupied by its tracks and switches. The top of this embankment was above high water. This embankment and its tracks constituted the switching yard of the company. At the time of the accident, the river was out of its banks, and there was water on both sides of the embankment. On this embankment there were four principal tracks, besides switches and spur tracks. These tracks were quite close together, there being a space of fourteen feet between the center of one track and the center of that adjoining. It was possible to walk between the tracks, there being a minimum of two feet clear space when each track was occupied by the widest cars in use. Between the outside tracks and slope of the embankment it was possible to walk in safety at some points; at others the slope of the embankment was too great. The West Memphis depot was near the northern end of this yard. The regular ferry landing was immediately in the rear of this depot. One of the streets of the village crossed this yard at the north end of the depot, and this street was the route both to depot and ferry landing behind it. There was no other way, in the then stage of the river, for one to get from the transfer boat than that by way of this embankment to the depot. When there, one could turn to the left on this traveled way and go west to the village, or turn to the left and go down to the ferry landing. The point where plaintiff was overtaken and run down was about 250 feet south of the street or way crossing the yard at depot, and on the direct and only way out of the yard, whether he wished to turn east or west when he reached this street. One of plaintiff's witnesses, acquainted with the location, in answer to a question as to whether there was any other way Cook could have gotten up to the depot except by those tracks, said: "After he got off the transfer boat, he would have to come up the tracks to get out anywhere." A plank walk led from back end of depot to the ferry landing. By all the testimony it is shown that engines or trains were in almost continuous motion within the limits of this yard, and all agree that it was an extremely dangerous place for use as a walkway, especially by one unacquainted with the tracks and their uses.

E. F. Adams and C. H. Trimble (Wallace Pratt, of counsel), for plaintiff in error.

George Gillham, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The most favorable statement of the circumstances immediately attendant upon the accident is that made by the defendant in error. The statement was that while in the yard of the appellant company, under the circumstances heretofore stated, and while making his way through that yard for the purpose of reaching the passenger ferryboat, he was walking upon the most westerly of the yard tracks when he met an engine, with tender attached, coming from the direction of the depot; that he stepped off of

that track to the one on his left, and had walked 20 or 25 yards in a northerly direction upon that track when some one between him and the depot, towards which he was walking, called out to him, "The train is going to run over you;" that he immediately looked back, when he was struck and knocked down and run over by an engine moving backward, with its tender in front. He made an effort to climb or catch onto the rear of the tender, failed, and was run over, losing a leg, and sustaining other very serious injuries. At the same time a train was passing on the track he had shortly before abandoned. He says he heard no bell or whistle, and did not hear the engine approaching from the rear. The engine which ran over him, he says, was the same engine which he had met and given way to when he stepped over to the track next on his left. That engine had just brought in the Kansas City train, had been taken charge of by the roundhouse employes, cut loose from its train, and was being taken to the roundhouse. To get there, it had to be taken towards the transfer landing on the west track, to a point about midway between the depot and incline, and then switched to the track next east, and backed some 200 yards, on the track upon which Cook was walking, to the roundhouse switch. According to the theory of plaintiff, this engine passed Cook, then reversed its direction, and took the track plaintiff was on, and ran him down.

Plaintiff's contention is that the railroad company was negligent in not warning him of his danger in time to get off the track. He says a switchman was seated on the rear end of the tender, with his legs hanging over, and that he should have seen the danger and given him notice. This very employé was introduced as a witness by the plaintiff, and he testifies that, as soon as he saw him on the track, he warned the engineer, but that there was not time to do more, for the rear of the tender struck him and the injury was done before anything could be done to avoid it. There was no evidence that any employé on the engine or tender was aware of the dangerous position of plaintiff until at the very moment of the collision, and no evidence that, after his danger became known, any effort to avoid injury would have averted the catastrophe. The evidence as to whether a bell was being sounded was contradictory. If any duty rested upon the railroad company to keep some one on the lookout ahead, or to keep a bell sounding, when engines or cars were being moved over its tracks and switches, then there was evidence tending to show negligence. But, if the liability of the railroad company depends upon the exercise of all reasonable precaution to avert the impending danger after it had knowledge of the dangerous position of the plaintiff, then the plaintiff made no case, and the request made to so instruct the jury, on the conclusion of all the evidence, should have been granted.

There was no question as to the duty of the railroad company at a public road crossing. This yard and these tracks were crossed by what the witnesses call a "paper street," near the depot. But that way was several hundred feet north of where this accident

occurred. Still further north was another path, crossing at a point where there was but one track. Neither was there any question as to the duty of a railroad company to a passenger. The court very properly eliminated every question of that sort by telling the jury that there was no evidence tending to show the relation of passenger and carrier.

Was the railroad company guilty of any negligence? The answer depends upon the duty and obligation resting upon it in respect to a person in its private switching yard under the circumstances detailed. When he crossed from Memphis to West Memphis, he did so in violation of the regulations of the company owning and operating the transfer boat. He did so without the invitation of any one having authority to suspend that rule. Whether his presence on the boat was unobserved, or he was there by the improper connivance of those on the boat, is equally immaterial, for he was, in either event, there without legal right, and necessarily a trespasser. When he had concluded his visit to the west bank, and again entered the yard of the company, and again entered upon the boat, he resumed his status as a trespasser. This much the court distinctly charged. The only duty which the law imposed under such circumstances is that the owner thus intruded upon will not wantonly and unnecessarily inflict injury upon the trespasser.

The learned judge who presided upon the trial in the circuit court was of opinion that when he left the boat, under order of its officer, and undertook to make his way through the yard of the company to the public ferry, a little higher up the river, while going through the yard the duty of the company was to afford him that degree of protection due from the company to strangers in that yard, by some species of invitation or license, express or implied. The view entertained by the circuit court is best shown by his instruction to the jury on this point, in regard to which he said:

"I think any reasonable man will say that, because he was violating their rules and regulations in being on their boat, they had no right to embarrass him in any way by putting him off their boat, and then claiming he was a trespasser on their grounds because he was a trespasser there originally. When they determined to enforce their rule that he should not come back across the river on their boat, they necessarily imposed upon him the duty, and it appears from the proof in this case, beyond any sort of dispute, that the captain, or somebody on the boat whom he took to be the captain, told him he must go to the Bryan, and come back across the river on that boat. He was undertaking to do that. Now, I say to you that it would be wholly unreasonable—and you know it would be unreasonable—to say that that man, as against this company, putting him in that situation, was a trespasser upon their premises upon the other side of the river, if it was necessary for him to be on those premises to get to the ferryboat Bryan. However much he was an intruder on the boat, he was not an intruder on their premises when they put him off and would not bring him back, and they cannot hold him to the responsibility of being a trespasser on their incline and tracks if you find from the circumstances and situation of that incline and those tracks that it was a reasonable thing for him to be in and about those tracks, and a necessary thing for him to be in and about those tracks to get to the ferryboat Bryan."

To this the court added that he could not, on the other hand, be called a licensee:

"They did not," said the court, "in other words, license him to be over there, and give him a special privilege to go over their tracks and by their yard in order to get to the ferryboat Bryan; and I should not say, under the circumstances of this case, that he could be called a 'licensee.' He was neither a licensee nor a trespasser. He was an unfortunate man whom they refused to take across the river, and who had to go to another boat, and must pass over and across their tracks to do so, if you find the fact that way."

As to the measure of care required from the company towards so anomalous a man, the court said to the jury:

"Now, what duty did they owe him? He seems to suggest by his counsel that they owed him some sort of a special duty to look out for him while he was in their yard and on their tracks, because they had put him there. I do not think he can claim that position under the law. They were not under an obligation to issue an order: 'Look out for this man. We have put him off the transfer boat to go to the steamer Bryan. Keep a special look-out for him.' They were under no such obligation to him. But they owed to him that kind of reasonable care and diligence that every railroad company and every person running their engines would owe to a man found on their tracks without fault upon his part."

If this view was entertained upon the assumption that the direction given as to the way to the ferry landing operated to send the appellee through this dangerous yard, which might have been avoided, then his honor was mistaken as to the locus in quo. There was, at the then stage of the river, no way off the boat or premises of the railroad company that did not require the appellee to go through the yard and to the depot. When once there, he could turn to the left at the path or street which crossed the yard at that point, and thence west to the village, or he could turn to the right, and take the plankway down to the ferry. When the company discovered him thus intruding upon its boat, it had one of two things to do,—either to carry him over in violation of its rule, or to say to him, "Get off my boat, and get off my premises, and cross the river by the means open to you and all others." If it carried him over, which, of course, it was not bound to do, he would have been subjected to the same kind of danger in getting up the incline and through its yard on the Memphis side as that which confronted him on the west side. His case was like that of a man found trespassing in the center of his neighbor's premises. If ordered off, he must cross a portion of the premises to get off. Cook had so placed himself, of his own volition, that he was a trespasser where he was found, and must continue a trespasser until he could get off of the premises upon which he was intruding. To tell him where he could take the public ferryboat, and point out to him the way thereto, under the circumstances, did not operate as a license, and change the relation which he bore to the railroad company, or impose on it any duty which had not before rested upon it in regard to one who was on its premises without invitation, express or implied. The narrow embankment elevated above high water was covered with a network of railway tracks, at intervals connecting with each other. It was the place where trains were broken up, and outgoing trains made up. Engines and cars were

from the necessities of a great business in continual motion backward and forward, and passing from one track to another. The business of the company, the rapidity of transportation, the success with which that business should be conducted, and the dangerous character of the work required to be there done demanded that the business of such a yard should be surrendered to the company's own uses, free from any interference, and untrammelled by unnecessary restrictions upon the manner in which its trains should be there handled. That a straggling village lay behind this yard, and that, to reach the public ferry, it was necessary to cross the yard, cannot alter the case as to this appellee. At a street crossing other and different duties are imposed, by reason of the fact that the public and the railroad at public crossings have equal and reciprocal rights and duties. But these rights and duties at public crossings do not enlarge the public rights or extend the company's duties to points in its private yard not occupied as public streets. At the crossing the public had certain legal rights, but upon its tracks generally, and inside its switching yards especially, one uninvited has no legal right whatever. That this yard was uninclosed does not alter the question. We are not dealing with a case of premises exposed to the curiosity of persons incompetent to look out for themselves, or with the consequences to animals led by instinct upon an uninclosed and dangerous space. That this yard was private property, and was used for purposes which made its use as a walkway exceedingly dangerous, was a thing which any man competent to go without guardianship must be assumed conclusively to know. Upon such premises the plaintiff below had no business, no legal right, and necessarily was an intruder. Having no legal right to be where he was, the company stood in no such relation to him as it would to one at a street crossing, or to a passenger, or to an employé whose duty kept him in the yard. *Aerkfetz v. Humphreys*, 145 U. S. 420, 12 Sup. Ct. 835. It was negligence per se for one to intrude himself into such a place, and his presence there imposed no particular duty upon the company, except that general duty which every one owes to every other person to do him no intentional wrong or injury. Its liability for failing to discharge this duty can only arise when it becomes aware of the danger in which he stood. This switching yard was private property. In *Nicholson v. Railway Co.*, 41 N. Y. 530, where the question was as to the legal right of a stranger to use the ordinary track of a railroad as a walkway, and who was injured by a collision with some cars which had been insufficiently secured and had broken loose, the court, concerning the liability of the company to one thus injured and the right of the company concerning the use to which it might put its own property, said: "It had the same unqualified right which every owner of property has to do with his own as he pleases, and keep it and use it where and as he pleases on his own ground, up to the point where such use becomes a nuisance." Where no statute affects the question, the railroad company is under no obligation, with reference even to its employés,

to keep a special lookout in its own yard, or to keep a bell ringing when an engine or train is in motion. *Aerkfetz v. Humphreys*, 145 U. S. 420, 12 Sup. Ct. 835. In the case last cited, the court said that "the ringing of bells and the sounding of whistles on trains, going or coming, and switch engines moving forward or backward, would have simply tended to confusion." Every one about such a yard as an employé or a trespasser must be taken to know the hazards of the situation, and that safety requires the utmost vigilance. The danger is apparent, and every instinct of self-preservation sounds a loud warning. *Railroad Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 921.

Plaintiff was not rightfully in the yard; his being there was negligence. The railroad company owed him no duty except to avoid, after discovering his danger, any wanton or unnecessary injury being done him.

In a case decided by the supreme court of Arkansas, it was said:

"The plaintiff being wrongfully upon the track, no duty arose in his favor until his presence was discovered, for the company had the right to run its trains without reference to the possibility that unauthorized persons might straggle upon its tracks. It was not bound to anticipate the intrusion. And, after he had been seen upon the track by the men in charge of the train, they might act upon the presumption that he would step aside in time to avoid a collision, unless it was so obvious that, owing to his condition or circumstances over which he had no control, he could not extricate himself from the danger which menaced him. The sole duty which the corporation owed to him was not wantonly or with reckless carelessness to run over him after his situation was perceived." *Railroad Co. v. Monday*, 49 Ark. 257, 4 S. W. 782.

The same rule was announced by this court in the case of *Mississippi Val. Co. v. Howe*, 6 U. S. App. 185, 3 C. C. A. 121, and 52 Fed. 362, where the question was as to the liability of the railroad to one of its employés who had gone to sleep upon its tracks. We cite a few of the many cases which support the view we have announced: *Nicholson v. Railway Co.*, 41 N. Y. 525; *Saldana v. Railroad Co.*, 43 Fed. 862; *Railroad Co. v. Stroud*, 64 Miss. 784, 2 South. 171; *Railroad Co. v. Cocke*, 64 Tex. 158; *Railway Co. v. Garcia*, 75 Tex. 591, 13 S. W. 223.

But if it be assumed that plaintiff was a licensee, and that the railroad company was guilty of negligence in not sooner discovering his presence, yet the negligence of the plaintiff, under the undisputed facts of this case, so grossly contributed to his own injury as to bar any recovery. In such a place he was under the highest obligation to exercise the utmost degree of vigilance in looking out for approaching engines or cars. Notwithstanding the appellee knew that he was in the midst of a network of tracks and switches, he did not, after being driven off of one track, take the slightest precaution to look out for a train coming on him from the rear. A train immediately followed the engine to which he had given way on the western track. The noise of its passage only made it the more important that he should use his eyes to see to it that no train ran on him from front or rear. If it be assumed that, when he crossed from one track to the other, he did look to the rear,

though this is not shown, yet he afterwards walked on straight ahead for from 20 to 30 yards, according to his own account, without looking behind him. The duty of one under such circumstances is not only to look each way on going upon a railroad track, but to continually exercise vigilance and observe the track behind as well as before. The duty of looking is a continuing one. *Patton v. Railroad Co.*, 89 Tenn. 370, 15 S. W. 919. It is no answer to say that he did not expect that this engine, which had passed him on one track, would switch onto another track, and reverse its direction. In a yard full of tracks and switches, he had no right to take such a thing for granted. The case in this respect is totally unlike that of *Patton v. Railroad Co.*, cited above. There the plaintiff stepped off the track to let a train pass him. When it had passed, as he supposed, he stepped back, and resumed his journey, without looking behind him. Within a few yards he was overtaken and run over by some cars which had broken loose from the train ahead, and were following through their own momentum. The court thought that, under such exceptional circumstances, the question as to whether the plaintiff was guilty of such a degree of contributory negligence as should bar his recovery might be submitted to a jury. Here the plaintiff was in a place where there was continuous movement, backward and forward. Switching from one track to another in the breaking or making of trains was to be anticipated by any man who was observant. "It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom." *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85. The noises about him made it all the more important that he should not rely on his sense of hearing alone. Under the circumstances of this case, the failure of the plaintiff to watch his rear was gross negligence. *Railroad Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 921. It is true that questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the jury, and direct a verdict. *Elliott v. Railway Co.*, cited above; *Railroad Co. v. Moseley*, cited above; *Aerkfetz v. Humphreys*, 145 U. S. 420, 12 Sup. Ct. 835; *Mississippi Val. Co. v. Howe*, 6 U. S. App. 172-186, 3 C. C. A. 121, and 52 Fed. 362. "When the evidence leaves no doubt that, if the plaintiff had made any proper use of his senses, he could have both seen and heard, in due season, an approaching train, and thereby have avoided injury, the question is one of law, and not a question for the jury." *Blount v. Railway Co.*, 9 C. C. A. 526, 61 Fed. 375. If but one inference can be legally drawn from the facts of a case, a direction for a verdict in accordance with that inference is proper. *Horn v. Railroad Co.*, 6 U. S. App. 381, 4 C. C. A. 346, and 54 Fed. 301.

The request for a peremptory instruction should have been allowed. For this and the other errors we have indicated, the case must be remanded, with directions to award a new trial.

DAVIS & RANKIN BLDG. & MANUF'G CO. v. JONES et al.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1895.)

No. 478.

CONTRACTS—JOINT OR SEVERAL—SUBSCRIPTIONS.

The D. Co. entered into a contract with J. and several others, farmers, for the construction of a butter and cheese factory. After providing that the factory should be built by the D. Co., on certain plans and specifications, for the sum of \$4,350, the contract contained the following provision: "We, the subscribers hereto, agree to pay the above amount for said factory, when completed." There was also a provision that, as soon as the contract price was subscribed, the subscribers should form a corporation, with stock not less than such contract price, to be issued to the subscribers in proportion to their paid-up interest, and that each stockholder should be liable only for the amount subscribed by him. The contract was signed by J. and his associates separately, and at different times, each adding to his signature a statement of the number of shares subscribed for by him, and the amount of stock to which he would be entitled, after incorporation. *Held*, that the contract of J. and his associates was several, and not joint, and that each was bound only for the amount of his own subscription.

In Error to the Circuit Court of the United States for the District of Nebraska.

This action was brought by the Davis & Rankin Building & Manufacturing Company, the plaintiff in error, against J. T. Jones and numerous other defendants, the defendants in error, to recover damages for nonperformance by the defendants of a contract for the erection of a butter and cheese factory at or near Tecumseh, Neb. The material portions of the contract were as follows:

"Form Two.

"Contract and Specifications for a Combined Butter and Cheese Factory on the Co-operative and Farmers' Protective System.

"The Davis and Rankin Building and Manufacturing Company, of Chicago, Illinois, party of the first part, hereby agrees with the undersigned subscribers hereto, party of the second part, to build, erect, complete, and equip for said party of the second part a combined butter and cheese factory, at or near Tecumseh, Nebraska, as follows, to wit: The factory building shall be twenty-eight feet wide and forty-eight feet long, by twelve feet high, with an addition attached, twelve feet by twenty-four feet, for boiler, engine, and office. Said building shall rest upon foundations described in specifications hereon. Said factory building is to be one story high, and divided into rooms, as shown on working plan, viz.: A manufacturing room, ice refrigerator or cold-storage room, cheese-curing room, office, boiler, and engine room. Said factory shall be equipped with the following outfit, to wit: [Here follows a description of the equipment of the factory, and numerous other provisions not necessary to be mentioned.] The Davis and Rankin Building and Manufacturing Company agrees to erect said butter and cheese factory, as set forth by the above specifications, for forty-three hundred and fifty dollars, payable in cash when the factory is completed, or approved note for ninety days. We, the subscribers hereto, agree to pay the above amount for said butter and cheese factory when completed. Said building to be completed within ninety days or thereabout after the above amount (\$4,350) is subscribed. Any portion of the amount subscribed not paid according to contract shall bear legal rate of interest. As soon as the above amount (\$4,350) is subscribed, or in a reasonable time thereafter, the said subscribers agree to incorporate under the laws of the state, as therein provided, fixing the aggregate amount of stock at not less than \$4,350, to be divided into shares of \$100 each. Said share or shares, as above stated, to be issued to the subscribers hereto in proportion to their paid-up interest herein, and it is herein

agreed that each stockholder shall be liable only for the amount subscribed by him. It is further distinctly understood by and between the parties hereto that if the subscriptions hereto shall amount to more than \$4,350, and less than \$4,950, the foregoing agreement, designated 'Form Two,' shall constitute the agreement between the parties; if the subscriptions hereto shall amount to more than \$4,950, then the foregoing agreement, designated 'Form Three.' All money that shall be paid in or collected upon this contract in excess of the contract price of the plant shall belong to the party of the second part. It is hereby understood that the Davis and Rankin Building and Manufacturing Company will not be responsible for any pledges or promises made by its agents or representatives that do not appear in this contract, and made a part thereof, either in print or in writing. For the faithful and full performance of our respective parts of the above contract we bind ourselves, our heirs, executors, administrators, and assigns. Executed and dated this 7th day of October, 1892.

"Davis & Rankin Bldg. & Mfg. Co., the First Party,
"Per F. H. Sherer, Special Agent."

Then followed lengthy specifications for the building of the butter and cheese factory in question, and thereafter the names of numerous subscribers signed to a paper in the following form:

"Names of Subscribers.	Number of Shares.	Amount of Stock After Incorporation.
J. T. Jones.....	2	\$200
Chamberlain Bros.....	2	200," etc.

In the circuit court of the United States for the district of Nebraska, where the case was tried, a verdict and judgment was rendered in favor of the defendants, and the plaintiff, the Davis and Rankin Building and Manufacturing Company, has brought the case to this court by writ of error.

Paul F. Clark (Charles S. Allen, W. F. Rightmire, and J. A. Woodbury, on brief), for plaintiff in error.

Clarence K. Chamberlain (J. W. Deweese and F. M. Hall, on brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The only question arising in this case that we have found it necessary to consider is whether the contract on which the suit was founded imposed a joint or a several liability, so far as the parties of the second part were concerned. If it is a several contract,—that is to say, if the various subscribers only bound themselves to pay for the erection of the butter and cheese factory in question the sums set opposite their respective names,—then the circuit court of the United States had no jurisdiction of the case, the amount in controversy being less than \$2,000, and the action should have been dismissed for that reason. This contract, or one nearly identical with it in form, has been before the courts for construction on several previous occasions, and the question whether the subscribers thereby bound themselves jointly to pay the full contract price, or severally to pay the sums by them respectively subscribed, has been considered at length, and often decided. In the following cases it was held that the contract simply required each subscriber to pay the amount of his individual subscription: Davis

v. Belford, 70 Mich. 120, 37 N. W. 919; Manufacturing Co. v. Barber, 51 Fed. 148; Gibbons v. Grinsel (Wis.) 48 N. W. 255; Davis & Rankin Co. v. Hillsboro Co. (Ind. App.) 37 N. E. 549; Manufacturing Co. v. Booth, Id. 818; Manufacturing Co. v. McKinney (Ind. App.) 38 N. E. 1093; Frost v. Williams (S. D.) 50 N. W. 964,—while in the following case the contrary view was taken, and the contract was held to impose a joint liability: Davis v. Shafer, 50 Fed. 764. It is worthy of notice, however, that in the case last cited (Davis v. Shafer) the conclusion reached, that the contract imposed a joint liability, was influenced to some extent by the view entertained by the court of the effect of a local statute of the state of Missouri, where the contract was executed. Rev. St. Mo. § 2384. We have felt constrained to concur in the views taken in those cases, above cited, which hold that the liability imposed by the contract is several, and not joint. Without repeating in detail the reasons that have been given to sustain this view, it is sufficient to say that, as the contract was made in a rural community, and the amount promised to be paid for constructing the plant was quite large, it is not probable that the several subscribers when they signed the paper, which was in the form of a subscription list, supposed that each was binding himself to pay the entire cost of the plant, to wit, the sum of \$4,350, or the sum of \$4,950, if the subscriptions reached the later amount. The very form of the paper which was circulated for signatures was well calculated to create the impression that each person would only be held bound to pay the sum set opposite his name, and the clause inserted in the agreement, "that each stockholder shall be liable only for the amount subscribed by him," was also well calculated to confirm that impression. We think it highly probable that each subscriber understood that the liability incurred by signing the agreement was limited to the amount of his individual subscription. Men of limited means do not usually bind themselves jointly with others to pay as large a sum as \$4,500 without knowing who are to be bound with them; and yet, in view of the manner in which the signatures to this contract were obtained, these defendants were guilty of that folly, if we presume that each one of them, when he signed the subscription list, understood that he was thereby binding himself individually to pay the whole cost of the factory. It is a noteworthy fact that, before the contract in suit was executed, two of the cases above cited, holding that it imposed a several liability, had been decided. Davis v. Belford and Manufacturing Co. v. Barber, *supra*. It had been decided, on the other hand, by the circuit court of the United States for the Western district of Missouri, that it imposed a joint liability. Davis v. Shafer, *supra*. These conflicting decisions were presumably well known to the plaintiff company, but were unknown to the defendants. Under these circumstances, it was the duty of the plaintiff to alter the form of its contract then in use so as to avoid the question whether it imposed a joint or a several liability which had theretofore given rise to conflicting decisions. Not having done so, the plaintiff cannot complain if the courts adopt a construction of the contract

which is most favorable to the defendants. The judgment of the circuit court is reversed at the cost of the plaintiff in error, and the cause is remanded to the circuit court, with directions to dismiss the suit for want of jurisdiction, and at the plaintiff's cost.

STEWART v. HENRY COUNTY.

(Circuit Court, W. D. Missouri, W. D. February 11, 1895.)

1. NOTICE—MATURITY OF BONDS.

The county of H., in Missouri, issued bonds on July 1, 1882, running for 20 years, with the option reserved to the county, as stated on the face of the bonds, to pay off the same at any time after July 1, 1887. No method of giving notice of such election was expressly provided in the bonds. Interest was payable annually on July 1st, and was regularly paid up to July 1, 1887, when the county, by an order regularly entered of record in the county court, elected to pay the bonds on September 1, 1887, with interest to that date. Notices of such election, stating that the bonds would be paid at the place of payment named on their face, were published in a local newspaper, and in newspapers of large circulation in St. Louis and New York City. On the date fixed, the money required for payment of the bonds and interest was ready at the place of payment, and all but a very small amount of the bonds were presented and paid. *Held*, that the county performed its obligation to the holders of the bonds by the method adopted to give notice of its election, and that personal notice to the bondholders was not required in order to stop the running of interest, after the date fixed for payment.

2. PLEADING—TENDER.

If payor is ready at time and place of payment with the money to pay, he may plead the fact, not in defense of action, but in avoidance of subsequent interest and costs, when he pays money into court. To enable plaintiff to avail himself of objection of failure to pay sum tendered on demand, he must set up the fact specifically in replication.

This is an action to recover on three bonds, and the interest coupons belonging thereto, issued by the defendant county. The principal of the bonds aggregates \$2,500. The bonds were issued on the 1st day of July, 1882, under what is known as the "Statute for Funding Debts of Counties and Municipalities in the State of Missouri." The interest on said bonds was represented by coupons attached thereto, payable the 1st day of July each year. The bonds run for 20 years, with the option reserved to the county to pay off the same at any time after the 1st day of July, 1887. The interest on these bonds was promptly paid by the county up to the 1st day of July, 1887; at which time the county court, by appropriate order, declared its election to pay off said bonds on the 1st day of September, 1887. Accordingly it caused formal notice of this fact, reciting the series of bonds outstanding, to be published in weekly issues, up to the 1st of September, 1887, of its leading local newspaper of the county, and in the St. Louis Republic, and in the New York World, notifying the holders of said bonds that on that day, September 1, 1887, the interest thereon would cease, and that the bonds would be paid either at the National Bank of Commerce in the city of New York, or at the office of William C. Little Bond Company, in the city of St. Louis, Mo., as the respective

holders thereof might elect. The county, through said Little, arranged for the placing of sufficient money at said bank, in the city of New York, for the redemption of said bonds; and all indebtedness of the county, amounting to \$419,000, was accordingly paid as of date September 1, 1887, by said bank or said bond company, with the exception of the bonds in controversy in this suit. The contention of plaintiff is that he did not have actual notice of the call so made by the county for the redemption of said bonds until in August, 1888, and that the published notice was not sufficient in law; and therefore he refused to accept the amount due on the 1st day of September, 1887, in satisfaction of his claim. He brought this suit on February 6, 1891, to recover both the principal and interest up to the day of judgment. The defendant's answer pleads the facts respecting said call; that it was ready and willing to pay the amount due on the 1st day of September, 1887, at said bank of Commerce, and the failure of plaintiff to have his bonds and coupons then and there for payment; and in its answer it renews the said tender, and it paid the money into this court for the benefit of plaintiff, where it has since remained on deposit.

Karnes, Holmes & Krauthoff, for plaintiff.

Fyke, Yates & Fyke and Jos. Parks & Sons, for defendant.

PHILIPS, District Judge. The statute under which the bonds in question were issued does not provide in terms for the redemption at the end of five years, nor prescribe any method therefor; though it does prescribe that no bond under the act shall be issued to run for a longer period than twenty years, nor less than five years. It was, however, competent for the county, in issuing the bonds, to reserve the right to make them payable at the end of five years after their issue, at its option. This it did, and this fact is expressed on the face of the bond, and the purchaser took subject thereto. After such recitation as to the statute under which, and the purpose for which, the bond was issued, it concludes with this provision: "But this bond is payable at any time after the 1st day of July, 1887, at the option of said county." The preceding part of the bond recites that the county "promises to pay bearer, at the National Bank of Commerce in the city of New York and state of New York, on the 1st day of July, 1902, with interest at the rate of six per centum per annum, payable at said bank, upon presentation and delivery of the coupons for said interest hereto attached on the 1st day of July of each year." Then follows immediately the provision above quoted, respecting the option to pay at any time after July 1, 1887. Clearly enough, then, it appears that the place of payment under either provision is the National Bank of Commerce in the city of New York. This admits not of debate. Unquestionably, upon the maturity of any coupons or the bonds under the first part of the obligation, should the county have on deposit at said bank the money to pay the same, it would have been the duty of the holder of the bond to present it there for

payment, and interest would cease thereon from that date, unless the defendant had failed to make its tender good on demand. *Ward v. Smith*, 7 Wall. 447-453.

The remaining question is, did the county perform its obligation to the holder of any such bond by declaring its option to pay on the 1st day of September, 1887, and publishing notice thereof in the manner in which it did, and having the money in readiness at said bank to meet the payment of any bond and interest that might be presented for payment at said place? or does the contract contemplate that in addition the county should have given personal notice of its election to the holder of said bonds and coupons? It is true, as suggested by plaintiff, the county could have provided in the bond for notice, and how it should be given. On the other hand, it seems to me, the defendant might with equal, if not greater, force reply that the plaintiff took the bond with full knowledge of the fact that the right was reserved to the defendant county, at any time after July 1, 1887, to elect to pay; and, inasmuch as he took the bond when issued without exacting any specification respecting notice, it does not come with grace for him afterwards to demand, without any notice to the county, that he would expect it to notify him, or, without keeping it advised that he was the holder of any such bonds, to claim that he should have his interest until such time as he had actual notice of the election made by the county. In construing a contract regard must be had always to the circumstances under which it was made, to the subject-matter, as well as the reasonable and customary method of its performance. The plaintiff knew when he took the bonds that they were subject to the provision respecting the option. He knew that such bonds possessed all the qualities of commercial paper on their face payable to bearer, and as such passed freely from hand to hand by mere delivery, and entered into all the channels of trade and commerce, like inland bills of exchange. How, then, was it possible for the defendant to know, when it made its election to pay, who held this or that particular bond and the coupons? Personal notice in such case would be practically impossible. The county might possibly have ascertained from the bank, where the payment of coupons was usually made, who presented the same at the last payment. But that would furnish no evidence as to who held the bond, as the coupons might be severed therefrom, or who held the remaining coupons. He who held the bond at the time of the payment of interest might not hold it to-morrow. So that, if notice were served on the holder of the coupon last paid, he could answer that he had parted with the bond and any other coupon held by him; and it would be practically impossible for the county to get at the real facts or the real holder. Under such construction of the contract, the county would absolutely be at the mercy of the commercial winds. Such a construction would be so unreasonable and impractical that the court should hesitate to adopt it, if there is any other more reasonable, natural, and equitable construction to both parties. County courts, under the state statute, are courts of record.

As such, all their acts and doings are made matters of record. The election made by the county to exercise the option given in this case was made matter of record in the county court. Plaintiff was advised by the bond in his hand that he held subject to such election, liable to be made at any time after the 1st day of July, 1887. It was more feasible and reasonable for him to have kept himself in communication with the clerk of the court, than to exact that the court should seek him out. Again, the place of payment being designated on the face of the bond, the law is that, if the obligor places the funds necessary for payment with a designated bank at the time for payment, it is the duty of the payee to call at the bank and make demand there. *Ward v. Smith*, 7 Wall. 450, 451. The plaintiff had two plain courses open to him to ascertain whether or not the county exercised the option, and to guard himself against the possibility of loss of interest, by either making direct inquiry of the clerk of the county court or any local correspondent, or by leaving his bonds and coupons at the bank in New York. One or the other was so easy and expenseless to him, while to require that the county should seek out an unknown holder of such commercial paper, not yet due, transferable from hand to hand by mere delivery, and give personal notice of its election to pay, is so extreme and impracticable as to repel the construction insisted upon by the plaintiff. As the evidence in this case shows, at, or shortly after, the time of the publication of said notice by the county, the plaintiff was not even at his customary place of abode in the state of Maine, but was out in the state of California, from whence he returned, by way of St. Louis, in the summer of 1888. Ordinary prudence and duty to his debtor dictated that he should have left his bonds and coupons with the bank in New York, where he had customarily collected his coupons, and where his debt would have been paid on the 1st day of September, 1887, had he so elected. As observed by the court in *Ward v. Smith*, *supra*:

"It is the general usage in such cases for the holders of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest for delay."

In the absence of any express provision in the bond for giving notice, the county took the only practicable course open to it, which a spirit of fairness and justice to the bondholders would dictate. It made publication of the order of the court in its home newspaper, of large circulation; in the *St. Louis Republic*, published at the commercial metropolis of the state, having a wide circulation; and in the *New York World*, published at the city of New York, where the bonds were payable, and the commercial center of the United States. As proof of its effectiveness, the evidence in this case shows that all of the bonds, amounting to \$419,000, with the single exception of the \$2,500 held by the plaintiff, were presented and paid at the places designated in the notice, over \$70,000 of which were paid at

the designated bank in the city of New York. The evidence shows that this form of bond, with a like provision respecting the option to pay, was common in municipal bonds of this state issued under the funding act of 1879; and that the method pursued in this case, in giving notice of the call, was practiced generally under such bonds. William C. Little, who has handled such bonds to the extent of \$1,000,000, testifies that that was the method adopted and pursued successfully; and such has been the observation of this court, obtained from litigation on similar bonds in this jurisdiction. This practice, under the funding act of 1879, has so universally obtained as to almost, if it does not, constitute a usage. As evidence that such method accords with the public view as to the only practicable method of imparting notice of such calls, the act of Congress (section 3697, Rev. St. U. S.), providing for the redemption of the 6 per cent. bonds of the government of 1865, prescribes that "a public notice be given by the secretary of the treasury, and in three months after the date of such public notice, the interest on the bonds so selected and advertised to be paid shall cease." The method of giving such public notice by the department is by advertisement in newspapers selected by it. That was merely an act providing for redemption in contradistinction from a payment. *Morgan v. U. S.*, 113 U. S. 477, 5 Sup. Ct. 588. The contract of the bond here provides for payment at the option of the county after a stated period, which put the holder on the *qui vive*, and imposed something more on him than to pocket his bonds in a distant state, and wait to be run down to be served with personal notice.

The plaintiff, in his testimony and instructions, *pro se*, makes question as to whether there was a sufficient tender made by the county at the New York bank, September 1, 1887. I find this issue of fact for the defendant. The evidence shows that Mr. Little, bond broker of St. Louis, contracted with the defendant county to take up said outstanding bonds in consideration of the county issuing to him bonds at a lower rate of interest, which the county did. Little arranged on behalf of the county, through the La Clede Bank of St. Louis, to have the National Bank of Commerce of New York pay off such bonds of the county under the call as should be there presented. To this the New York bank consented, and accordingly it paid off all such bonds so presented, including principal and interest up to the 1st day of September, 1887, and was ready and willing to pay all that might be presented. Its cashier testifies that the bank would have paid the principal and interest of the plaintiff's bonds up to that date had they been presented. The evidence further shows that the bank was ready and willing to pay the plaintiff the principal and interest of his bonds as late as October, 1888, up to September 1, 1887, had he been willing to accept the same. And the evidence further shows that Mr. Little, on meeting the plaintiff in St. Louis in the summer of 1888, on his return east from the state of California, offered likewise, under his contract with the county, to pay the interest and principal of his bonds up to September 1, 1887. The plaintiff declined to do so, unless he received interest up to July 1, 1888. He made no question of the bank or

Little to so pay, but it is too manifest to admit of question that he placed his refusal to accept, and turn over his bonds and coupons, unless he received interest up to July, 1888, on the ground that he did not have actual notice of the call. Under such circumstances, it was not necessary that the money should have been counted out and physically tendered him.

Outside of the issues made in the pleadings, his final contention is that when he went to the bank in New York in October, 1888, he expressed a willingness to its cashier, or other officer, to accept from the bank the principal of his bonds, and to withhold the coupons of interest unless the bank would pay thereon up to July, 1888; thereupon he had the bonds protested. As shown by the deposition of the bank officer, and as the plaintiff unquestionably understood it, this refusal of the bank to pay the bonds without the coupons was based solely upon the ground that it had no power of attorney from the county to pay one without the other. In other words, it was not authorized to halve or subdivide its agency by taking up one and leaving the other outstanding. Of course, if it could be regarded as a demand on the defendant, the case in this particular would stand differently had the coupons represented other bonds than those held by the plaintiff. But the coupons belonged to the bonds owned by the plaintiff. It would be the merest jugglery to say that, by severing the coupons from the bonds held by the plaintiff, he acquired any greater right than if they had remained physically attached to the bond. The coupons, though detached from the bond, represented the interest thereon, and, as such, were an integral part of the bond, as much so in the plaintiff's hands as if written in the face of the bond. *Howard v. Bates Co.*, 43 Fed. 276. A reference to some well-settled principles of law and pleading will demonstrate that the plaintiff's contention in this connection is most lame. Where a note is made payable at a designated place, it is the duty of the payor to be in readiness at the designated time and place to meet the debt, and it is the duty of the payee to have his note at the designated place so it may be paid. If the payor be so ready with the money, and the payee fail to present his note, the payor may plead the fact as he would a tender; and when sued he may bring the money into court, not to defeat the action, but in bar of interest and costs. Then, to avoid such plea, the plaintiff may reply and prove a subsequent demand and refusal. But the demand, to be available to the plaintiff, must be of the precise sum tendered. The plaintiff in this case did not demand the precise sum in effect tendered on the 1st day of September, 1887, but demanded more. But his replication in this case is wholly insufficient to let in the proof, if any there had been, in avoidance of the plea of tender. His replication is simply a general denial,—a tender of the general issue,—which puts in issue only the fact of the defendant being in readiness to pay the money at the designated bank, September 1, 1887; whereas the rule of pleading is that he should plead the facts constituting the avoidance. *Berthold v. Reyburn*, 37 Mo. 586; *Mahan v. Waters*, 60 Mo. 167. Again, the demand, when made, must be of the debtor. "A tender may be

made by an agent, or to an agent, where he is authorized to receive the money; but a demand ought to be made personally of the debtor, in order that he may have an opportunity of paying the money demanded." *Berthold v. Reyburn*, 37 Mo. 597, and citations. This the plaintiff never did. The defendant's evidence is that it was at all times ready and willing to discharge the plaintiff's bonds and coupons at any time from the 1st day of September, 1887, either at said bank, or at its county treasurer's office; and it has kept on deposit in this court, since it made answer in this suit, the sum to make good said tender. Had the plaintiff, when the bank at New York declined to pay him the money, unless he would accept the principal and interest up to September 1, 1887, and surrender his bonds and coupons, then gone to the county court with his demand, it is not improbable that the whole matter could then have been amicably adjusted, and this vexatious litigation avoided. Believing that the justice and the merits of the case are with the defendant, I find the issues accordingly for the defendant. Judgment will go for plaintiff for the principal and interest on bonds to September 1, 1887, costs adjudged against plaintiff.

KILPATRICK v. HALEY.

(Circuit Court of Appeals, Eighth Circuit. February 4, 1895.)

No. 490.

1. MORTGAGES—ACQUISITION BY OWNER OF EQUITY—MERGER.

One D. purchased the furniture of an hotel, upon which there were two chattel mortgages, which D. assumed and agreed to pay. D. afterwards sold the furniture to H., subject to the chattel mortgages. H. caused the first mortgage to be bought in by one F., with money furnished by H., and to be foreclosed, H. buying the property, and thereafter claiming to hold it discharged from the second mortgage. *Held*, that inasmuch as the mortgages were treated as part of the consideration in the contract of sale between D. and H., the first mortgage was in legal effect satisfied when H. purchased it through his agent, and he was not thereafter entitled to assert it as a subsisting lien upon the furniture.

2. CHATTEL MORTGAGE—SEIZING PROPERTY—BREACH OF THE PEACE.

A clause in a chattel mortgage providing that upon breach of condition, etc., it shall be lawful for the mortgagee to take immediate and full possession of the mortgaged goods, does not authorize the mortgagee to commit a breach of the peace in obtaining possession of such goods, nor to seize the same by violence.

3. PRINCIPAL AND AGENT—TRESPASS—PUNITIVE DAMAGES.

Where, in carrying out the instructions of his principal, an agent commits a trespass, with circumstances of wanton and reckless violence, and the principal afterwards accepts and retains the fruits of such trespass, with knowledge of the manner in which they have been obtained, punitive damages may properly be awarded in an action against the principal.

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action which was brought by Ora Haley, the defendant in error, against James G. Kilpatrick, the plaintiff in error, for forcibly entering the St. Cloud Hotel, in the city of Denver, which belonged at the time to Haley, and for unlawfully removing therefrom, and converting to his

own use, a large quantity of hotel furniture which was at the time in Haley's possession. The facts out of which the controversy arises are as follows: The hotel in question and the furniture therein originally belonged to George W. Beckley. On the 18th of February, 1892, Beckley executed a chattel mortgage, in favor of J. R. Reed, on the furniture in the hotel, to secure the payment of two promissory notes, one in the sum of \$1,500, due four months after date, and one for \$500, due six months after date, both of them being dated February 18, 1892. On the same day Beckley executed a junior or second chattel mortgage on the same furniture, in favor of James G. Kilpatrick, to secure the payment of a note in the sum of \$878, which was due on the 2d day of November, 1892. On the 24th day of February, 1892, Beckley sold and conveyed the St. Cloud Hotel, and all of the furniture therein, to Emily A. Dickson. The bill of sale of the furniture which was executed by Beckley contained the following provision: "This bill of sale is made subject to, and the warranty below excepts, two certain chattel mortgages on said goods, given to secure two promissory notes, one for \$2,000, and one for \$878; and, as part of the consideration above specified, the second party, by the acceptance of these presents, hereby assumes and agrees to pay said notes, together with the interest thereon." This clause of the bill of sale referred to the two chattel mortgages heretofore mentioned in favor of Reed and Kilpatrick. On the 25th of May, 1892, Ora Haley, the defendant in error, entered into an agreement with Mrs. Dickson for the purchase of said hotel and the furniture therein. The agreement between Haley and Mrs. Dickson provided that Haley, the purchaser, should take the hotel, "and all the furniture, fixtures, and household goods contained therein, subject to four obligations, to wit, one deed of trust in the sum of twelve thousand dollars, one of five thousand dollars, one of twenty-five hundred dollars (on the realty), and a chattel mortgage on the furniture in the sum of twenty-six hundred and twenty-five dollars, and subject to the paid-up lease to present tenant and occupant until and up to the first day of August, 1892; said party of the second part [Haley] agreeing to assume all interest as now shown by holders of the certain mortgage and three deeds of trust, and insurance policy thereon." The chattel mortgage on the furniture in the sum of \$2,625, which was referred to in the foregoing clause of the agreement, was understood to be the two chattel mortgages in favor of Reed and Kilpatrick heretofore mentioned, on which the amount then due was \$2,625. On the 27th day of July, 1892, the mortgage in favor of Reed was purchased by John H. Farrar, with money that had been furnished for that purpose by Haley. Farrar then went through the form of making a private sale of the mortgaged property to Haley, pursuant to a power of sale contained in the mortgage. Having thus acquired the first chattel mortgage, and a title thereunder, by virtue of the sale made by Farrar, Haley immediately took possession of the St. Cloud Hotel and the furniture, and was in the peaceable possession of the same on the 4th day of August, 1892. The evidence tends to show that on the last-mentioned day Kilpatrick, the plaintiff in error, forcibly entered the St. Cloud Hotel, and, by means of his servants and agents, seized and removed nearly all of the furniture in the hotel, and converted the same to his own use. On the trial in the circuit court Haley recovered a judgment against Kilpatrick, for the wrong and injury complained of, in the sum of \$3,945. To reverse that judgment, the defendant below sued out the present writ of error.

Thomas H. Hood, for plaintiff in error.

W. T. Hughes filed brief for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first question presented for consideration is whether the sale of the first chattel mortgage on the hotel furniture by Reed to Haley, after the latter had purchased the hotel furniture subject to the mortgages thereon, operated to extinguish the

first incumbrance. The plaintiff in error requested the court to instruct the jury "that the purchase of the Reed mortgage by Farrar, as Haley's agent, and with Haley's money, under the terms of the contract with Mrs. Dickson, extinguished or paid the first or Reed mortgage, and Mr. Kilpatrick's mortgage thereupon became a first lien upon the property." The circuit court declined to give the instruction, but charged the jury, in lieu thereof, that the purchase of the first mortgage by Haley did not extinguish it; that Haley had the right to acquire it by purchase, and assert it as an existing lien against Kilpatrick, the owner of the second mortgage. This is the first alleged error that deserves notice. It has been held in a number of well-considered cases, and the doctrine is well established, that the lien of a mortgage or other incumbrance will be regarded as extinguished whenever such incumbrance is purchased, and becomes the property of a person who has theretofore bought the mortgaged property, and has agreed with his vendor to assume or discharge the incumbrances existing thereon. It is very generally held that, when the purchaser of an equity of redemption agrees with his vendor to assume and discharge outstanding incumbrances upon the property, the effect of such an agreement is to make the mortgaged property a primary fund for the payment of the liens existing thereon. From the fact that the mortgaged property thus becomes a primary fund for the payment of incumbrances, it follows that if the purchaser of an equity of redemption, who has agreed to assume an outstanding mortgage on the property, subsequently acquires the mortgage, and takes an assignment thereof, it will thereafter be treated as paid and extinguished; it also follows that, if the mortgagor is subsequently compelled to pay the mortgage, he becomes subrogated to all of the rights of the mortgagee, and may proceed to enforce the incumbrance against the mortgaged property either in the hands of his vendee or in the hands of a purchaser from his vendee. *Russell v. Pistor*, 7 N. Y. 171; *Kneeland v. Moore*, 138 Mass. 198; *Goodyear v. Goodyear*, 72 Iowa, 329, 33 N. W. 142; *Burnham v. Dorr*, 72 Me. 198; *Winans v. Wilkie*, 41 Mich. 264, 1 N. W. 1049; *Frey v. Vanderhoof*, 15 Wis. 396. It may be conceded that an agreement by the purchaser of an equity of redemption in mortgaged property to take the property *subject* to an existing incumbrance differs essentially from an agreement to assume or discharge the incumbrance. An agreement of the former kind does not render the purchaser personally liable either to the mortgagor or to the holder of the incumbrance for the payment of the mortgage debt; it gives him an option either to discharge the incumbrance, and thus preserve the estate, or to abandon the mortgaged property to the incumbrancer. But it does not follow as a necessary consequence that one who purchases property subject to a mortgage, without expressly agreeing to assume or pay the same, is for that reason at liberty, under all circumstances, to acquire the mortgage, and thereafter assert it as an existing lien against the mortgagor, or other persons who have an interest in the mortgaged property. On the contrary, it has been held in several well-considered cases

that where one buys property subject to an existing incumbrance, which is specified in the conveyance, the incumbrance will be understood as forming a part of the consideration for the conveyance, and, if the purchaser of the equity of redemption subsequently acquires the incumbrance, it will be treated as paid.

In the case of *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547, the facts were these: Daggett, in exchange for unincumbered property, conveyed to Drury other property of the estimated value of \$40,000, which was subject to two incumbrances, one for \$19,600, and one for \$6,500. Subsequently, Drury procured a third party to buy the incumbrance for \$6,500, with money which had been furnished by Drury. In a suit brought by such third party to foreclose the mortgage, a decree of foreclosure was entered, and Drury purchased the property at such foreclosure sale for the sum of \$1,000. It was held that the sale thus made was void, and conveyed no title, because the outstanding incumbrance was paid and extinguished when it was purchased by a third party for Drury's benefit. The court said:

"It is well established that when a party purchases premises which are incumbered to secure the payment of an indebtedness, and assumes the payment of the indebtedness as a part of the purchase money, the premises purchased are, in his hands, a primary fund for the payment of the debt, and it is his duty to pay it. *Lilly v. Palmer*, 51 Ill. 331; *Russell v. Pistor*, 7 N. Y. 171. And the rule is the same, although there be no assumption of payment of the indebtedness, if the purchase be made expressly subject to the incumbrance, and the amount of the indebtedness thereby secured is included in and forms a part of the consideration of the conveyance. *Lilly v. Palmer*, supra; *Comstock v. Hitt*, 37 Ill. 542; *Fowler v. Fay*, 62 Ill. 375; *Russell v. Pistor*, supra; *Ferris v. Crawford*, 2 Denio, 298."

In the case of *Guernsey v. Kendall*, 55 Vt. 201, 204, the facts were as follows: Guernsey bought a farm subject to the incumbrance of four mortgages. The defendant, Kendall, owned the second and fourth of these mortgages, and subsequently acquired the first mortgage. The plaintiff, Guernsey, purchased the third mortgage. He subsequently acquired the first and second mortgages, which were owned by the defendant, and, having acquired the same, he thereafter filed a bill against the defendant to compel her to pay the first and second mortgages. In default of such payment, he prayed for a decree of foreclosure, and that the mortgaged premises might be sold discharged from the lien of the fourth mortgage, which was still owned by the defendant. The bill was dismissed. The court said:

"If the mortgagor had paid the incumbrances which were paid by the orator [Guernsey], it would have been the payment of his own debts, which he was obliged to pay to relieve his estate. The orator, by the purchase of the equity of redemption, acquired the estate of the mortgagor. He had no greater estate to convey than the right to pay off the incumbrances then resting upon the premises, and by so doing his grantee would become the owner of the estate. In the absence of an agreement to pay incumbrances, it is optional with the grantee of an equity of redemption to pay them or not. If he would preserve his estate in the premises upon which the incumbrances rest, he must pay them. He may give up the property in satisfaction of the liens upon it. He cannot, by the payment of a part of the incumbrances, be subrogated to the rights of the incumbrancers whose debts he has paid, and by such subrogation defeat the liens

of other incumbrancers whose rights are prior in time to his conveyance of the equity of redemption. The mortgaged premises remained a security for the debts which the mortgages were given to secure, after the equity of redemption had been conveyed to the orator, the same as before. And, inasmuch as the orator has only the interest which the mortgagor had in the mortgaged premises, it is difficult to see how he can be subrogated to any rights that the mortgagor could not have been subrogated to. One who purchases an equity of redemption by a deed without covenants takes the estate charged with the payment of mortgage debts, and it is presumed, in the absence of any special contract, that the amount paid or agreed to be paid was the price of the property purchased, less the amount of the mortgages, and it would be for the purchaser, and not the seller, to discharge the incumbrances. * * * The orator alleges that he bought said premises subject to said incumbrances, and it was held in *Sweetser v. Jones*, 35 Vt. 317, that, where one purchases land expressly subject to a mortgage, the land conveyed is as effectually charged with the incumbrance of the mortgage debt as if the purchaser had expressly assumed the payment of the debt, or had himself made a mortgage of the land to secure it."

In the case of *Byington v. Fountain*, 61 Iowa, 512, 14 N. W. 220, and 16 N. W. 534, a person purchased land subject to the incumbrance of two mortgages. He afterwards bought in and took an assignment of the senior mortgage. It was held that the purchase thus made operated to extinguish the first mortgage, and advanced the second mortgage to the dignity of a first lien. The court said:

"When the plaintiff succeeded to the rights of Paddock in this land, he took it just as it was held by Paddock,—burdened with the payment of both mortgages. As between the plaintiff and the Amana Society and Boal and Clark [the two mortgagees], it was the duty of plaintiff to pay off both mortgages out of the land. When the plaintiff procured an assignment from the Amana Society of the notes and mortgages, this at once operated as an extinguishment of the mortgage. The mortgage came into possession of the party who was under obligation to pay it, at least to the extent of the value of the mortgaged land, and, the same party thus becoming creditor and debtor, the debt was extinguished."

In *Twitchell v. Mears*, 8 Biss. 211, Fed. Cas. No. 14,286, it was said:

"The rule is probably, as contended for by the defendant's counsel, that the purchase of an equity of redemption from a mortgagor of real estate does not make the purchaser personally liable to the mortgagee, but where the payment of an outstanding incumbrance, created by the grantor, constitutes part of the purchase money, the law implies an undertaking by the purchaser to pay it, and the mortgagee may recover in assumpsit. The legal effect of the transaction is to leave the portion of the purchase money represented by the incumbrance in the hands of the purchaser for the purpose of paying the incumbrance, and, the promise being made for the benefit of the holder of the incumbrance, he may maintain an action to enforce it. *Burr v. Beers*, 24 N. Y. 178; *Comstock v. Hitt*, 37 Ill. 542; *Garnsey v. Rogers*, 47 N. Y. 234; *Thompson v. Thompson*, 4 Ohio St. 333."

It has also been held that if the purchaser at an execution sale of a mortgagor's equity of redemption subsequently purchases the mortgage on the land, and takes an assignment thereof, the mortgage indebtedness is thereby extinguished, and that one who purchases a mortgage under such circumstances cannot enforce the payment thereof out of other property of the mortgagor. *Bank v. Burns*, 87 Pa. St. 491. See, also, to the same effect, *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 514.

In view of the foregoing authorities, we are constrained to hold that the purchase by Haley of the first chattel mortgage had the

effect of discharging that incumbrance upon the hotel furniture. Mrs. Dickson had agreed to assume and pay both of the chattel mortgages on the furniture when she acquired it by purchase from Beckley, the original mortgagor. In the contract between herself and Haley, the two chattel mortgages were described as existing incumbrances upon the property, and her vendee agreed to take the property subject to said incumbrances. Considering the circumstances under which the trade was made, it admits of no doubt, we think, that the amount of these mortgages figured as a part of the consideration in the trade between Haley and Mrs. Dickson. She received in exchange for the mortgaged property only so much as it was estimated to be worth over and above the amount of the mortgage indebtedness, on the evident assumption that her vendee would protect her from liability on the chattel mortgages, to the extent, at least, of the value of the mortgaged property. The property thus became a primary fund in Haley's hands for the payment of the mortgages, and it was his duty to devote it to that use so long as he continued to own and control the property. He certainly had no right to buy in the senior outstanding mortgage and use it as an instrument either to defeat the payment of the junior mortgage or to cast the burden of paying that mortgage upon his vendor. The evidence seems to indicate that his purpose in purchasing the first chattel mortgage was to acquire the mortgaged property at a low price by a sale made thereunder, and by this means to defeat the lien of the second chattel mortgage, which was then held by Kilpatrick, the plaintiff in error. The necessary result of such proceeding would have been to impose on Mrs. Dickson, his vendor, the burden of paying the second incumbrance, notwithstanding his express agreement with her to take the property charged with and subject to the lien of both incumbrances. Such conduct on the part of the defendant in error was clearly inconsistent with the duty that he owed to his vendor to protect her, as far as possible, from liability on the mortgages, by applying the property, so far as it would extend, to the payment of both incumbrances. For these reasons, we conclude, as hereinbefore stated, that the first chattel mortgage was in legal effect satisfied when Haley elected to purchase the same, and that he was not thereafter entitled to assert it as a subsisting lien upon the hotel furniture.

The mortgage executed by Beckley in favor of Kilpatrick contained a provision that:

"If the said goods and chattels, or any part thereof, should be attached, or claimed by any other person or persons, at any time before payment, or if the said party of the first part [Beckley] shall attempt to sell or remove the same without the authority or permission of the said party of the second part, in writing expressed, then it shall and may be lawful for the said party of the second part [Kilpatrick], or assigns, to take immediate and full possession of the whole of said goods and chattels to his own use, and sell the same for the best price that can be obtained, and, out of the money arising therefrom, to pay said note and all charges touching the same. * * *

It is claimed by the plaintiff in error that because of the sale of the goods and chattels by Beckley to Mrs. Dickson, and by her to Haley, without Kilpatrick's written consent, a default was created

which, under the aforesaid provision of the mortgage, authorized Kilpatrick to enter the St. Cloud Hotel without Haley's consent and forcibly take and carry away the mortgaged property. This proposition was embodied in substance in an instruction which the court declined to give, and the refusal of that instruction is assigned for error. The instruction, as we think, was properly refused. The clause of the mortgage above quoted did not authorize the mortgagee to force an entrance into the hotel where the property was situated, seize the property, and wrest it from the custody of those who were then in the peaceable possession of the same. In other words, the mortgage did not authorize the mortgagee to commit a breach of the peace in obtaining control of the mortgaged property, even though the conditions of the mortgage had been broken, and a default had thereby been created. It simply gave the mortgagee a license to enter upon the premises where the property was situated, and to remove the property therefrom in a peaceable manner. It was not competent for the parties to authorize the use of force and violence, either in obtaining possession of the property or in removing it from the hotel, and it will not be presumed that the mortgagor and mortgagee intended to make such an agreement. Inasmuch, then, as all of the testimony tended to show that the mortgaged property was, in fact, taken and removed from the St. Cloud Hotel under circumstances that amounted to a breach of the peace, we think that the court properly declined to give the foregoing instruction. We are furthermore of the opinion that, in forcibly seizing and removing the property from the hotel, Kilpatrick was guilty of a trespass which renders him liable for whatever damage was occasioned by the wrongful act in question, even though it be conceded that at the time of the seizure he had a superior lien upon the mortgaged property.

The only remaining question which it seems necessary to consider at this time is whether the case was one which warranted the assessment of punitive damages. It is insisted in behalf of the defendant below that there was no evidence to warrant the allowance of such damages, and that the circuit court erred in saying to the jury, in substance, that they might, in the exercise of their best judgment and discretion, award punitive damages, if they believed that the wrongful act was done with "an intent to wantonly inflict injury upon the plaintiff." Enough has already been said of the manner in which the mortgaged chattels were taken and carried away to demonstrate that the defendant was clearly guilty of a trespass. But, in this connection, and for the purpose of showing the exact circumstances under which the wrong complained of was committed, it will be well to quote the following passage from the testimony of one of the plaintiff's witnesses, who was in charge of the hotel when the furniture was taken. He says:

"The next morning, the morning of the 5th, I woke up early, and when I got up I found Beckley in the hall in his shirt sleeves, at the front door, and I found Hinckley with his undershirt and pants on. I looked through the window, and saw Turner's vans there again. Hinckley demanded the door to be opened. We had both doors locked. He went to a window, and opened the window, and he got a ladder,—a short ladder. I went to the window, too, and protested, and told them they came in on their own peril; and he brought

in through the window the van men and a man named Richards. I heard him ask Richards for his six-shooter. Richards was then on the ladder. When they got on the inside, I stood in front of the front door, and Hinckley shoved me to one side, and said to me: 'You son of a bitch, if you don't keep your hands off this thing I will pump you full of cold lead. I will have this house if I have to burn it.' They held me by force, and went to the front door, broke the lock, opened the door, and loaded the rest of the furniture, except the three rooms."

Hinckley, the man referred to in the foregoing excerpt from the testimony, was an agent of the defendant, who had been sent by him to the hotel for the express purpose of taking and removing the furniture from the hotel to the defendant's warehouse. After the furniture was seized and removed, the defendant received, retained, and appropriated it to his own use, with knowledge of the manner in which it had been obtained, thereby ratifying what had been done in his name and in his behalf, even if he did not originally authorize the use of force and violence. We think there was evidence from which the jury might legitimately infer that the defendant intended to assert his alleged right to the property in controversy by force and arms, without reference to consequences or the legal rights of others. The conduct of the person sent to seize the property was reckless, wanton, and unlawful, and the acts of that person he has approved and adopted by receiving and retaining the property with full knowledge of the manner in which it had been obtained. Under the circumstances, the circuit court left the jury at liberty to assess exemplary damages, if they thought proper, telling them, in substance, that they were to exercise their best judgment as to whether the case was one which warranted the allowance of such damages. In so doing, we think that no error was committed by the trial court.

It follows from the preceding discussion that the circuit court erred in instructing the jury that the plaintiff was entitled to recover the value of the mortgaged chattels which were taken from the hotel, to the amount of the first chattel mortgage thereon, and the accrued interest, if the property was worth that amount. We are of the opinion, for the reasons heretofore stated, that the first chattel mortgage should have been treated as paid and extinguished when it was acquired by the plaintiff. This view of the case entitled the plaintiff to recover, on account of the wrongful taking of the mortgaged property, whatever sum it was worth, over and above the amount of the second chattel mortgage, which was owned by the defendant, and such exemplary damages, if any, as the jury saw fit to award. The existing judgment is therefore reversed, and the cause is remanded, with directions to grant a new trial.

**SAFETY INSULATED WIRE & CABLE CO. v. MAYOR AND CITY
COUNCIL OF BALTIMORE.**

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 112.

1. MUNICIPAL CORPORATIONS—POWER TO CONTRACT.

Cities and towns, as municipal corporations, possess a double character, —the one governmental, legislative, or public; the other proprietary or

private. In the former such a corporation is made, by the state, one of its instruments for the exercise of certain political powers, which cannot be controlled or embarrassed by any contract of the corporation; but in its proprietary or private character powers are conferred for the private advantage of the particular corporation, and, as to such powers, and contracts made thereunder, such corporations are to be regarded as private corporations.

2. SAME.

In the exercise of its governmental powers, a municipal corporation has a discretion as to the time and manner of making improvements, etc., but when such discretion has been exercised the duty becomes purely ministerial, and contracts made in reference to the carrying out of such improvements, etc., cannot be revoked at the will of such corporation.

3. SAME—ATTEMPT TO REVOKE.

The city of B. passed an ordinance directing certain officials to advertise for proposals for furnishing cables, conduits, etc., and placing the police and fire alarm telegraph wires belonging to the city under ground, and, after deciding upon the best cables, etc., to award a contract for furnishing the same and doing the work. Said officials, after due advertisement, accepted the proposal of the S. Co. That company, two days later, declared itself ready to begin work, but on the same day was notified that the acceptance of its proposal had been reconsidered because of an opinion of the city solicitor that the ordinance authorizing it was defective in certain matters of detail. *Held*, that such attempted revocation of the assent of the city was no defense to an action by the S. Co. on the contract.

4. DAMAGES—LOSS OF PROFITS.

Held, further, that, though profits on such contract could not be recovered unless shown to be the direct and immediate fruits of the contract, the S. Co. should not be excluded from making such proof as it could as to loss of profits, though it had not actually entered upon the performance of the contract, or expended any money thereon.

In Error to the Circuit Court of the United States for the District of Maryland.

This was an action by the Safety Insulated Wire & Cable Company against the mayor and city council of Baltimore to recover damages for the failure of the city to perform a contract with the plaintiff. The circuit court gave judgment for the defendant. Plaintiff brings error.

Wm. Pinkney Whyte (Morrill H. Packard, appearing in brief), for plaintiff in error.

Thomas G. Hayes, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the circuit court of the United States for the district of Maryland. The city of Baltimore, by authority of an act of the legislature and a vote of the people, was authorized to issue a loan of \$6,000,000 for certain specified purposes, among them "the laying of conduits for telegraph and other wires." The apportionment of the sum obtained from this loan was left with the city council of Baltimore. Exercising this discretion, the mayor and city council, October 7, 1892, set apart \$250,000 of the loan for constructing conduits for underground wires in Baltimore as may

hereafter be directed by ordinances of the mayor and city council of Baltimore. Ordinance 100, 1891-92. By chapter 200, Acts 1892, of the state of Maryland, the mayor and city council of Baltimore were authorized—

"To provide a series of conduits under the streets, lanes and alleys of the city or any part or parts thereof for the use of telephone, telegraph, electric-light and other wires, either by constructing such conduits themselves or by authorizing their construction by any person or corporation upon such terms as may be agreed upon, and to provide for the appointment of an electrical commission, with such powers and duties as the said mayor and city council may deem necessary or appropriate for carrying out the purposes of this act; and to require all such wires or any part or parts thereof and the poles carrying the same to be removed from the surface of the streets, lanes and alleys of said city or any part or parts thereof and to require such wires to be placed in such conduits, all under such penalty as they may prescribe, and to prescribe and establish reasonable rentals to be paid by any company or person using any of said conduits by whomsoever the same may be constructed for the use thereof, and to provide for the collection of said rentals in addition to the ordinary processes by such summary methods as they may deem appropriate."

The city of Baltimore itself had a system of telegraph and telephone wires carried on poles in said city, used exclusively by the city for the use of the police and fire departments, respectively. At the time of the passage of the ordinance of 1893 next mentioned, out of which this case arose, the city of Baltimore had given to the Chesapeake & Potomac Telephone Company the privilege of constructing conduits for its wires under the streets, lanes, and alleys of the city, reserving to the city the right to use the conduits and subways of that company for its own wires without cost to the municipality. Under these circumstances the mayor and city council of Baltimore, on 1st May, 1893, passed an ordinance No. 106. The title of the ordinance is "An ordinance to place the wires of the police and fire alarm telegraph and police patrol systems under ground." It puts the matter in charge of the board of fire commissioners and the superintendent of the police and fire alarm telegraph, and authorizes and directs them to advertise for proposals to furnish cables, conduits, and trenching, separately or as a whole, when it may be necessary. It directs that the subways and conduits of the Chesapeake & Potomac Telephone Company be used, as far as practicable, under the right reserved to the city to place therein the wires of the police and fire alarm telegraph and police patrol telegraph. It empowers them, after deciding upon the cable or cables best in their judgment, to award the contract to the lowest responsible bidder or bidders. It appropriates for this work \$100,000 of the \$250,000 "set apart for laying conduits for underground wires" in the ordinance distributing the \$6,000,000 loan. The board of fire commissioners and the superintendent of the police and fire alarm telegraph, acting under this ordinance, advertised for bidders to do this work. The Safety Insulated Wire & Cable Company put in a bid for \$97,985, and it was accepted on 28th June, 1893. On 30th June, 1893, this company declared itself ready to begin and conclude the work. On the same day it was informed by the board of fire commissioners and the superintendent of the police and fire alarm telegraph, by a

secretary, that the vote awarding the contract to the Safety Insulated Wire & Cable Company was reconsidered, for that the ordinance authorizing the same is defective and void for indefiniteness, as declared by the opinion of the city solicitor. The Safety Insulated Wire & Cable Company made no further progress in the work, but it brought its action in the circuit court of the United States for the district of Maryland against the mayor and city council of Baltimore for the breach of contract. The defendant interposed a special plea to the declaration. This plea, in effect, is that under the advice of the city solicitor the board of fire commissioners and the superintendent of the police and fire alarm telegraph reconsidered their action accepting the bid of plaintiff, and so notified it, and that the city council subsequently repealed the ordinance of May 1, 1893, under which the contract was given out, concluding with the averment that it appears by the bill of particulars filed with the declaration, plaintiff had done no work under the bid which had been accepted by the defendant, and had incurred no expense whatever under said bid so accepted. The plaintiff demurred to the plea. The cause was heard on the demurrer, and it was overruled. Thereupon plaintiff excepted, and the case comes here on the assignments of errors.

The assignment of error relied upon by appellant is the third. The court was in error in not discriminating between the acts of the municipal corporation when acting in its governmental capacity and when acting as a property holder, and putting contracts made in these different capacities upon the same level of liability for nonperformance. That this contract was made by the corporation through its lawful agents, and within the scope of its powers, is not denied. The position taken by the defendant is that the city council, in passing this ordinance advertising for bids, accepting this bid, and engaging in this work, acted in its governmental capacity, and that no contract so made is irrevocable. It seems to be a contradiction in terms to speak of a contract revocable at the will of one of the contracting parties. Be this as it may, municipal corporations, confining the term to cities and towns, possess a double character,—the one governmental, legislative, or public; the other in a sense proprietary or private. In its governmental or public character, the corporation is made by the state one of its instruments, the local depository of certain limited and prescribed political powers to be exercised for the public good on behalf of the state, and not for itself. These legislative or governmental powers they cannot cede away or control or embarrass by any contract disabling them from performing their public duties. *Western Saving Fund Soc. v. City of Philadelphia*, 31 Pa. St. 182. Such contracts necessarily are void ab initio. They are not within the scope of the powers of the corporation. But in its proprietary or private character the powers are conferred on the municipal corporation, not from considerations connected with the government of the state at large, but for the private advantage of the particular corporation as a distinct legal personality. As to such powers, and as to the property acquired thereunder and contracts made

with reference thereto, the corporation is to be regarded quoad hoc a private corporation. Judge Dillon, in whose valuable work on Municipal Corporations these principles are discussed, further illustrates the peculiar character of these municipal bodies in these words:

"One reason given for the distinction (between municipal and quasi corporations) is that, with respect to local or municipal powers proper (as distinguished from those conferred on the municipality as a mere agent of the state), the inhabitants are to be regarded as having been clothed with them at their request, and for their peculiar and special advantage, and that as to such powers and the duties springing out of them the corporation has a private character, and is liable on the like principles, and generally to the same extent, as a private corporation." Dill. Mun. Corp. § 26.

The city of Baltimore owned certain telegraph and telephone lines, giving greater efficiency and convenience to its police and fire departments. They were above ground, on poles. They were liable to constant injury and interruption from fires, gales, and other causes. For their better preservation, the city determined to put them under ground in conduits, and made this contract for that purpose. The contract was for the private advantage of the city as a legal personality, distinct from considerations connected with the government of the state at large; and with reference to this contract the city must be regarded quoad hoc a private corporation.

There is another point of view. In its governmental or legislative capacity a municipal corporation is invested with discretionary powers. It has a discretion as to the time and manner of making corporate improvements, grading streets, making sewers, drains, vaults, etc. The courts cannot control this discretion. But when this discretion has been exercised, and the public improvements determined upon, and a contract made relative thereto, the legislative function has been exhausted, and the duty has become purely ministerial. Dill. Mun. Corp. § 949; *Weightman v. Washington*, 1 Black, 49. But, apart from and above all this, the obligation of a contract made between parties competent to contract cannot be impaired at the option of one of the contracting parties. This doctrine controls whether the party to the contract be a sovereign state or an humble individual. It has been enforced against the action of states when the subject-matter of the contract was the exercise of the highest governmental and legislative powers,—the granting of a franchise. It has perpetuated an exemption from the power of taxation when such exemption has been the consideration for the contract between the sovereign and the citizen. And municipal corporations, mere creatures and agents of the sovereign, are not exempted from the operation of the rule. "Upon authorized contracts within the scope of the charter powers of the corporation, and duly made by the proper officers and agents, they are liable in the same manner and to the same extent as private corporations." Dill. Mun. Corp. § 935. It is true that when, in the contract entered into, it appears that its execution will interfere with the duties of the municipal corporation in preserving the public health and morals of the city, or will create a nui-

sance, the corporation can refuse to go on with the contract. *Brick Presbyterian Church v. City of New York*, 5 Cow. 540. Even, however, in that case, it must reimburse the contractor for all outlay made under the contract (*Rittenhouse v. Mayor, etc., of Baltimore*, 25 Md. 336), and for all damages not speculative or too remote (*Masterton v. Mayor*, 7 Hill, 62; *U. S. v. Behan*, 110 U. S. 344, 4 Sup. Ct. 81).

There is nothing in the opinion of the city solicitor, introduced in and made a part of the plea, which claims or intimates that this contract is one into which the city could not enter. It does not interfere with the public health or morals. It does not create a nuisance. It is not in disregard of a public trust. It does not limit the legislative discretion of the city council. It simply provides for the construction of works, admitted to be within municipal powers. The objections of the learned counsel go to the framing of the ordinance, and the manner in which the specifications were given. He admits the right to contract, and the substantial compliance with the ordinance, when he recommends that the ordinance be amended, unless, "in your judgment, it is of great importance to commence this work at once." Nor is it enough to aver, as is done in this plea, that the plaintiff has made claim only for the profits he has been prevented from making, and that these cannot be recovered. The true rule is laid down by Mr. Justice Bradley in *U. S. v. Behan*, 110 U. S. 339, 4 Sup. Ct. 81. The government had contracted with Behan for certain improvements in the harbor of New Orleans. The contract was rescinded by the government. Behan sued the United States for damages resulting from the breach of contract, and claimed as well the profits he might have made as his actual outlay. On this point the court says:

"The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item—profits—cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterton v. Mayor of Brooklyn*, 7 Hill, 69, they are 'the direct and immediate fruits of the contract,' they are free from this objection. They are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.'"

See, also, *Howard v. Manufacturing Co.*, 139 U. S. 206, 11 Sup. Ct. 500.

The plaintiff should have an opportunity of making such proof on this point as it can. In our opinion, the circuit court erred in overruling the demurrer. Its judgment is reversed. Let the case be remanded to the circuit court for such other proceedings as may be proper.

In re CHARGE TO GRAND JURY.

(District Court, N. D. California. February 15, 1895.)

INTERSTATE COMMERCE—UNJUST DISCRIMINATION—FREE PASSES.

An officer of a railroad company engaged in interstate commerce who, as a matter of personal favor, issues to a person not within any of the exceptions contained in section 22 of the interstate commerce act a free pass for transportation from one state to another, is guilty of unjust discrimination, in violation of sections 2 and 3 of that act.

MORROW, District Judge (charging jury). You have been summoned and sworn as grand jurors of the district court of the United States for the Northern district of California. It now becomes the duty of the court to give you some instructions concerning the duties you will be called upon to perform under the laws of the United States. By the constitution of the United States, no person can be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger. Your duties are therefore not only highly important to the community, but they require, on your part, the exercise of patience in the careful investigations of charges against persons accused, and firmness and judgment in presenting offenders for prosecution. It is not my purpose to call your attention to all the cases or matters you will be called upon to examine, but it is incumbent upon me to direct your attention to one subject that has come under the observation of the court, relating to railroad transportation, under the law concerning interstate commerce.

The act of congress entitled "An act to regulate commerce," approved February 4, 1887, provides in section 1 as follows:

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia," etc.

Section 2 provides as follows:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3 provides as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or

any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." 24 Stat. 379.

Section 10, as amended by the act of March 2, 1889, provides as follows:

"That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: provided, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term not exceeding two years, or both such fine and imprisonment, in the discretion of the court." 25 Stat. 857.

These provisions of the law respecting unjust discrimination are qualified by the provisions of section 22, as amended by the act of March 2, 1889, as follows:

"That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes. Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees. * * *" 25 Stat. 862.

The interstate commerce commission was created by virtue of section 11 of this same act to regulate commerce, approved February 4, 1887. It is endowed with the authority of investigating charges against any common carrier subject to the provisions of the act and the acts amendatory thereof, for any violations by such common carrier of any of the provisions contained in said acts.

This commission has considered the question as to whether the granting of transportation to persons free or at reduced rates constituted a violation of the provisions I have just read to you.

In *Re Boston & M. R. Co.*, 5 Interst. Commerce Com. R. 69, it was held by the commission, on December 29, 1891, that it was a violation of the act to regulate commerce, and therefore an unjust discrimination, for the Boston & Maine Railroad Company to issue passes entitling the holders to free transportation over the lines of its system, extending into the states of Maine, New Hampshire, Vermont, and Massachusetts, where such persons did not come within the exceptions specified by section 22 of the act, as it is amended by the act of March 2, 1889, but were gentlemen whose claim for the privilege of free transportation was based upon the fact that they were long eminent in the public service, higher officers of the states, prominent officials of the United States, members of the legislative railroad committees of the above-named states, and persons whose good will was claimed to be important to the defendant.

The same question was again considered by the commission in the case of *Harvey v. Railroad Co.*, 5 Interst. Commerce Com. R. 153, where the conclusions reached in *Re Boston & M. R. Co.*, supra, were decisively and unequivocally reaffirmed. Commissioner Martin A. Knapp, of New York, who delivered the report and opinion of the commission, used the following language:

"The fundamental and pervading purpose of the law is equality of treatment. It assumes that the railroads are engaged in a public service, and requires that service to be impartially rendered. It asserts the right of every citizen to use the agencies which the carrier provides on equal terms with all his fellows, and finds an invasion of that right in every unauthorized exemption from charges commonly imposed. No form of favoritism and no species of partiality seems more odious or indefensible than that which accords to personal influence or public station privileges not enjoyed by the community at large. The free carriage of certain persons merely because they occupy official positions, or have acquired some measure of distinction, offends the rudest conception of equality, and contravenes alike the policy and the provisions of the statute. The practices complained of in this proceeding are illegal, and must receive our condemnation."

The order of the commission reads as follows:

"The order of the commission is that the defendant forthwith cease and desist from granting free passes or otherwise furnishing free transportation over its interstate lines, except as provided in the twenty-second section of the act."

You will observe, gentlemen of the grand jury, from the provisions of the statutes, as well as the conclusions respecting the construction of such provisions reached by the interstate commerce commission, that it was the intent of congress to prevent unjust discrimination in charges or rates for transportation of persons or property by any common carrier engaged in interstate commerce, and that the issuing of passes, entitling the holder to free transportation from one state to another, is, unless justified by the exceptions, an "unjust discrimination," which congress intended to prevent and punish. In other words, one of the objects of congress in this character of legislation was to do away with the pernicious practice of unjust discriminations in rates, and to break up the

odious system of favoritism and special privileges, so contrary to the principles of our government, of which one of the fundamental ideas is that all men are equal in the eyes of the law, and should be so treated. It was designed, by the act referred to, to compel common carriers of interstate commerce to discharge their public function impartially in charging for transportation; treating everybody alike, so far as that is practicable, whether in high or low station, whether public functionary or private citizen, whether rich or poor. The duty of ascertaining whether there has or has not been in this district any violation of the penal provisions of these laws to prevent unjust discriminations is, for the time being, by the law of the land, reposed in your hands; and it becomes my duty to call to your attention, and it will be yours to calmly, thoroughly, and impartially consider, a matter brought to the notice of the court upon the trial of a criminal case in the month of December of last year, and of which the court is therefore judicially advised.

While the case of the United States of America v. John Cassidy and John Mayne, popularly known as "The Strikers' Case," was on trial in this court, Mr. Frank B. Stone, who was called as a witness for the government, gave the following testimony on Thursday, December 6, 1894, which appears in volume 16 of the transcript of testimony, as follows:

"Frank B. Stone, called for the United States. Sworn. Mr. Knight: Q. You are an attorney at law? A. Yes, sir. Q. Of San Francisco? A. Yes, sir. Q. Residing at San Francisco? A. Yes, sir. Q. Will you state where you were on the 30th day of June last? A. I was in San Francisco until evening. I left on the seven o'clock train for the North. Q. What was your point of destination? A. I think I intended to leave the road at Ashland. I was accompanied by Judge J. E. Murphy, of Del Norte, going on a camping trip. We were to leave the railroad at Ashland, Oregon, and take the stage for Crescent City. Q. You are referring to Ashland in the state of Oregon? A. Yes, sir. I think it may have been beyond there. It has escaped me, the exact point we were to leave the road; somewhere in Oregon. We were to take the stage, and proceed to his ranch in the vicinity of Crescent City. Q. Did you go through to your point of destination? A. I did not. I was stopped at Red Bluff. Q. What train was this that you went up on? A. What was known as the 'Oregon Express.' Q. That is over the line of the Southern Pacific road? A. Yes, sir."

Upon cross-examination, the same witness testified as follows:

"Mr. Monteith: Q. What is your business here? A. Practicing law. Q. Anything else? A. Any other business? Q. Yes. A. No, sir. Q. Are you connected in any way with the operating department of the Southern Pacific? A. I am not in any way. Q. With the traffic department? A. No, sir; in no way, in any shape or manner. I am in a position to-day and would be glad to take any case that was brought to my office that I thought was right against that company. Q. I am asking about the mechanical department. A. In no way, shape, or manner. Q. Are you connected with the legal department in any way? A. In no way, shape, or manner. Q. Have you not tried in the last year or two to obtain a situation in connection with the legal department of the Southern Pacific? A. No, sir. Q. Have you not traveled on passes? A. I have. Q. Were you not traveling on a pass then? A. I was, with Mr. C. P. Huntington's personal pass. Q. Have you not been in the habit of having a book of passes in your office, and giving them out to people? A. No, sir. Q. During the campaign two years ago, did you not, while you were acting as manager for Mr. De Young's campaign, have in your office a book of free tickets or passes that you gave away? A. I had blank passes. Q. You issued them? A. I did on occasions. Q. You got

them from the railroad company? A. Yes, sir. Q. At that time you had some connection with the railroad company? A. None on earth. Q. How did you happen to handle these passes? A. Through my personal friendship, extending back to my partnership with A. A. Sargent, with Mr. C. P. Huntington. Q. How many passes did you give out that year? A. I could not say; not a great many. Q. You had several books? A. I might have had several books. There were not any great number of passes."

He further testified upon cross-examination as follows:

"Mr. Monteith: Q. You went to Red Bluff on a train on June 30th? A. I left on the night of June 30th. Q. You traveled on a Pullman car? A. Yes, sir. Q. Did you have a Pullman pass? A. I did. Q. Do you remember on what account that Pullman pass was issued? Was it not issued on account of the Southern Pacific? A. No, sir. Q. On account of C. P. Huntington? A. No, sir; it was a personal favor extended to me. I have said Mr. C. P. Huntington is my personal friend. Any favors I have received have been received through his personal influence. The Court: Mr. Monteith is asking about a Pullman pass. A. I understand. Mr. Monteith: Q. Was your Pullman pass an annual or a trip pass? A. An annual. Q. Does not the pass say on it— Have you it with you? A. No, sir; it does not say anything. Q. See if I cannot refresh your memory. Does it not say on it, 'Pass Frank M. Stone on account of' so and so? A. Absolutely not. If you would like to be enlightened, I can show you my pass, and bring the other. Here is Mr. Huntington's pass: 'Southern Pacific Company: Pass Frank M. Stone over lines of Southern Pacific Company. 1894 until December 31st, unless otherwise ordered. C. P. Huntington.' It is as good in Texas as it is in California, and over any line wherever a Southern Pacific engine runs, and has been given me something like ten years, by Mr. C. P. Huntington personally. There is nothing issued to me in any other way. Q. You are not employed by the Southern Pacific Company? A. In no way, shape, or manner. Q. By any other railroad company? A. No, sir. Q. Did you ever advise Mr. Huntington that the issuance of that pass was in contravention of the interstate commerce act? A. No, sir. Q. Those other passes that you spoke about—those books of passes—were all on your personal account? A. Absolutely; to me personally. No one could have issued one under any circumstances except myself, and they were given to me as a personal favor, and at my personal request. Q. Those were in the form of tickets? A. Blank tickets. Q. Two inches long, and about an inch wide? A. They were not passes. They were tickets. I should judge that was about the size. Q. They had the stamp of the general passenger and ticket agent on the back? A. Yes, sir. Q. The blanks in them were simply the points of beginning and the points of destination? A. Yes, sir, they were simply tickets; they were not passes. Q. They were free tickets, given away without compensation? A. By myself? Q. Yes. A. Yes, sir; I never received anything for any of them."

You will observe that Mr. Stone testifies that his destination was Ashland, in the state of Oregon, or to some place beyond in that state. He was therefore on a journey that carried him from this state into another, bringing his transportation within the laws of the United States relating to interstate commerce. It will be noticed, further, that Mr. Stone does not claim to belong to any of the excepted or privileged classes mentioned in section 22 of the interstate-commerce act. His claim is that the pass was given to him as a matter of personal favor and friendship. You will therefore carefully examine all the facts in this case, and ascertain to what extent the pass system has been employed, if at all, by the officers of the Southern Pacific Company, in favoring individuals not entitled to such favors under the law in the matter of free transportation beyond the boundary of the state.

In each judicial district there is a United States attorney, appointed by the president, to represent the interests of the government in the prosecution of parties charged with the commission of public offenses against the laws of the United States. The United States attorney for this district will therefore appear before you, and present the accusations which the government may desire to have considered by you. He will point out to you the laws, other than those I have mentioned, which the government deems to have been violated, and will subpoena for your examination such witnesses as he may consider important, and also such other witnesses as you may direct. To constitute a legal grand jury, at least 16 of your number must be present; and not less than 12 must concur to authorize you to find an indictment or make a presentment; a majority will not be sufficient. In your investigations, you will receive only legal evidence, to the exclusion of mere reports, suspicions, and hearsay evidence. Subject to this qualification, you will receive all the evidence presented which may throw light upon the matter or matters under consideration, whether it tend to establish the innocence or guilt of the accused. And more: if, in the course of your inquiries, you have reason to believe that there is other evidence not presented to you within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced. Formerly it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment, you must be convinced, so far as the evidence before you goes, that the accused is guilty. In other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury. You will regulate the time of your sessions to accommodate the convenience of yourselves and the district attorney, but you will not adjourn for a period of more than four days without the permission of the court. In the progress of your examinations, should questions arise concerning which you may desire further instructions from the court, you may come into court for that purpose, and the law will be further explained to you with respect to such questions.

MAGNON v. UNITED STATES.

(Circuit Court, S. D. New York. January 2, 1895.)

CUSTOMS DUTIES—ACT OCT. 1, 1890—LIVE SNAKES—TOOLS OF TRADE.

Certain trained snakes, imported by a professional snake charmer, held to be free of duty under paragraph 686, under the provision therein for "implements, instruments and tools of trade, occupation or employment," and not dutiable as "live animals" under paragraph 251, as classified by the collector.

This was an application by the snake charmer Magnon, importer of certain trained snakes, for a review of the decision of the board

of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on said snakes.

Comstock & Brown, for importer.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. The importer in this case is a snake charmer, and imported 28 trained snakes, in her actual possession, and used by her in exhibitions of her skill in that profession, and which were not for sale. A duty was assessed upon them as animals. She claims they are free under paragraph 686 of the tariff act of 1890, which exempts "professional books, implements, instruments, and tools of trade, occupation or employment," under such circumstances. A suggestion is made in argument that these words do not include animate things. One definition of "instrument" is: "One who, or that which, is made a means, or caused to serve a purpose." Webst. Dict. "Instrument" 4. These snakes are clearly "instruments" within this definition. They are instruments with which she practices her profession, and are her professional instruments. As such, she seems to have been entitled to have them come with her, duty free. Decision of board reversed.

SCHWARZWALDER et al. v. NEW YORK FILTER CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

1. PATENTS—EFFECT OF DISCLAIMER ON QUESTION OF NOVELTY.

Where a disclaimer has been filed by the patentee as a result of litigation, the validity of the patent, as regards the question of novelty, is to be tested, not by its original terms and scope, but by what remains after the disclaimer, in the same manner as if the matter disclaimed had never been a part of the patent. *Dunbar v. Myers*, 94 U. S. 194, followed.

2. SAME—OPERATION OF DISCLAIMER.

The disclaimer of matter which is not a part of the description, but is merely a recital designed to enlarge the scope of the patent, operates merely to expunge from the claim what otherwise would, by force of the recital, be incorporated into it constructively.

3. SAME—CONSTRUCTION OF CLAIM—PURIFYING WATER—EQUIVALENT COAGULANTS.

In a patent for a process of purifying water, a claim which covers the use of coagulants "such as perchloride or persulphate of iron" includes the use of alum, which is a recognized equivalent.

4. SAME—NOVELTY AND INFRINGEMENT.

The Hyatt patent, No. 293,740, for a method of purifying water, consisting in the simultaneous application of a coagulant and a process of filtration, the coagulant being mixed with the water at the time of its introduction into the filtering apparatus, and while it is flowing continuously through the filter bed, thus dispensing with settling tanks, held valid, and infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit by the New York Filter Company against Henry Schwarzwald, August Finck, and the O. H. Jewell Filter Com-

pany for infringement of letters patent No. 293,740, for an improvement in the art of filtering water. There was a decree for complainant directing an injunction and an accounting. 61 Fed. 840. Thereafter a motion by defendants for leave to amend the answer and take new proofs was denied. 62 Fed. 582. From the decree for complainant, defendants appealed.

This is an appeal from a decree of the United States circuit court for the Southern district of New York adjudging the validity of letters patent No. 293,740, dated February 19, 1884, granted to Isaiah Smith Hyatt, and charging the defendants as infringers. The patent is for "method of purifying water." The specification is as follows:

"The invention relates to improvements in the art of filtration, and it consists in the method hereinafter described of arresting and removing the particles of foreign matter liable to pass through the filter bed with the escaping water during an uninterrupted process of filtration, or one in which a stream of water is passed through a bed of filtering material contained in a filter; the filter being a receptacle containing a bed of filtering material, and having a supply pipe for the introduction of the water and a pipe for its passage therefrom, the said supply pipe having another pipe, through which I introduce into the water, simultaneously with its passage into the filter, a substance—such as perchloride or persulphate of iron—for the purpose of sufficiently coagulating the impurities in the water to admit of their arrest by the bed during the passage of the water through the filter. In practicing the invention some form of mechanical apparatus must be employed, and, while I do not confine myself to any particular construction, I recommend the apparatus described and claimed in letters patent of the United States No. 273,542, granted to John W. Hyatt on the 6th day of March, 1883, which I have used with very satisfactory results. In the accompanying drawing I have illustrated a sectional view of such an apparatus, by means of which the invention sought to be protected hereby may be successfully practiced; but, as I have stated, other forms of filtering apparatus may be used with good results. The apparatus shown in the drawing consists of the upper and lower compartments, A, B, separated by a diaphragm, C, in which is provided the valve, D. The upper compartment is provided with a waste outlet, E, and the lower compartment with a supply pipe, F, a delivery, G, and a waste pipe, H. The delivery consists of a tube of perforated metal, I, connecting with the pipe, J. A transfer washing pipe, K, will extend from the lower part of the compartment B to a suitable point adjacent to the upper part of the compartment A. The bed of sand or other suitable filtering agent will be placed in the lower compartment. The passage of the liquid through the apparatus above described and the method of washing the filter bed will be the same as that set forth in said letters patent. The supply pipe, F, has connected with it a pipe, O, which will pass from any suitable supply of persulphate of iron or perchloride of iron or other coagulating agent, which, by preference, will be in solution. The filter bed and the persulphate or perchloride of iron or other coagulating agent will meet at the juncture of the pipes, F and O, and then pass into the filter together, with the result that the minute particles of foreign matter in the liquid will be sufficiently coagulated to permit their arrestation by the filtering agent. As I have stated, the proportions or quantities of the coagulating agent cannot be accurately defined. It is only necessary that a sufficient quantity be used to effect that degree of coagulation which will admit of the fine impurities being arrested from the water on its passage through the filter bed during a continuous process. It will be understood that in this process the coarse impurities present in the water may be arrested by the filter bed without coagulation. I may mention, as an illustration, that I have successfully purified the water of the Mississippi river at New Orleans by using about one-eighth of a pound of perchloride of iron of from 50° to 60° Baume to a thousand gallons of water. I do not confine myself to the employment of persulphate or perchloride of iron or permanganate of potassa, but make use of any other suitable agent which is capable of coagulating the impurities of the liquid, and preventing their passage through the filter bed. Neither do I limit myself to any particular pro-

portions or quantities of the coagulating agent, as they may be varied according to circumstances and the character of the liquid to be treated. Nor do I confine myself to any particular liquid, although I contemplate chiefly the purification of water in large quantities. It is obvious that by the use of the uninterrupted process hereinbefore described I entirely dispense with the employment of settling basins or reservoirs as now commonly employed."

The claim is as follows:

"The method hereinbefore described of arresting and removing the impurities from water during an uninterrupted passage of same from a supply pipe into a filtering apparatus, thence through a filter bed contained therein, and out through a delivery pipe leading therefrom, which method consists in introducing into the water, simultaneously with its passage to or into the filter, a substance which will sufficiently coagulate or separate the impurities to facilitate their arrest and removal by the filter bed, thus obviating the necessity of employing settling basins."

After a litigation upon the patent in a suit in the United States circuit court for the Northern district of Illinois, in which, in February, 1889, the bill for infringement was dismissed, and on July 27, 1889, the owner of the patent filed in the patent office a disclaimer of that part of the specification of the patent which is in the following words: "I do not confine myself to the employment of persulphate or perchloride of iron or permanganate of potassa, but make use of any other suitable agent which is capable of coagulating the impurities of the liquid and preventing their passage through the filter bed. Neither do I limit myself to any particular proportions or quantities of the coagulating agent, as they may be varied according to circumstances and the character of the liquid to be treated. Nor do I confine myself to any particular liquid, although I contemplate chiefly the purification of water in large quantities."

Lysander Hill, for appellants.

M. H. Phelps and M. B. Philipp, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and COXE, District Judge.

WALLACE, Circuit Judge (after stating the facts). In their assignment of errors the appellants insist that the decree of the court below proceeded upon a wrong construction of the patent, and that, properly construed, it should have been adjudged void for want of novelty. They also insist that, if it be capable of a sufficiently narrow construction to uphold its validity, they have not infringed it.

The patent relates to improvements in the art of filtration. These improvements, as disclosed by the description in the patent and an examination of the prior state of the art, lie within plain boundaries; but we regret to say that in finding them we have been much embarrassed by the many illusory theories of the expert witnesses for the complainant. According to the description, read in connection with the disclaimer, they consist in a method of arresting and removing the particles of foreign matter in water, during an uninterrupted process of filtration, by introducing into the water, simultaneously with its passage into the filtering apparatus, a sufficient quantity of a coagulant, such as perchloride or persulphate of iron (salts of iron), to coagulate the fine impurities present, and permit the filter bed to arrest them, coarse impurities in the water being arrested by the filter bed without coagulation. Any filtering apparatus which dispenses with settling basins, and in which

there is a bed of filtering material, may be used, although the use of a particular form is recommended. As different waters vary in the extent of their impurities, it is manifest that the proportions or quantity of the coagulating agent must vary accordingly; and the description, being addressed to those skilled in the art, conveys sufficient information that the usual preliminary test is to be made to ascertain the amount requisite for the particular waters which are to be purified. The suggestion of the small quantity which has been successfully used to purify the waters of the Mississippi river is of some value in imparting the information, but the method is not confined to the use of small quantities. The method is not exclusively applicable to the purification of natural or potable waters; and, although the patentee undoubtedly contemplated its application to the purification of waters in large volume, the description does not contain any limitation to that effect. The description implies to those skilled in the art the use of a granular filter bed, capable of being readily washed, where large volumes of water are to be treated. The method embraces the treatment of any waters, whether they are to be purified on a small scale for family use, or on a large scale for the use of factories or municipalities.

In the prior state of the art it was not new to use the coagulants mentioned, as well as the salts of alumina, or alum, a well-known equivalent, for the purification of water. It was a well-known fact that either alum or the salts of iron would agglomerate with the coloring matter and other finely suspended impurities in water, and the united particles or masses would precipitate, leaving the water comparatively clear. An appreciable period of time, varying, with different waters, from a few minutes to several hours, was supposed to be necessary to thus clarify the water. These coagulants had been used with other chemicals in filtration processes in the course of the chemical treatment of the water to precipitate the impurities, the other chemicals being added in the subsequent treatment before filtration. They had also been used in sedimentation processes to precipitate the impurities in reservoirs or settling basins, whence the water, if desired, could be subsequently filtered. Indeed, as appears by the file wrapper of the patent in suit, the original application of Hyatt was rejected because, as his description and claims were then expressed, the subject-matter was covered and anticipated by the well-known and commonly practiced method of clearing Mississippi river water by the addition of alum, followed by settling and decantation or filtration; and his patent was not allowed until he amended his application so as to show that he dispensed with settling basins and purified the water by an uninterrupted process of filtration.

In considering the anticipatory references in prior patents and printed publications, of which a great number have been introduced, it will not be profitable to dwell upon those which treat of the use of chemicals in filtration processes for the purpose of softening water, inasmuch as the present patent relates to a different art; nor to consider in detail those which treat of their use in sedi-

mentation processes for the purification of water, because it is the special object of the present patent to substitute the method of filtration. The sedimentation processes are only of value as they tend to throw light upon the inquiry whether the method of the patent in departing from them involves invention. The most valuable references are the English patent to Paget of October 20, 1874, and the English patent to Spence of November 28, 1881. The former describes the closest approximation in the prior art to the method in the patent in suit. The latter contains the most apposite description of the use of the coagulants of the patent in suit for purifying water by sedimentation.

Paget's patent is for improvements in the means of purifying and clarifying the refuse water of manufacturing works. It states that water containing organic or inorganic substances in an extremely minute state, and generally in suspension, cannot be clarified in large standing reservoirs, because the impurities fall very slowly, or in most cases remain in suspension; that mere filtration is also incapable, because the greater portion of the matter in suspension passes through filtering material; and that, in order to separate these matters completely, rapidly, and with certainty, and get rid of the greater portion, it is necessary to first prepare or treat the water chemically, and then subject it to filtration. The process described is a continuous one, and is carried on in a self-acting apparatus. The water is first brought into a receiver, and mingled with a definite proportion of sesquichloride of iron and chloride of aluminum, the proportions varying according to the nature and quality of the water, to be ascertained in each case by a previous trial on a small quantity of water. Here the first chemical reaction takes place, giving an insoluble precipitate. Thence the water flows into a mixer, where it takes up a determinate quantity of lime milk or lime water, and a new chemical reaction occurs, forming a voluminous precipitate which carries down with it the most minute particles in suspension. Thence it flows through a filter bed, which retains the precipitate, and from which the water issues clear and limpid.

Spence's patent is for the purification of water for domestic, manufacturing, and other purposes by the use of salts of alumina or alumina and iron. It recites that he had previously obtained a patent for a process for the purification of sewage by the use of salts of alumina, or alumina and iron, and that he has found that his process is also applicable to the purification of other impure waters. It states that his present invention consists in the application of salts of alumina, or alumina and iron, for the purification of water for domestic, manufacturing, and other purposes from all matters contained in such waters which are capable of being precipitated by salts of alumina or alumina and iron. The water to be purified is run into tanks or reservoirs, and the salts added thereto in sufficient quantities to cause all the dissolved and other impurities which are capable of being acted upon by them to be separated from the water, and fall to the bottom of the tanks or

reservoirs. The reagent is preferably in a liquid form, and may either flow into the stream of water on its passage to the tanks or reservoirs, or may be added when the tanks or reservoirs are filled with water. The precipitated matter can then be removed by pumping or in any other convenient manner. The water, having been thus deprived of all the precipitated magma, is now pure and transparent, and may be used for any desired purpose.

The patent in suit describes a departure from anything which appears to have been done or known in the prior art, so far as appears by the record. It describes a method for the purification of water by the simultaneous application of a specified coagulant and a process of filtration, the coagulant being applied to or mixed with the water to be filtered substantially at its introduction into the filtering apparatus, and while it is flowing continuously to the filter bed. By this method the coagulants perform their principal work within the filter bed itself. By this change in previous processes the patentee not only dispensed with the use of settling tanks, thus saving the time and expense required in sedimentation processes like that of Spence, but he also dispensed with the additional chemical treatment of the water and the use of the more complicated apparatus involved in processes like that of Paget. So far as appears, no one had previously discovered that the agglomerating action of the coagulants could be obtained without waiting a considerable time for precipitation, or during the passage of the water through the filtering bed. As the celerity of operation would be of comparatively little practical value in treating waters on a small scale, it is not so strange as it might otherwise seem that no instances of the mixing of alum with water in family filters at the time of filling the filter have been proved. It may be doubted, in view of what was necessarily disclaimed in order to restrict the patent within valid lines, whether Hyatt himself had any intelligent conception of the real nature of his improvements. However this may be, it is not open to fair doubt that what he described was an improvement upon prior methods, and involved invention. The subject of the purification of waters on a large scale had engaged the attention of many thoughtful minds, as is evidenced by the number of earlier patents and publications; yet the practical superiority of Hyatt's process was manifest immediately after being tested, and has been decisively recognized by many of the business competitors of the complainant, who have preferred to use it, at the risk of accountability as infringers of his patent, rather than avail themselves of other processes.

It has been urged for the appellants that the patent before the disclaimer covered broadly any continuous process of filtration of any liquid in which the treatment with any coagulants or reagents is adopted, and that the validity of the patent as regards the defense of want of novelty is to be tested by its original terms and scope. We are aware of no principle which will permit a patent to be defeated for want of novelty in respect to the subject-matter which has been eliminated from it by a disclaimer. The

office of a disclaimer is to enable the patentee to save himself from the peril of such a defense. Matters which have been properly disclaimed cease to be a part of the invention, and, as was said by the supreme court in *Dunbar v. Myers*, 94 U. S. 194:

"It follows that the construction of the patent must be the same as it would be if such matters had never been included in the description of the invention or the claims of the specification."

It is also urged for the appellants that the effect of the disclaimer was to limit the method of the patent to one in which perchloride or persulphate of iron is used as a coagulant. If these coagulants only, instead of coagulants "such as perchloride or persulphate of iron," had been mentioned in the description of the invention, there would be much force in the argument; and it might well be held that by disclaiming "the use of any other suitable agent which is capable of coagulating the impurities," all equivalents would be excluded. The literal effect of the disclaimer is to confine the claim to a method in which no other coagulants are employed except "such as salts of iron." It is to be observed, however, that the part disclaimed is not part of the descriptive matter, but a recital intended to enlarge the scope of the claim. The disclaimer consequently operates only to expunge from the claim what otherwise would, by force of the recital, be incorporated into it constructively. Obviously, it was intended to obliterate the recital from the patent, and to have no other effect. The patent, after the disclaimer, is to be read exactly as though the recital had never been inserted. Thus read, it is clear that the claim covers the use of any coagulant having similar properties to the salts of iron, which was a recognized equivalent.

As thus construed, the infringement of the claim by the defendants is established, although they use alum as the coagulant instead of the salts of iron. In some of the plants of the corporation defendant settling tanks are used between the introduction of the coagulant and the filter bed. In those plants the method of the patent is not appropriated, and there is no infringement.

The decree of the circuit court is affirmed, with costs.

THE IODINE.

HUDSON v. THE IODINE.

(District Court, E. D. Pennsylvania. February 18, 1895.)

No. 79.

SALVAGE—AMOUNT OF COMPENSATION—THE ELENA G., 61 FED. 519.

This was a libel by Joshua H. Hudson, master of the tug S. A. McCaulley, against the bark Iodine, to recover for services rendered.

John F. Lewis, for libellant.

Alfred Driver and J. Warren Coulston, for respondent.

BUTLER, District Judge. This case arises out of the facts stated in the suit by Neal v. The Elena G., 61 Fed. 519. A repetition of the statement made in that case is unnecessary.

It is not denied that the libelant rendered salvage services, and should be compensated accordingly.

The only dispute respects the amount justly due. After full consideration of all the circumstances I believe the payment of \$1,000 will be a fair compensation. The Iodine and the bark Munch were lying side by side, and were removed together. For the services to the latter \$500 were tendered and received.

The former is a much larger vessel, and was somewhat differently situated. I think double the sum paid by the Munch is sufficient for the services rendered the Iodine; and a decree may be prepared accordingly, with costs.

THE CITY OF HAVERHILL.

KNICKERBOCKER STEAM-TOWAGE CO. v. THE CITY OF HAVERHILL.

WATROUS v. THE ICE KING.

(District Court, S. D. New York. March 1, 1895.)

SALVAGE—TUG AND TOW—DANGEROUS LEAK—DEVIATION.

The City of H., a flat-bottomed river boat, while in tow from Boston to New York, with other barges, in December, sprang a dangerous leak not far from Gay's Head, in weather not unusual for the season, and without any fault of the tug. The tug was obliged to anchor the rest of her tow, and take the H. into Newport; and she preserved the latter from sinking by the use of the tug's pumps: *Held*, that the service of the tug in the rescue of the H. was outside of the contract of towage, and entitled the tug to extra compensation on salvage principles, but upon a lower basis of compensation than might be awarded to an independent tug, and \$800 was allowed.

This was a libel in rem by the Knickerbocker Steam-Towage Company, owners of the tug Ice King, against the steamship City of Haverhill, to enforce a claim for salvage. A cross libel was filed by Warren P. Watrous, owner of the City of Haverhill, alleging fault on the part of the tug which contributed to the injuries sustained by the salved vessel, and rendered her liable therefor under the contract of towage.

Wing, Putnam & Burlingham, for Knickerbocker S. T. Co. and the Ice King.

Goodrich, Deady & Goodrich, for the City of Haverhill and Warren P. Watrous.

BROWN, District Judge. 1. I do not find sufficient evidence to support the claim in the cross libel that the hawser was fastened in an improper manner, or that the mode of fastening caused any damage, or contributed to produce the leak; or that there was any

negligence by the Ice King when she ran alongside of the City of Haverhill to rescue her from sinking. In the circumstances of a choppy sea, the nighttime, and the City of Haverhill being a light flat-bottomed boat, and tossing almost like a chip upon the waves, the slight damage done in necessarily going alongside, in the absence of evidence of any specific acts of negligence or lack of care and reasonable nautical skill, should be set down to sea perils in a difficult situation, rather than to any presumptive negligence in the Ice King.

2. The service of the Ice King in deviating from the usual course of towage on a trip from Boston to New York by putting in to Newport with the City of Haverhill, and keeping her afloat by her pumps, was a service wholly outside of the contemplation of the parties in making the towage contract. The deviation was made necessary because the City of Haverhill sprung a dangerous leak, under circumstances not at all extraordinary at that season, but only such as were to be expected in December, when the trip was undertaken. The leak, I find, occurred through no fault of the Ice King, or lack of reasonable care on her part, but, as her captain says, from striking a heavy sea, in the roll from the southward. She was a flat-bottomed river steamer, not designed for service at sea. The contract of the parties for towage to New York imported that the owner of the City of Haverhill should bear all risks, save those caused by the fault of the tug. On plunging in the southerly roll some seams were opened, and she was saved from sinking through the Ice King's superior pumps, which were sufficient to keep her afloat until she was towed by the Ice King into Newport, where the open seams on her port side, some 20 feet aft of the stem, were temporarily filled in, sufficiently to enable the towage to be completed after the loss of a day's time. This was an extraordinary service, because not within the scope or contemplation of the contract. It should, therefore, be compensated for on salvage principles. But the equitable relation of the parties in such cases, where the tow is all the time in charge of the tug, requires, I think, the allowance of a much less compensation than would be proper to be given to an independent tug. Some of the important considerations in salvage awards are absent; and here there was no actual danger incurred by the tug.

The great differences in the estimates of the value of the City of Haverhill, viz., from \$2,500 to \$10,000, are embarrassing, so far as that element is to be considered in fixing the award. On the whole evidence, I think \$800 will be a proper award, with costs, and with a dismissal of the cross libel, without costs.

Decrees accordingly.

LUCKER v. PHOENIX ASSUR. CO. OF LONDON.

(Circuit Court, D. South Carolina. March 5, 1895.)

1. REMOVAL OF CAUSES—TIME OF FILING TRANSCRIPT.

While, upon removal of a cause from a state to a federal court, security is required that the transcript shall be filed on the first day of the next succeeding term, the federal court is not to be deprived of jurisdiction if the transcript is filed at a later day in the term, but, for good cause, may permit it to be filed at such later day.

2. DISTRICT OF SOUTH CAROLINA—DIVISION.

The district of South Carolina, though divided into Eastern and Western divisions, is one district, and the terms of the circuit court, though held at different places, in different parts of the state, are all held for the entire district.

This was an action by Minnie Lucker against the Phoenix Assurance Company of London, a corporation created by and under the laws of Great Britain. The action was brought in a court of the state of South Carolina, and was removed by defendant to the United States circuit court. Plaintiff moved to remand to the state court.

Bryan & Bryan, for the motion.
Trenholm, Rhett & Miller, contra.

SIMONTON, Circuit Judge. This is a motion to remand. The plaintiff began an action against the defendant in the court of common pleas for Charleston county, S. C., on 10th January, 1895. The defendant, a few days before the time for answering had expired, filed in the office of the clerk of the state court its petition and bond for removal into this court, upon the ground of diversity of citizenship. No term of the state court was then being held, nor has any been held since that time, to which the petition and bond could be presented. An order for removal has been passed by a circuit judge of the state at chambers, but this is clearly irregular. When the petition, with bond, was filed the November term of this court was current. This term ended 2d of February, 1895, and the Greenville term began on first Monday (4th) of February thereafter. No steps having been taken by the defendant to transmit the record to this court on the first day of the session thereof next after the filing of the petition for removal, the plaintiff on 28th of February last filed with the clerk of this court a certified copy of said record, and now moves to remand the cause for this default of the defendant. The defendant appeared to this motion, and stated orally in argument his reason for the default. The proper practice, when a motion to remand is made, is that the moving party should file a petition in writing setting forth the grounds for the remand, and the petition should be traversed or otherwise pleaded to by the resisting party. The present case will be treated as a demurrer to the facts set out in the motion of the plaintiff. The ground upon which the defendant resists the motion is that the bond for removal provides for filing the record in this court on the

first day of the next sitting thereof in the district in which the cause is brought; that this cause was brought in the Eastern district of South Carolina, and that the first term of the circuit court for this district is the first Monday in April next, and not in Greenville, on first Monday in February, because Greenville is in the Western district. There has been some confusion with regard to the division of the district of South Carolina into Eastern and Western districts. The bar have entertained great doubt as to the effect of this division. But the district of South Carolina has never been abolished, and all doubt has been removed by the act of congress approved 26th April, 1890 (26 Stat. 71). That act makes one circuit court for the district of South Carolina, and creates for it four regular terms,—in the city of Greenville, first Monday in February and first Monday in August in each year; in the city of Columbia, fourth Monday in November; and in Charleston, first Monday in April. The term of this court next after the filing of this petition, on the first day of which the record should have been in this court, was the first Monday in February. The defendant, therefore, is in default. But, while the act of congress requires security that the transcript shall be filed on the first day of the term, it nowhere appears that this court is to be deprived of the jurisdiction if it be filed at a later date in the term. *Removal Cases*, 100 U. S. 475; *Railroad Co. v. Koontz*, 104 U. S. 16. This is a matter within the discretion of the court. If the cause assigned for the delay is satisfactory to the court, it can permit the record to be filed after the first day of the term. *Railway Co. v. McLean*, 108 U. S. 217, 2 Sup. Ct. 498; *Hall v. Brooks*, 14 Fed. 113. The courts jealously guard against any use of the privilege of removal for the purposes of securing delay in the trial of a cause. The application must be made in good faith. The counsel who argued this motion for the defendant assured the court that he was honestly of the opinion that the next succeeding term was that in April. His statement is amply sufficient. Besides this, had this record been filed to the February term, by the rule and usage of this court, adopted for the convenience of parties, counsel, and witnesses, a continuance could have been had as of right to the April term. So no delay in this court has resulted from the omission. The situation in this district is very like that in the Eastern district of Virginia. The court there sits at Norfolk, Alexandria, and Richmond. In each of these cities there is a distinct bar, not practicing in the other cities, and the distances are great between them. Judge Hughes protects removal of causes originating within the territory of each of these cities to the court sitting therein. *Cobb v. Insurance Co.*, Fed. Cas. No. 2,921. In this district we have Greenville in the western part of the state, Columbia in the middle, and Charleston on the seaboard. For reasons similar to those governing Judge Hughes, this court has adopted the rule and usage above referred to. The explanation given by defendant's counsel is satisfactory, and the motion to remand is refused. But defendant, being in default, is put on terms. The defendant must file his transcript in this court within three days from the date of this order, the de-

fense to the action must be filed within ten days from this date, and the cause will be called for trial on the first Wednesday of the April term of this court next hereafter.

WESTERN ELECTRIC CO. v. REEDY.

(Circuit Court, S. D. Ohio, W. D. February 25, 1895.)

No. 4,540.

1. DEFAULT DECREES—MOTION TO VACATE—EQUITY JURISDICTION.

A suit in equity for infringement of a patent was commenced before the patent expired, and after its expiration a decree by default was entered for injunction and accounting. The testimony adduced before the master by complainant related entirely to a different patent, which concerned the same subject-matter, but which had expired before the suit was commenced. *Held*, that these facts did not show such want of equity jurisdiction as would compel the court to set aside the decree on motion.

2. SAME.

After a decree by default, respondent is debarred from setting up the defense of an adequate remedy at law; and, while the court may itself interpose it, there is no obligation to do so, and the matter rests in its discretion.

This was a suit in equity by the Western Electric Company against Henry J. Reedy for infringement of a patent. Defendant moved to set aside a decree by default.

Barton & Brown and R. de V. Carroll, for complainant.
Cobb & Howard and L. M. Hosea, for respondent.

SAGE, District Judge. The suit is upon patent No. 172,993, issued February 1, 1876, to the Western Electric Manufacturing Company, as assignee of Elisha Gray, the inventor, for improvements in electric annunciators for elevators. The defendant being in default, a decree pro confesso for the complainant was entered March 20, 1893, and on the 1st of May, 1893, the decree for an injunction and an account was entered. The defendant moves to set aside the default and dismiss the case for want of jurisdiction, on the ground that it appears from the testimony taken before the master that the averments of the bill are not true, and that the assumptions upon which the default was rendered were erroneous. Counsel urge that it is now apparent that by reason of the expiration of the Hahl patent (owned by the complainant, dated March 10, 1874, and being for an improvement in electric indicators for elevators) before this suit was begun there was no infringement whatever by the defendant. These, it is said, are jurisdictional facts, which appear in the testimony presented before the master by the complainant in his own behalf, and bear upon the averments of infringement made by the bill. The testimony before the master does not show that the defendant put any annunciators in elevators, excepting flexible cable annunciators. That "flexible cable" annunciators are covered by the Hahl patent was held in *Western Electric Manuf'g Co. v. Chicago Electric Manuf'g Co.*, 14 Fed. 691.

Counsel insist that if the decision of this court in a former case between these parties, affirmed by the United States supreme court (140 U. S. 704, 11 Sup. Ct. 1031), is law for this case, the court has no option but to dismiss. That suit was upon the Hahl patent and the Gray patent. The Hahl patent expired March 10, 1891. The Gray patent expired February 1, 1893. The bill in this case was filed May 31, 1892. Being founded on the Gray patent, and commenced nearly a year before its expiration, it was properly brought, and the jurisdiction continued, for the purpose of an account, after the expiration of the patent. See cases cited under section 1093, Rob. Pat. Upon the hearing before the master the only testimony offered on behalf of the complainant is of the apparatus covered by the Hahl patent. I do not think that upon this state of fact the court should set aside the default, and dismiss the case; or, in other words, that the testimony referred to should be used to negative the findings of the decree upon default. The result of the testimony may be to make the final decree in favor of the plaintiff for a nominal amount only. To state the proposition in other words, the fact that the only proof made for the complainant is of the use by the defendant of a device or apparatus set free to the public by the expiration of the Hahl patent should not, in the present condition of the case, be used to override the decree that the defendant is an infringer. It may establish that there is a failure of proof upon the proceeding before the master for an account. If these facts had appeared upon hearing, as in the former case between these parties, the result would have been a dismissal of the bill. It is further urged that it now appears that the complainant has a full, complete, and adequate remedy at law. The general rule is that the objection that the complainant has a complete and adequate remedy at law should be taken at the earliest opportunity, and, if not so taken, the court having the general jurisdiction will exercise it. *Reynes v. Dumont*, 130 U. S. 395, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 514, 9 Sup. Ct. 594. But if the court, upon looking at the proofs, should find none of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact, and give it effect, though not raised by the pleadings nor suggested by counsel. *Lewis v. Cocks*, 23 Wall. 466; *Oelricks v. Spain*, 15 Wall. 211. The defendant is barred by delay, but even then the court may, of its own motion, upon proper occasion, make and sustain the objection. Whether the court shall do so is discretionary, not imperative. *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604. Where there has been a decree by default, the court is under no obligation to interpose. *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127. In that case the court said, at page 380, 150 U. S., and page 127, 14 Sup. Ct.:

"Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal."

This was said with reference to the objection that the remedy at law was complete. The motion will be overruled.

MERRILL v. TOWN OF MONTICELLO.

(Circuit Court, D. Indiana. March 9, 1895.)

No. 8,797.

1. EQUITY—GROUNDS OF DEMURRER—LIMITATIONS.

Where it appears by the complainant's bill that the remedy is barred by lapse of time, or that by reason of laches he is not entitled to relief, the defendant may avail himself of the objection by demurrer.

2. TRUSTS—LIMITATIONS.

In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in suits in equity as in actions at law; and the bar of the statute begins to run when the cause of action has accrued.

3. SAME.

The town of M. intrusted certain bonds to one W. for sale. W. sold the bonds and embezzled the proceeds. The town afterwards recovered \$6,988 from a bank which held the same for W. More than six years after the recovery of this money, one M., a holder of some of the bonds sold by W., which had been adjudged to be invalid, brought suit against the town to charge it as trustee of the money recovered from W.'s bank, on the ground that such money equitably belonged to the purchasers of the bonds. *Held*, that the statute of limitations was a bar to the suit to charge the town under such implied or constructive trust.

4. LIMITATIONS—INDIANA STATUTE—SAVING CLAUSE.

M. also sought to obtain an assignment of a bond given by W. to the town to account for the proceeds of the town bonds intrusted to him. The town had brought a suit on such bond, which it had dismissed after a judgment in its favor had been reversed on appeal. The statute of limitations (1 Burns' Rev. St. § 300; Rev. St. 1881, § 299) provided that if after an action was commenced it should fail or abate, or judgment be arrested, or reversed on appeal, a new action might be brought within five years, and deemed a continuation of the first action. *Held*, that such saving clause did not apply to actions voluntarily abandoned; that the alleged right to an assignment of W.'s bond was not the same cause of action as that litigated in the action of the town on the bond, and that therefore the saving clause of the statute did not apply.

A. C. Harris, for complainant.

Ayres & Jones, David Turpie, Walter S. Hartman, and Charles C. Spencer, for defendant.

BAKER, District Judge. This is a bill in equity to require the town of Monticello to account for the proceeds of certain bonds issued by it, which were sold by one J. C. Wilson, as agent of the town. It seeks further to charge the town, as trustee, with the sum of \$6,988.43, which amount was received in 1882 by the officers of the town as the proceeds of certain litigation; and also to compel the town to assign the bond given by Wilson to account for the money realized by him from the sale of the bonds. The history of this litigation fully appears in the case of *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441. The town issued 210 bonds, of \$100 each, which were sold in the market by Wilson, who had been appointed by the town to sell the bonds. He sold the bonds for \$19,680.17, and fled to Canada with a part of the proceeds. The town found \$6,988.43 of the money in a bank in Monticello to the credit of Wilson, as trustee, for the recovery of which amount the town

brought suit against Bundy, as receiver of the bank, and recovered the same, in 1882. *Bundy v. Monticello*, 84 Ind. 119. The town took a bond from Wilson, on which it recovered a judgment in the court below, which judgment was reversed on appeal. *Wilson v. Monticello*, 85 Ind. 10. The town then dismissed that suit. Merrill holds 143 of these bonds, which he purchased in open market, at par, for cash, in 1878, and the remaining 67 bonds are held by other persons unknown to the plaintiff. The town has interposed an amended demurrer to the bill, and laches and the statute of limitations, among other causes, are insisted upon as reasons why the complainant is not entitled to relief.

Where it appears by the complainant's bill that the remedy is barred by lapse of time, or that by reason of his laches he is not entitled to relief, the defendant may avail himself of the objection by demurrer. *Bank v. Carpenter*, 101 U. S. 567. All actions for the recovery of money arising out of contracts not in writing are required by the statute of this state to be brought within six years after the cause of action has accrued. 1 Burns' Rev. St. § 293 (Rev. St. 1881, § 292). Section 300, 1 Burns' Rev. St. (section 299, Rev. St. 1881), provides:

"If, after the commencement of an action, the plaintiff fail therein, from any cause except negligence in the prosecution, or the action abate, or be defeated by the death of a party; or judgment be arrested or reversed on appeal, a new action may be brought within five years after such determination, and be deemed a continuation of the first, for the purposes herein contemplated."

Statutes of limitation are entitled to the same respect as other statutes, and ought not to be explained away or evaded. *Clementson v. Williams*, 8 Cranch, 72; *McCluny v. Silliman*, 3 Pet. 270; *U. S. v. Wilder*, 13 Wall. 254. Nor should such statutes be viewed in an unfavorable light, but should be treated as statutes of repose to secure the peace and good order of society. Usually they are founded in a wise and salutary public policy, and promote the ends of justice. *Bell v. Morrison*, 1 Pet. 352; *Lewis v. Marshall*, 5 Pet. 470. And such statutes may be invoked as a defense in suits in equity, as well as in actions at law. *Lewis v. Marshall*, supra; *Leffingwell v. Warren*, 2 Black, 599. In the absence of an act of congress, the courts of the United States are bound to conform to the decisions of the courts of the states in regard to the construction to be put upon statutes of limitation of the several states. *Leffingwell v. Warren*, supra; *Ross v. Duval*, 13 Pet. 45. As a general rule, it is doubtless true that lapse of time is no bar to the enforcement of an express trust, clearly established, for the reason that the possession of the trustee is presumed to be the possession of the cestui que trust. *Prevost v. Gratz*, 6 Wheat. 481, 497; *Lewis v. Hawkins*, 23 Wall. 119, 126; *Railroad Co. v. Durant*, 95 U. S. 576. But this rule is subject to the qualification, clearly pointed out in the decisions of the courts, that the bar of the statute begins to run against a trust as soon as it is openly disavowed by the trustee insisting upon an adverse right and interest which is clearly and distinctly made known to the cestui que trust. In the case of an

implied or constructive trust, it is equally well settled that, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in suits in equity as in actions at law; and the bar of the statute begins to run when the cause of action has accrued. *Hovenden v. Annesley*, 2 Schoales & L. 607, 634; *Elmendorf v. Taylor*, 10 Wheat. 152, 174; *Speidel v. Henrici*, 120 U. S. 377, 386, 7 Sup. Ct. 610. This is the settled rule of construction given to our statute of limitations by the supreme court of this state. In *Raymond v. Simonson*, 4 Blackf. 77, it was said:

"The general rule, however, that the statute of limitations is a bar to suits in equity as well as actions at law, has its limits. It is opposed by another general rule, that in cases of frauds and trusts the statute of limitations does not run. The trusts coming within this rule are direct trusts, technical and continuing trusts, which are not cognizable at law, but which are mere creatures of a court of equity, and fall within the proper and exclusive jurisdiction of chancery. There are numerous eventual and possible trusts, that are raised by implication of law or otherwise, that fall within the control of the statute. Every deposit is a trust; every person who holds money to be paid to another, or to be applied to any particular and specific purpose, is a trustee, and may be sued either at law or in equity. Contracts of bailment are express and direct trusts, but these are all within the statute. The sound rule, then, is that the trusts not reached or affected in equity by the statute of limitations are technical and continuing trusts, of which courts of law have no cognizance."

The doctrine of this case has often been reaffirmed by the same court. *Smith v. Calloway*, 7 Blackf. 86; *Mussleman v. Kent*, 33 Ind. 452; *Newsom v. County of Bartholomew*, 103 Ind. 526, 529, 3 N. E. 163. In the case last cited it was held that the receipt of money under claim and color of right by public officers does not constitute them trustees in such a sense as to bar the defense of the statute of limitations.

If the complainant in this case has acquired any right to compel the town to account to him for the moneys received by it or its agent, such right of action is raised by implication of law. It was settled by the supreme court of the United States in *Merrill v. Monticello*, supra, that the town had no legal power to bind itself by an express contract. The bonds issued by it were held ultra vires and void, and incapable of ratification. The cause of action exhibited in the bill, if any exists, arises out of the equitable doctrine that one shall not retain that which, ex debito justitiae, belongs to another. The trust relied on is one which is raised by implication of law, and is therefore within the control of the statute. The cause of action accrued as soon as the defendant received the money which, ex aequo et bono, ought to have been paid to the plaintiff, and which the defendant could not withhold with a safe conscience. If the complainant could charge the defendant as trustee for the money received by its agent, Wilson, that cause of action accrued in 1878; and, if he could charge the town as trustee for the money received as the proceeds of the litigation against Bundy, that cause of action accrued in 1882. The present suit was not commenced until 1892. No demand was necessary to set the statute in motion. But if it were conceded that a demand was necessary, it would avail nothing, for the de-

mand was not made until after the statute had run, and in such a case the demand is fruitless. Equity will deny relief in cases of this character, for to hold otherwise would put it in the power of the party to defeat the beneficial effect of the statute by delaying his demand. *High v. Commissioners*, 92 Ind. 580, 588; *Codman v. Rogers*, 10 Pick. 112; *McDonnell v. Bank*, 20 Ala. 313; *Morrison v. Mullin*, 34 Pa. St. 12; *Palmer v. Palmer*, 36 Mich. 487; *Thrall v. Mead*, 40 Vt. 540; *Keithler v. Foster*, 22 Ohio St. 27; *Jameson v. Jameson*, 72 Mo. 640. The complainant's right to relief for the recovery of the money received by the town or its agent is barred by the statute, as well as on the ground of laches, unless it is saved by section 300, 1 Burns' Rev. St. (section 299, Rev. St. 1881), copied above. It is apparent that the claim to have an assignment of the bond given by Wilson cannot aid the complainant's cause of action, because unless he can maintain his bill for the recovery of the money he can have no right to claim an assignment of the bond. The present suit is not within the saving effect of that section of the statute. The former action did not abate, nor was it defeated, by the death of a party, nor was the judgment therein arrested or reversed. Can the present suit be regarded as a continuation of the former action? If an action is voluntarily abandoned, it will not avail to save another action for the same cause from the bar of the statute. *Null v. Canal Co.*, 4 Ind. 431. Nor does this section apply to actions defeated by reason of being wrongly instituted. *Hawthorn v. State*, 57 Ind. 286. The failure of a suit on account of a defect of title relied on in the former action does not fall within this section of the statute. *Sidener v. Galbraith*, 63 Ind. 89. The court in *Sidener v. Galbraith*, *supra*, say:

"We shall not undertake in this opinion to enumerate the particular instances in which a new action may be brought under this section. We content ourselves with showing that the present is not a continuation of the former action, within its meaning. We may premise that the previous action, claimed to have failed in this case, did not abate by the death of a party, nor was the judgment in it arrested or reversed on appeal; but, on the contrary, the judgment was affirmed on appeal to this court. We express no opinion on the question of negligence. The present case cannot be held to be a continuation of the former suit. The parties are not the same; the title on which the plaintiffs, the appellees in this court, base their right of action, is not the same; and the relief sought is not the same."

In the present suit the cause of action is not the same as that relied on in the former action, nor is the relief sought the same. The present suit is upon a new and independent cause of action. Besides, it is settled that if a complaint is so amended as to set up some new claim or title, not previously asserted, involving the statute of limitations, the sufficiency of a plea of the statute in bar of such new claim or title will relate to the time of the filing of such amendment, and not to the date when the action was originally commenced. *School Town of Monticello v. Grant*, 104 Ind. 168, 171, 1 N. E. 302; *Railroad Co. v. Bills*, 118 Ind. 221, 223, 20 N. E. 775. So that, if, while the former case was pending, the present cause of action had been pleaded by way of amendment to the original complaint, at any time after six years from the time the

cause of action had accrued, the statute could have been interposed as a bar. A fortiori, it can be invoked as a bar to the present suit.

The foregoing views render it unnecessary to consider the other objections urged to the bill on the argument. The demurrer to the bill is sustained, at the costs of the complainant; and, unless the bill is amended within 30 days, it will stand dismissed for want of equity.

FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al.

(Circuit Court, E. D. Wisconsin. February 21, 1895.)

1. EQUITY—PARTIES—TRUSTEE AND CESTUI QUE TRUST.

The rule that courts can deal with bondholders only through their trustees is a rule of convenience, proceeding upon the assumption that the cestuis que trustent are fully and fairly represented by such trustees; and if it appears that the trustees refuse or neglect to act, or stand in a hostile position, or a position prejudicial to the rights of the cestuis que trustent, such rule is set aside, and the cestuis que trustent admitted to represent their rights.

2. SAME—TRUSTEE REPRESENTING DIVERSE INTERESTS.

The N. R. Co. was the owner of an extensive railway system, upon which there were numerous mortgages, covering parts of such system and tributary roads controlled by the N. R. Co., and three so-called "general mortgages" and a consolidated mortgage, each covering substantially the whole property of the N. R. Co., but with some exceptions in the case of each mortgage, there being also some question as to precisely what property was covered by such mortgages. The F. Trust Co., the trustee of the second and third general mortgages and of the consolidated mortgage, and also of many of the divisional mortgages and mortgages on subordinate roads, together with certain stockholders and creditors, brought a suit to marshal all the assets of the company, ascertain the various liens, and decree the rights of the several parties. Subsequently, it brought a suit to have an account taken of the bonds under the second and third consolidated mortgages, to have their liens declared, and for foreclosure of the second general mortgage. These two suits were consolidated. Certain committees, representing holders of the second and third general mortgage bonds and of the consolidated mortgage bonds, petitioned to be made parties, alleging that the position of the F. Trust Co. was inconsistent; that the interests of its several cestuis que trustent were different, and, in certain respects, hostile to one another; and that they should be permitted to intervene to protect their several rights and claims. Held that, in view of probable or possible conflicts which might arise between the several interests represented by the trustee, a representative of each interest should be admitted as a party to the suit to protect the same.

3. SAME—RESTRICTION ON RIGHT OF BONDHOLDER TO INSTITUTE SUIT.

The second and third general mortgages each contained a provision that no holder of a bond should have the right to institute a suit for foreclosure of the mortgage or other remedy thereon, except after request to and refusal by the trustee to act. Another provision permitted the removal of the trustee by a majority of the bondholders. Held, that neither provision limited the power of a court of equity to permit the intervention of bondholders for the protection of their rights, when it was otherwise just and proper to permit them to do so.

This was a suit by the Farmers' Loan & Trust Company against the Northern Pacific Railroad Company for the foreclosure of a mortgage. Certain bondholders petitioned to be made parties.

Turner, McClure & Rolston and Winkler, Flanders, Smith, Botum & Vilas, for complainant.

M. H. Cardozo, Van Dyke & Van Dyke, and John M. Butler, for Johnston Livingston and others.

Samuel B. Clarke, for Charles B. Van Nostrand.

Quarles, Spence & Quarles, for Edward D. Adams and others.

JENKINS, Circuit Judge. A committee, of which Mr. Johnston Livingston is chairman, claiming to represent holders of bonds secured by the general second mortgage of the defendant company, has petitioned the court that all or some one member of the committee be made parties or party defendant to this cause. Charles Van Nostrand, in his own behalf, and at the request and for the benefit of a committee of the holders and owners of upwards of \$1,000,000 of the general third mortgage bonds, and in behalf of all others who may join in protecting the interest of the third mortgage bondholders, also presents a petition that he may be made a party to the suit. These petitions are opposed by the trust company, complainant. There is also presented the petition of Edward D. Adams and others, a committee of bondholders representing \$6,036,000 of the second mortgage bonds, \$6,593,000 of the third mortgage bonds, and \$19,880,000 of the consolidated bonds, which in effect sustains the trustee in its objection to the allowance of the petitions of the other committees, and expresses contentment with the action of the trust company in the execution of its trust, but asks the court, if the prayers of the other petitions should be allowed, that they also may be made parties to the suit, as representatives of bondholders.

That the situation may be accurately conceived, a general review of the condition of affairs should be stated. The bonded indebtedness of the Northern Pacific Railroad Company, secured by mortgage or trust deed, is as follows: First. A mortgage dated May 1, 1879, to the Farmers' Loan & Trust Company as trustee, to secure bonds to the amount of \$2,500,000, of which there are outstanding bonds to the aggregate amount of \$1,904,000. This mortgage is upon the Missouri Division of the road, being that part of its main line extending from the Missouri river, in the state of North Dakota, to the Yellowstone river, in the state of Montana, and upon all the lands granted by congress appertaining thereto, with certain other property. Second. A mortgage to the Farmers' Loan & Trust Company, dated September 1, 1879, to secure bonds to the amount of \$4,500,000, of which there are outstanding \$455,000 in amount. This mortgage is on the Pend d'Oreille Division, extending from the Snake river, in the state of Washington, to Lake Pend d'Oreille, in the state of Idaho, and all the lands granted by congress appertaining thereto. Third. The general first mortgage to the Central Trust Company, dated January 1, 1881, to secure bonds now outstanding, to the amount of \$43,393,000. This mortgage is upon the main line of the road and its Cascade Branch (being a branch over the Cascade Mountains to Puget Sound), and upon all lands granted by congress and upon the rolling stock of the company

and other property acquired or to be acquired for use in connection with its railroad. Fourth. The general second mortgage issued to the Farmers' Loan & Trust Company, November 20, 1883, to secure an issue of bonds to an amount not to exceed in the aggregate \$20,000,000, and under which mortgage there are now outstanding bonds to the aggregate amount of \$19,216,000. This mortgage is upon the main line, telegraph lines, and upon the land grant, except as to those lands lying east of the Missouri river; also upon the lease of the St. Paul & Northern Pacific Railroad Company, and upon the one undivided half of that part of the St. Paul & Duluth Railroad which extends from its junction with the main line of the railroad of the Northern Pacific Railroad near Thompson to Duluth, Minn.; and also upon lands then owned or thereafter acquired in the city of St. Paul or Duluth for use in connection with or for the purposes of the road, and upon all other property, of every kind and nature, then owned or thereafter to be acquired, wherever situated or however held, for use in connection with or for the purposes of the railroads or any of them, or the business of the Northern Pacific Company. Fifth. The general third mortgage to the Farmers' Loan & Trust Company, dated December 1, 1887, to secure bonds aggregating \$12,000,000 principal, of which there are now outstanding \$11,461,000. This mortgage covers the main line of the railroad, the Cascade Branch, the land grant, the lease of the St. Paul & Northern Pacific, the undivided half of that part of the St. Paul & Duluth Railroad between Thompson and Duluth, and also all the interest of the Northern Pacific Company in some 20 branch lines of railroads mentioned, and all other branch roads that might thereafter be acquired or constructed and operated as feeders of the main line or of the Cascade Branch. Sixth. The consolidated mortgage to the Farmers' Loan & Trust Company as trustee, dated December 2, 1889, to secure bonds in the aggregate not exceeding \$160,000,000, under which there are outstanding bonds to the amount of \$62,443,000. This mortgage in general covers all the property and rights included in the previous general mortgages. It recites also that some 21 branch lines have been constructed, naming them, and that the capital stock of all the branch line companies owned by the Northern Pacific Company is of the par value of \$37,781,057.50, of which \$8,552,600 is owned absolutely by the company, and the remaining stock, amounting at par value to \$29,228,457.50, is held in trust for the railroad company to become the absolute property of the company when the mortgage debt of the branch lines is paid. In addition to the indebtedness secured by mortgage upon the railway, there is also a certain collateral trust indenture, dated May 1, 1893, to the Farmers' Loan & Trust Company as trustee, to secure an issue of notes to the amount of \$15,000,000, of which there were outstanding at the institution of the suit \$10,050,000, secured by certain collateral bonds and stock of the branch lines and other roads controlled by the Northern Pacific Company. The Farmers' Loan & Trust Company is also trustee under various mortgages

made by some 17 of the branch lines connected with the Northern Pacific Railroad to secure bonds amounting in the aggregate to some \$33,873,000, which bonds bear the guaranty of the Northern Pacific Railroad Company.

This suit was originally brought by the Farmers' Loan & Trust Company as trustee under all the trusts recited, and by certain stockholders and creditors of the railroad company, and in behalf of all other stockholders and creditors of the company who might choose to become parties to the suit and contribute to its expense; praying the court to fully administer the trust fund in which the complainants were interested, constituting the entire railroad system, lands, and assets of the defendant corporation, to marshal all its assets, to ascertain the several respective liens and priorities existing upon each and every part of the system of railway and property, the amount due upon each and every part of the mortgages or other liens, and to enforce and decree the rights, liens, and equities of each and all of the preferred and common stockholders and bondholders and creditors of the company as the same may be finally ascertained and decreed upon the respective interventions or applications of each and every such stockholder or lienor in and to not only said lines of railroad, appurtenances, equipment, land, and property, but also to and upon each and every portion of the assets and property of each of the said corporations. Subsequently the Farmers' Loan & Trust Company filed its bill of complaint, setting forth the several mortgages upon the road executed to it as trustee, reciting the proceedings in the suit which it had brought in connection with the stockholders co-complainants, and asking that all the rights and franchises, and all the property, real and personal, of the Northern Pacific Company, may be declared subject to the lien of the consolidated mortgage; that an accounting may be taken of the outstanding bonds under the general second mortgage, and they declared a first lien on the property of the company described in the general second mortgage, subject only to the lien of the general first mortgage and the prior divisional mortgages; that an account be taken of the outstanding bonds under the general third mortgage, and that the amount of them may be found to be the next lien following the lien of the general second mortgage on the property described in the general third mortgage; that an account be taken of the outstanding bonds under the consolidated mortgage, and that the amount thereof may be found to be a lien next following the lien of the general third mortgage on the property of the company, according to the terms of the consolidated mortgage; that, in default of payment of interest due under the general second mortgage, the property and franchises of the company may be sold to satisfy the entire amount of the general second bonds and coupons; and that out of the proceeds the amount due under the general second mortgage may be paid, and the surplus, if any, be applied as the court may direct. Upon the filing of the bill, an order was entered, upon the prayer of the complainant, extending the receivership created under the original bill to the

bill of foreclosure filed by the trust company, and directing that the two causes be consolidated, the consolidated cause to proceed under the title of the bill of foreclosure.

The petitions, in brief, proceed upon the following grounds: First. That the trustee occupies inconsistent positions; that, by its bill to foreclose the second mortgage, it seeks to cut off the equity of the third mortgage bondholders; that, as trustee of the general second mortgage, it becomes its duty to press a foreclosure and sale, while, as trustee of the general third mortgage, it is its duty to avoid or delay such a foreclosure. Second. That grave questions exist whether the general first and the general second mortgage cover the same property, and whether the general third mortgage does not cover property that is claimed to be covered exclusively by the consolidated mortgage; that it is in the interest of the holders of consols that the expense of the receivership and administration should be charged against the interest of third mortgage bondholders, and of the latter that such expense should be charged only against the classes of bonds the holders of which are benefited by such expense; that the interest of the third mortgage bondholders is for a sale of the road so soon as it will realize enough to pay the interest and principal of the third mortgage bonds and of prior mortgages in full; and that the expense of administration, if such sale should be delayed, is in the interest of the consolidated mortgage bondholders, and counter to the interest of the bondholders under the general third mortgage; that it is in the interest of holders of consolidated bonds that all such hypothecated bonds should be redeemed, but that such redemption is counter to the interest of the third mortgage bondholders; that there is a conflict of interest between third mortgage bondholders and the holders of bonds issued under the mortgages on branch lines of which the complainant is trustee. It is also insisted that the complainant was guilty of improper conduct in assenting to the issue of receivers' certificates imposed as a lien upon the railroad property superior to the general second and third mortgages, and issued for the redemption of outstanding securities, and in failing to disclose to the court that it was itself the holder of some of the securities to be redeemed; and also that in the course of administration the trust company has acted with partiality towards the consol holders, and unfairly to the prior mortgage holders, in this: that it suffered provision to be made under which the proceeds of receivers' certificates to the extent of \$2,000,000 and upward were used by the receivers to redeem some \$4,000,000 of consols, \$700,000 of Chicago & Northern Pacific bonds, and \$400,000 collateral trust notes which could not benefit the second and third general mortgage bondholders.

It is a cardinal principle in the administration of the law that no man shall be condemned without a hearing. Therefore, it is that no one shall be concluded by a judgment to which he is neither party nor privy. Therefore, it is that, as a general rule, all persons interested in a controversy must be made parties thereto, that their rights may be determined and concluded by the judgment. There

has grown into the practice an exception, in some states recognized by positive enactment, that the trustee of an express trust may maintain suit without joining his cestui que trust. This is to avoid the expense and the delay attending the getting together and joining of numerous parties whose interests had been committed to the keeping of a trustee, and could be protected by him without their intervention. Under this exception, it has been well held that, in general, courts can deal with bondholders only through their trustee, and that it is not to be tolerated that each individual bondholder could, at his own suggestion, proceed to assert his rights, when they can as well be asserted through a trustee. The rule, however, creates an exception to the general principle that all interested should join in the controversy. It is a rule of convenience, to facilitate the conduct of the suit. It proceeds upon the assumption that the cestui que trust can be fully and fairly represented and protected in his rights by the trustee or representative. A rule of convenience must, however, give way when rights are involved. If it appears that the trustee refuses or neglects to act, or stands in a hostile position, or has assumed a position prejudicial to the interests of the cestui que trust, the rule of convenience is put aside, and the cestui que trust admitted to represent his rights, because in such case the trustee has not or cannot fully and faithfully represent them. *Jones, Corp. Bonds*, § 338.

It is, however, insisted for the complainant that the court has not the power to permit these petitioners to intervene as parties to the suit, because so to do would be to permit them to violate their contract obligations. This contention is founded upon a provision of both the general second and general third mortgages to the effect that:

"No holder or holders of a bond, or of any bonds secured hereby, shall have the right to institute any suit, action, or proceeding, in equity or at law, for the foreclosure of this indenture, or for the execution of the trusts thereof, or for the appointment of a receiver, or any other action, suit, or remedy hereunder, or under or upon any bond or coupon for interest hereby secured, without first giving notice in writing to the trustee of default having occurred and continued, as in this article aforesaid, and requesting the trustee, and affording it a reasonable opportunity, to institute such action, suit, or proceeding in its own name, or to proceed to exercise the powers hereinbefore granted, and also offering to it adequate security and indemnity against the costs, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared to be conditions precedent to any suit or action, or right of suit or action, for the foreclosure or for the execution of the trust of this indenture, or for the appointment of a receiver, and to any other action, suit, or remedy hereunder, or under or upon any bond or coupon for interest hereby secured."

It is asserted that by this provision the bondholders have expressly agreed that except under peculiar circumstances of request and neglect to sue, which do not exist, their rights shall be protected and enforced only by the trustee. I cannot assent to this contention. The provision is restricted to suit by the bondholders to foreclose the mortgage, or to enforce the bonds except through the instrumentality of the trustee, but cannot, I think, be applied to a case where suit has been brought by the trustee, if the conditions

would justify a court in admitting the bondholders to intervene. They do not by this provision conclude themselves against the subsequent assumption by the trustee of hostile position or against its violation of duty. The stipulation is a mere restraint upon suit by the bondholder unless and until the trustee, upon proper demand and indemnity, refuses to bring suit, but it cannot be that a trustee, by a mere formal institution of suit, could therein, by the assumption of hostile position or in violation of his duty, sacrifice the interests of the bondholders, and they be without remedy because of this stipulation.

It is claimed that the only remedy of the bondholders in case of dereliction of duty on the part of the trustee is to be found in article 15 of the mortgage, in which it is declared "that the trustee may be removed by the majority in interest of the bondholders of all of said bonds hereby secured and then outstanding, by instrument or instruments in writing, under their hands and seals, or by a vote of a meeting duly called and held as herein provided." This provision puts it in the power of a majority of bondholders at any time, and for or without cause, to displace the trustee, but does not limit or control the powers of a court of equity to permit the intervention of bondholders for the protection of their rights when otherwise it would be just or proper to permit them so to do. The intervention does not displace the trustee, but admits the cestui que trust, that they may be heard in the protection of their claims. The question, I think, resolves itself to this: Are the circumstances disclosed such as to call upon the court, in the exercise of a sound discretion, to permit bondholders to intervene for the protection of their rights?

I proceed now to the consideration of the grounds upon which intervention is sought, and to the consideration of the charges preferred against the trustee. I do not design to go over the ground with respect to the propriety of the issuance of receivers' certificates. That question was long ago fully presented, considered, and determined. I am satisfied of the wisdom of the course then pursued, and that it has resulted in saving this great system of railway from disintegration. The facts presented to the court upon that application were undisputed and indisputable. Counsel for the present petitioning second mortgage bondholders was allowed, *amicus curiae*, to be heard at length. There was no contention upon the facts. It was a question of propriety of action upon ascertained conditions. Certainly no objection can be justly taken to the action of the trustee with regard to its submission to the court of the question of the propriety of the issuance of those certificates. It is said, however, that the complainant acted improperly in failing to disclose to the court the fact that it at the time held a debt against the company, secured by collaterals which it was proposed to redeem with the proceeds of the receivers' certificates to be issued. It is true that that fact was not disclosed to the court, and therein I think the trust company failed in its duty to the court. It should have disclosed that it was actually or possibly interested in the issuance of those certificates, and its omis-

sion to advise the court of its debt has given rise, I think, to just criticism. The action of the court, however, would have been no different had the fact been disclosed. It appears that the loan made by the trust company to the railway company was to aid it in an emergency; that the loan was made upon reasonable terms, no advantage being taken of the necessities of the company, and that it was a favorable loan for the company; that it has not as yet been paid, and has been carried by the trust company through a period of serious financial revulsion without charge to the estate other than the accruing interest; and that the trust company has not and does not desire with respect to this debt to avail itself of the provision of the order for the issuance of certificates. I cannot think that the omission to advise the court of this debt, while improper, was designed, and it certainly has resulted in no injury to the interests of the petitioners.

The court is then confronted with the question whether the trustee stands in such relation to the different mortgages upon the road that it may be hindered in fully and impartially representing each independent interest in the foreclosure of the general second mortgage and in the conduct of the suit. And here it must be remembered that this consolidated suit is not one merely to foreclose the general second mortgage; it is also an administration suit to marshal the assets, to ascertain and determine the several respective liens and priorities existing upon this whole system of railway, and to enforce the rights, not only of the lienors, but of the general creditors and stockholders of the company. I do not deem it proper at this time to assert the respective rights under the different mortgages, but it is apparent that there may well arise conflicting claims under these mortgages with respect to the property covered by each, and the respective rights of the bondholders thereunder. It is not needful, nor would it be proper, now to say that, as matter of proper construction of the various instruments, the contention cannot be sustained. It is enough to say that it is debatable ground, and in a court of justice, in the determination of such a question, the contestants have a right to be heard. If such questions should arise, how can the trustee under one mortgage, with strict impartiality, represent the interests under another mortgage? It was well said in *Cuthbert v. Chauvet*, 136 N. Y. 326, 332, 32 N. E. 1088, with respect to the duty of a trustee, that "the absolute and positive duty is imposed upon him to defend the life of the trust whenever it is assailed." A trustee cannot be permitted to assume a position inconsistent with or in opposition to his trust. His duty is single, and he cannot serve two masters with antagonistic interests. The interest of the general second mortgage bondholders is to secure their money as speedily as possible. The interest of the third mortgage bondholders is to delay foreclosure until arrangements can be made that will insure their interest in the property, and therefore to insist upon postponement of the enforcement of the rights of the second mortgage bondholders. The interest of the holders of consolidated mortgage bonds is in this respect antagonistic to both the general second and

general third mortgage bondholders. It would be improper to say what course should be pursued in the determination of the questions when they shall be confronted, but surely it would seem inconsistent with its trust under the consolidated mortgage for the trustee to insist upon immediate sale under the prior mortgages, and so vice versa. Upon that question each interest should be heard in its own behalf. These observations will apply also to possible contention between the different mortgage interests with respect to the property covered by each, and possible contention between the third mortgage bondholders, and the consolidated mortgage bondholders and the holders of collateral trust notes, with respect to which interest has a prior lien upon the collateral notes and upon the bonds of the branch lines which may be held by the trust company (complainant) as trustee. It would be neither profitable nor wise to forecast the controversies that may arise with respect to conflicting interests in this case. It is sufficient to say that each conflicting interest has a right to its day in court, and to be heard; and, where there is the same trustee in each of the mortgages and under the collateral trust agreement, it seems just and proper that each interest should be represented in the suit, that the court may be properly advised upon a full hearing of all interests. I think it will not do to say that the controversies suggested have not as yet arisen. They could probably never arise if all the bondholders under the different mortgages were alone represented by the same trustee. In such case their rights would most likely be determined without controversy. The presence of disputing parties is necessary that the conflict may be formulated and determined by judgment. It would, I think, be an anomaly if a trustee under one trust should sue himself as trustee under another trust to determine the conflict between the trusts. I think it proper, therefore, in view of the possible and probable conflicts that may arise, and in view of the position of the complainant as trustee under all these mortgages, that a representative of each interest should be admitted to protect the rights of each in any conflict that may arise between these interests.

It is objected to the application of the Livingston committee that it only represents a million or a million and a half dollars of bonds out of the total amount of \$19,216,000; and to Mr. Van Nostrand that he or his committee only represent a million dollars of bonds out of \$14,461,000; and that the Adams committee, opposing the granting of the petitions, and content with the action of the trustee, represents nearly one-third of the bonds issued under the general second mortgage, and over one-half of the bonds issued under the general third mortgage. This objection might be of great force and availing were it not for the fact that the Adams committee also represents nearly one-third—some \$19,881,000—of the consolidated mortgage bonds. The Adams committee, therefore, stands in the same plight with the complainant, trustee under all the mortgages. Its interest would be not only to protect the general second and general third mortgages, but also the consolidated mort-

gage, and possibly its interest under the general second and general third mortgages might be subordinated to its larger interest under the consolidated mortgage.

It is also objected to the Livingston committee and to the Van Nostrand committee that they largely represent stockholders as well as bondholders. I am not impressed with the validity of this objection. The stockholders are now represented by the corporation defendant, actively asserting their rights in the suit. These committees could do no more. I am, however, impressed with the consideration that the Livingston and the Van Nostrand committees respectively represent but a small minority of the bonds issued under the general second and third mortgages; and if there were a representative of a majority of the bonds issued under these two mortgages respectively, having no other interest to serve than that of the respective mortgages mentioned, I should not feel inclined to grant these petitions. But they are the only persons before the court representing distinctively the interests of the mortgages under which they respectively hold bonds. The stock which they hold is at the best of but trifling value. It is not reasonable to suppose that they would sacrifice or endanger their bonds in the protection of that which is of but trifling value.

It is urged that these petitions should not be granted, because it is feared that they are not preferred in good faith, but merely to obtain vantage ground from which they can embarrass the trustee and the court in the management of this great railway, and impede and hinder the work and injure the credit of the receivership. The court has no right to assume that such is the purpose of the petitioners, nor can it perceive that such result can follow the granting of the petitions. If, however, such be the purpose,—which I have no right to assume, and which is disclaimed by counsel,—the court will be quite able to protect itself and the estate against improper intrusion into and attack upon the management of the property committed to its supervision. The petitioners are admitted for the protection of their rights, not for factional opposition to the management of this property by the receivers.

The fear is also expressed by counsel for the trustee that the exercise of the right to appeal may prevent a proper reorganization plan from being carried out. I am not forgetful of the considerations which influence the actions of courts with respect to properties of this kind in recognizing every fair plan of reorganization; nor am I unmindful of the consideration that the minority of bondholders are in large measure subject to the action of the majority; but such considerations ought not to avail to abridge the right to appeal in any case where a party deems his right infringed. It is more important that the right to appeal be preserved in its integrity than that any plan of reorganization should be carried into effect without the delay which may be incident to the assertion of legal rights. At the same time, however, care should be taken that, while the right should be granted, it should be protected from abuse. And to that end I have come to the conclusion to allow but

one individual of each of these committees to be represented in the suit, to the end that each mortgage interest shall thus have representation. This will, as I think, enable the court to be informed of the claims and rights of each interest, prevent confusion in the orderly conduct of the litigation, and factional opposition in the management of the estate.

The prayers of the several petitions will therefore be granted so far as to permit Mr. Johnston Livingston, Mr. Charles B. Van Nostrand, and Mr. Edward D. Adams to be made parties defendant to the suit for the purpose of protecting the interests of the bonds represented by them respectively in any conflict which may arise as to their respective interests in the estate.

GROVES et al. v. SENTELL.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1895.)

No. 337.

1. INTEREST—FUND IN REGISTRY—BILL IN NATURE OF BILL OF INTERPLEADER.

The complainant in a bill in the nature of a bill of interpleader cannot be required to pay interest on the fund which he deposited in court at the commencement of the suit, where he is not chargeable with any delays occurring during the litigation.

2. APPEAL—SPECIFIC DECREE—DUTY OF COURT BELOW—INTEREST.

The supreme court, reversing a decree upon a bill in the nature of a bill of interpleader, gave specific directions as to the decree to be entered below, requiring payment to some of the parties of a stated sum, with interest, out of the fund deposited in the registry by complainant, and ordering a personal judgment against him for costs alone, although the prevailing parties had prayed a judgment against him for additional interest. *Held* that, in view of the specific nature of the supreme court's directions, the court below had nothing to do but enter the decree ordered, and execute the same, and was bound to presume that the supreme court had passed upon all the issues; for which reason the circuit court could not order the complainant to fill up the registry by paying interest on the fund there deposited from the time of deposit to date.

3. ESTOPPEL—CONSENT TO PAYMENT OF COSTS AND FEES PENDING APPEAL.

Voluntary consent, shown by the record, to the execution, pending an appeal, of a part of the decree which directed payment out of the fund in court, of the special master's costs, and a solicitor's fee for complainant, binds the consenting party, although the decree is afterwards wholly reversed, and the appellate court decides that these allowances were erroneous.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This was a bill in the nature of a bill of interpleader, brought by George W. Sentell against Martha Groves, William J. Groves, and others. A decree having been entered by the circuit court, an appeal was taken to the supreme court by the said Martha and William J. Groves, and by Thomas A. Pogue, administrator of Rosetta Rhea, deceased. The supreme court reversed the decree, with specific directions to the court below (14 Sup. Ct. 898), and

from the action of that court in execution thereof the present appeal was taken by the said Martha Groves and William J. Groves.

W. S. Benedict, for appellants.

E. M. Hudson, for appellee George W. Sentell.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. The supreme court, in the opinion delivered by Mr. Justice White, saw fit to specifically prescribe the final decree to be entered in this case as follows:

"The decree is reversed, and a decree is rendered in favor of Martha Groves and William J. Groves, directing the payment out of the fund of \$4,873, with interest at eight per cent. from March 5, 1884, until paid, and costs of this and the court below." *Groves v. Sentell*, 153 U. S. 465-486, 14 Sup. Ct. 898.

The mandate filed in the circuit court concludes as follows:

"On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, with costs; and that the said Martha Groves, William J. Groves, and Thomas A. Pogue, administrator of Rosetta Rhea, deceased, recover against the said George W. Sentell et al. three hundred and forty-nine dollars for their costs herein expended, and have execution therefor. And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions to enter a decree directing the payment to Martha Groves and William J. Groves, out of the fund in the registry of the court, the sum of \$4,873, with interest at 8 per centum per annum from March 5, 1884, until paid, with costs in that court.

"May 14, 1894.

"You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as, according to right and justice, and the laws of the United States, ought to be had; the said appeal notwithstanding."

In the circuit court, on filing the mandate, a decree was entered adjudging that the whole amount in the registry of the court in the case be paid to Martha Groves and William J. Groves, and, further, that George W. Sentell, Fanny B. Randolph, William B. McLean, liquidator of the partnership company of G. W. Sentell, testamentary executor of Benjamin Conyers, deceased, be condemned in solido to pay the sum of \$349, costs expended in the supreme court of the United States, and the further sum of \$507.50, costs in the circuit court, for which sums execution was directed.

The first assignment of error in this court is:

"That the court erred in not complying with the final decree of the supreme court, as set forth in its mandate, and the opinion upon which same was based."

The decree prescribed by the supreme court and directed to be entered in the circuit court was not a personal decree against any of the parties to the suit, except for the sum of \$349, costs of the supreme court, but was a decree disposing of the fund in the registry of the court, of which alone it would seem, from the pleadings, the court had jurisdiction. As the decree of the circuit court rendered in pursuance of the mandate gave all the fund in the

registry of the court to Martha Groves and William J. Groves, it is clear that in this respect the appellants cannot complain. If the appellants desired relief beyond the fund in the registry of the court, their application should have been to the supreme court.

The second assignment of error is:

"That the court erred in limiting its decree to the sum of \$5,346, now in its registry; in not ordering the amount to be at once paid on account; and in not ordering George W. Sentell to fill up the registry with a sufficient fund to satisfy the balance found due by him to Martha Groves and William J. Groves by the supreme court, with interest accrued to date, and their counsel fees."

The real proposition asserted by this assignment of error is that George W. Sentell should be required to pay into the fund interest at 8 per cent., pending the suit. According to the opinion of the supreme court, the original bill of George W. Sentell was not a strict bill of interpleader, because of an ultimate interest of Sentell in the fund in controversy; but that, as a bill in the nature of a bill of interpleader, it was allowable. The difference between a strict bill of interpleader and a bill in the nature of a bill of interpleader, so far as practice and proceedings are concerned, is that in the one the complainant is entitled of right to his costs, including solicitors' fees, while in the other—as generally in equity cases—the costs are within the discretion of the court. Willard, Eq. Jur. (Ed. 1863) p. 321. In both the fund should be paid into the court before any order is made in the case. 2 Daniell, Ch. Prac. 1563, and cases there cited. If paid into court to the full amount, no interest on the fund in the court while proceedings are pending ought to be required of the complainant, unless some fault or delay in the proceedings can be attributed to his conduct. In *Spring v. Insurance Co.*, 8 Wheat. 270-293, the complainant in a bill of interpleader was required to pay interest on the fund pending the proceedings, because he had not paid the same into court. In *Richards v. Salter*, 6 Johns. Ch. 445, the complainant was excused from paying interest because he had, with all reasonable diligence, resorted to the court, and paid the money into court, after in vain calling on the defendant for indemnity. The record in this case shows that at the time the fund was paid into court the full amount, principal and interest, to wit, the sum of \$4,873, with interest thereon at the rate of 8 per centum per annum from March 5, 1884, aggregating the sum of \$5,743.46, was paid into court. The fault herein attributed to the complainant, George W. Sentell, as a reason for charging him with interest upon the fund while lying in the registry of the court is that, soon after the injunction restraining the Groveses and others from prosecuting their suit at law was issued, Mrs. Groves and others, through their counsel, suggesting that the funds were on deposit in the registry, and that from the showing before the court the same belonged to movers, took a rule on the complainant to show cause why the movers in the rule should not be permitted to withdraw the same on giving bond for the amount thereof, with surety to be approved by the court, without prejudice

to any of their rights in the premises; and that such rule, being submitted to the court, after argument by the parties respectively, was discharged by the court. The record does not show whether the rule was opposed by counsel for the complainant in the bill. It is stated in this court by his solicitor then and now that he did not oppose the rule, but that the same was opposed by counsel for other defendants. The rule taken was practically an informal demurrer to the bill of complaint, and as such seems to have been properly overruled. The delay caused in this respect, as well as that resulting from the appeal to the supreme court, if operating an injury, should be attributed to the action of the circuit court, for which the interpleading complainant should not be held responsible. However this may be, in our opinion the limitation of the decree as suggested in this assignment of error would have been wholly unwarranted. When the supreme court prescribed the decree to be entered in the circuit court in such specific terms as the record shows, there was nothing left for the circuit court to do in the premises but to enter the decree prescribed by the supreme court, and execute the same. As noticed above, there was no personal judgment directed against George W. Sentell, except for costs in the supreme court, although the answer of Martha Groves and William J. Groves to the bill of interpleader claimed that George W. Sentell was indebted to them in the sum of \$4,873, with interest thereon at 8 per cent. per annum from March 5, 1884, until paid, and prayed the court to decree "that the fund deposited in the registry of this court is the property of these respondents, and that the same be paid to them; and they further pray that this matter be referred to a master to ascertain what further amount may be due to these respondents by complainant as interest until final payment under his contract and agreement and assumption hereinbefore set forth, and what further damages, and also what costs, are due to these respondents by said complainant." We are bound to presume that the supreme court in their decree passed upon this issue, and neither from the mandate nor from the opinion rendered by the court can we infer any intention to leave undecided any issue in the case, or in any wise refer the same to the circuit court for future disposition.

The third assignment of error is:

"That the court erred in not requiring the return to the registry of the sum of \$350, taken therefrom as costs of George W. Sentell, and paid to the officers of the court as such costs pendente lite."

The record shows that the circuit court, in rendering the final decree in the case (which was reversed), adjudged that "there be allowed and paid out of the fund in the registry of the court a fee of \$250 to E. M. Hudson, Esq., solicitor for the complainant, for services in filing the bill of interpleader, and conducting the proceeding therein"; and, further, "that there be paid out of the registry of the court to the master specially appointed to take the testimony and state the account the sum of \$100." These sums were paid out of the registry pending the appeal. In the opinion of the supreme

court it is held that the original bill in the case was not a strict bill of interpleader, but was a bill in the nature of a bill of interpleader, and that George W. Sentell's ultimate interest prevented him from being allowed a solicitor's fee from the fund dedicated to the payment of the mortgage. As the original decree of the circuit court was wholly reversed, and as no reservation was made in the decree prescribed by the supreme court in the matter of special master's costs and solicitor's fee, we think it clear that prima facie the payment of the same out of the fund pending the appeal was a diversion of the fund in the registry of the court. But an inspection of the record shows that, after the appeal taken by Martha Groves and William J. Groves from the original decree of the circuit court, they, by their solicitor of record, consented to the execution of the decree, so far as the special master's fee and solicitor's fee were concerned. After such consent to the execution of the decree in the respect mentioned, they cannot be heard to object to the action of the circuit court in not requiring the return of the money so paid out; and we are of opinion that, if the voluntary performance of the decree appealed from in the matter of solicitor's fee had been called to the attention of the supreme court, that court would not have troubled itself to decide on the propriety of the allowance made by the circuit court.

The fourth assignment of error is:

"That the court erred, if it was without power to order the registry to be filled up with a sufficient amount to fully satisfy said mandate, in not reserving the right to Martha Groves and William J. Groves to proceed for the balance found to be due, after exhausting the registry, under and with their original action enjoined by George W. Sentell; said injunction being in effect finally quashed."

The record shows that the circuit court, on the bill of complaint, directed the defendants in such bill to show cause on June 5, 1886, why an injunction should not issue according to the prayer of the bill, and in the meantime ordered a restraining order to the same purport to be issued; but it does not show that any such rule was ever heard or otherwise disposed of, or that the restraining order was ever dissolved or perpetuated. The decree of the supreme court is silent as to any injunction or restraining order. We are therefore unable—even if otherwise it would be within our province—to express an opinion as to whether said injunction was in effect quashed. We are clear, however, that, whatever the effect on the injunction, the circuit court was in no wise called upon to enlarge or limit in favor of Martha Groves and William J. Groves the specific decree prescribed by the supreme court in the case. The decree of the circuit court is affirmed.

CONTINENTAL NAT. BANK v. HEILMAN et al.

(Circuit Court, D. Indiana. March 12, 1895.)

No. 9,137.

1. **EQUITY—BILL OF DISCOVERY—CORPORATION.**

The fact that all the officers of a corporation are competent witnesses for either party in a suit is not a reason for refusing to sustain a bill of discovery against the corporation.

2. **SAME—PARTIES.**

It seems that the practice of making an officer of a corporation a party to a bill of discovery against the corporation, in order to secure his oath, though questionable in itself, has become established by precedent.

3. **SAME—VERIFICATION OF ANSWER.**

It seems that the answer of a corporation to a bill of discovery should be made under its corporate seal.

This was a suit by the Continental National Bank against Mary Jenner Heilman and others to enforce a lien upon certain stocks. The defendants filed a cross bill against the bank for discovery. The bank moves to strike the cross bill from the files.

A. C. Harris, for complainant.

Gilchrist & De Bruler and Duncan & Givens, for defendants.

BAKER, District Judge. The complainant has filed its bill against the defendants to obtain a decree for the payment of the amount of money evidenced by a note, and to procure the sale of certain pledged securities, and the application of the proceeds on the amount which may be found due to it. The defendants have filed an answer, which, if true, completely meets and overthrows the equity of the bill. The defendants in the original bill, as complainants, have also filed a cross bill in this cause against the Continental National Bank as sole defendant, seeking discovery in aid of the defense to the original bill. The Continental National Bank has moved the court to strike the cross bill from the files, on the ground that the same is wholly unnecessary, and needlessly incumbers the record, and is not essential to securing the defendants the relief sought, to wit, a discovery of what may be the testimony of the officers of the complainant touching the matters and facts surrounding the execution and payment of the note in suit.

A corporation aggregate is bound to answer a bill the same as a natural person, except that it puts in its answer under its corporate seal, while a natural person answers under oath. It is the usual rule of practice to join the clerk or other principal officer of a corporation as a party to a suit for discovery against such corporation. "The principle," said Lord Eldon in *Fenton v. Hughes*, 7 Ves. 287, "upon which the rule has been adopted, is very singular. It originated with Lord Talbot, who reasoned thus upon it: that you cannot have a satisfactory answer from a corporation, therefore you make the secretary a party, and get from him the discovery you cannot be sure of having from them; and it is added that the answer of the secretary may enable you to get better information." This rule of practice is extremely questionable, if it

were now to be considered for the first time, but it has so long and universally prevailed without objection that it must be considered established. But, while this is the usual practice, it is not necessary to make any officer of a corporation a party to such a bill. Where the corporation is the sole party defendant, it is its duty, if required to do so by the bill, to put in a full, true, and complete answer, and, to enable it to do so, it must cause diligent examination to be made of all deeds, papers, and muniments in its possession before answer. 1 Daniell, Ch. Pl. & Prac. 146. And it was said by Sir John Leach, M. R., in *Attorney General v. Burgesses of East Retford*, 2 Mylne & K. 40, that if a corporation pursue an opposite course, and the information required is afterwards obtained from the documents scheduled to its answer, the court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice, and on that ground will charge it with costs of suit.

It is urged that, since all the officers of the corporation are made competent witnesses for either party by the federal statutes, there is no longer any reason for allowing a bill of discovery against a corporation, and that, the reason failing, the rule has failed. But whatever force this suggestion might be entitled to where a discovery is sought from a natural person, it has none in such a case as the present, for the corporation cannot be sworn and examined as a witness; and it is apparent that in many cases a discovery by a corporation may be important to attain the ends of justice. In the present case the corporation is alleged to be possessed of facts essential to the defense, which the defendants do not possess, and cannot acquire, except by obtaining a discovery through the answer of the corporation. The examination of its officers as witnesses can in no event be the exact equivalent of a discovery by the corporation itself, through an answer made under its corporate seal. The cross bill asks that the corporation may be required to answer under oath, but this it cannot be required to do. I am of opinion, however, that it is competent for the court to require it to make answer under its corporate seal. The only order which I will now make is to overrule the motion to strike the cross bill from the files, at complainant's costs.

E. BEMENT & SONS v. LA DOW.

(Circuit Court, N. D. New York. March 4, 1895.)

No. 6,036.

1. CONTRACTS—FRAUDULENT REPRESENTATIONS—EXTENT OF PATENT RIGHTS.

B. & Sons and L. entered into a contract, by which B. & Sons took a license under L.'s patents, existing and to be thereafter granted, for harrows like a sample furnished, and agreed to manufacture certain numbers of harrows in each year, and to pay L. certain royalties thereon. After manufacturing the harrows and paying the royalties for some time, B. & Sons brought suit against L. to set aside the contract on the ground that it was obtained by fraudulent representations on L.'s part to the effect

that his patents covered an entirely new field and involved an entirely new principle. In such suit it appeared that both parties, at the time the contract was made, were familiar with patents and patent litigation, and especially with harrows and the state of the art relating thereto, and were persons of unusual intelligence; that the main point of difference between B. & Sons and L. was as to whether L. had represented himself to be the first to introduce each of two valuable features in harrows, or to be the first to introduce them in combination, one statement being false and the other true, and the falsity of the former, if made, being easily ascertainable; that B. & Sons had been anxious to make the contract, had sought out L., and, on seeing the harrow, had expressed their satisfaction with it and their desire to obtain a license; that B. & Sons had had full opportunity to examine and test a sample harrow, and to investigate the state of the art, before concluding the contract; and that, after the harrows were placed on the market, they sold readily in large numbers, and B. & Sons repeatedly expressed their satisfaction with them, and were not molested by attempted infringements. *Held*, that there was no evidence of fraudulent misrepresentations inducing the contract.

2. SAME—RATIFICATION.

It further appeared that, if L. had made fraudulent misrepresentations, the fact must probably have been disclosed to B. & Sons within a few months after the making of the contract, and certainly by circumstances which occurred about two years after the making thereof, but that, instead of rescinding the contract immediately, B. & Sons continued to manufacture the harrows, and to assert, in negotiations with a third party, the value of the contract, and sold it to such third party for a large sum. It also appeared that, in an action by L. for royalties, B. & Sons had set up fraud as a defense, and, upon such defense being overruled, had obtained a reassignment of the contract, and tendered the same back to L., but without offering to return any of the profits made under the contract. *Held*, that by continuing to treat the contract as existing, after discovering the supposed fraud, and by retaining its fruits, B. & Sons ratified such contract.

This was a suit by E. Bement & Sons, a corporation, against Charles La Dow to set aside a contract for fraud. The cause was heard on the pleadings and proofs.

Henry J. Cookinham, for complainants.

Alden Chester, for defendant.

COXE, District Judge. On the 22d day of March, 1889, the parties to this action entered into an agreement, which, so far as its stipulations affect the issues in this cause, is as follows:

"Agreement or License.

"Know all men by these presents: That whereas, C. La Dow, of Albany, New York, is the owner of a large number of patents on spring-tooth harrows, and Messrs. E. Bement & Sons, of Lansing, Michigan, are desirous to obtain rights to manufacture at Lansing, Michigan, and sell throughout the following territory, the harrow invented by said La Dow, which is represented by the sample furnished said E. Bement & Sons by La Dow, and La Dow consenting thereto, therefore this agreement witnesseth: * * * That said La Dow hereby grants license to said Bement & Sons to build spring-tooth harrows (like the sample furnished them by La Dow) at Lansing, Michigan, under La Dow's patent of March 11, 1884, for the territory of the United States, except the counties of Albany, Schoharie, Greene, Delaware, Schenectady, Rensselaer and Saratoga, in the state of New York, for and during the life of any patent now granted, or that may be granted said La Dow which relates to said harrow, upon the following terms and conditions, viz.: La Dow grants this license exclusive under said patent so far as embodied in said harrow, and also under patent to be applied for on said harrow, for the ter-

ritory of the United States, excepting the territory hereinbefore reserved, and except that La Dow reserves the right to license to others within the territory hereinbefore granted said Bement & Sons, rights to use his inventions of fastening teeth directly between opposing parts of a harrow frame, without the use of a 'clip' when used in harrows, in which the frame bars do not stand edgewise vertically; and La Dow also reserves the right to use said invention in said territory in such style harrows as the 'None Such,' now made by McSherry & Co., of Dayton, Ohio, upon the conditions that the said Bement & Sons will build the said harrows substantially the same as the sample furnished them by La Dow, and in a substantial and workmanlike manner and of good finish, painting the harrow frames red and the teeth black, that they will thoroughly advertise and push the sale of said harrows in all of said territory, and use their best endeavors to sell as many of them in each year as possible, and to pay the said La Dow, his representatives or assigns, during the continuance of this agreement a royalty on each harrow made by them, as follows: Said Bement & Sons agree to pay royalty on not less than two thousand (2,000) of said harrows for the year 1889 at a royalty of fifty cents per harrow, payable one-half July 1, 1889, and one-half December 31, 1889. They also agree to build and pay for not less than ten thousand (10,000) of said harrows for the year 1890 and to build and pay on not less than ten thousand (10,000) harrows in each year thereafter during the four years following, viz.: The years 1891, 1892, 1893 and 1894, and to pay to said La Dow or assigns a royalty of fifty cents on each harrow made in each of said five years aforesaid. The royalty year to begin January first in each year and the royalty to be paid as follows: Twenty-five hundred (\$2,500.00) dollars of the amounts specified shall be paid on July first, and the balance of twenty-five hundred (\$2,500.00) dollars together with royalty on any excess of the number specified shall be paid on December 31st of each year beginning July 1, 1890, and ending December 31, 1894. * * * Said Bement & Sons may bring suits against infringers at their own expense, and for their own benefit, except that La Dow shall retain his equity of fifty cents per harrow against all who infringe his patent, and said amount shall be paid La Dow as damages out of any money collected by Bement & Sons from infringers. * * * In case said Bement & Sons do not fulfill the terms and conditions of this contract, La Dow may declare it void and the rights hereby conveyed shall thereupon revert to La Dow or his assigns. Said Bement & Sons hereby accept said terms, and agree to faithfully fulfill their part of the same, for and during the time named, and that the same shall be binding on their representatives, successors or assigns. In witness thereof, the parties have hereunto set their hands and seals this 22d day of March, A. D. 1889.

Charles La Dow.

"E. Bement & Sons,

"By A. O. Bement, President."

On the 2d day of September, 1889, the parties entered into a second agreement by which La Dow extended the license to the counties excepted from the original agreement. The royalty for these counties was fixed at \$1 per harrow on not less than 500 harrows annually.

Briefly stated, there was a contract by which Bement & Sons took a license under La Dow's patents existing and to be thereafter granted for harrows, like the sample furnished, and agreed to manufacture not less than 2,000 harrows for the first year and not less than 10,500 for the five succeeding years and to pay La Dow 50 cents royalty for each harrow sold and a dollar royalty for harrows sold in the territory specified in the second agreement. The complainants seek to set aside these agreements and to recover \$3,500 paid thereunder by them to the defendant, on the ground that they were induced by fraudulent representations made by La Dow and relied upon by them. These representations are alleged to

be in substance as follows: Before the execution of the agreements La Dow stated to the complainants that he was well acquainted with the state of the art relating to harrows; that his inventions involved an entirely new principle, viz. that of grasping the harrow teeth edgewise, and also a harrow frame of zigzag form; that his patents, applications and inventions were very valuable and covered the two features referred to and the entire field; that he was the first to conceive of the idea of holding the teeth edgewise; that his inventions covered this field so completely that there would be no trouble or annoyance by other parties; that the complainants if they took the license would have this field entirely to themselves so far as the two features of clasping the teeth by the edges and the frame of zigzag form were concerned.

The defenses are—First, that no fraudulent representations were made; second, that complainants with full knowledge of all the facts relating to the alleged fraudulent representations ratified and confirmed the agreements; third, that complainants have not offered to restore all that they have received under the agreements and are not entitled to relief until they do this—restitution is now impossible; and, fourth, that the judgment in the action at law, in which La Dow recovered in this court for royalties under the agreements, is *res judicata* upon the present issues.

The law applicable to controversies of this kind is clearly stated in *Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881. The supreme court said:

"In order to establish a charge of this character the complainant must show by clear and decisive proof—First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; fourthly, that it was made with intent that it should be acted on; fifthly, that it was acted on by the complainant to his damage; and, sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true. The first of the foregoing requisites excludes such statements as consist merely in an expression of an opinion or judgment honestly entertained; and, again (excepting in peculiar cases), it excludes statements by the owner and vendor of property in respect to its value."

It is thought that the third of these propositions should be qualified by the further statement that if the defendant conveys the impression that he has actual knowledge of the existence of the facts when he is conscious that he has no such knowledge, he is as responsible for the injury caused by such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity. *Iron Co. v. Bamford*, 150 U. S. 665, 673, 14 Sup. Ct. 219; *Marsh v. Falker*, 40 N. Y. 562. In *Slaughters' Adm'r v. Gerson*, 13 Wall. 379, the supreme court said:

"Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another."

Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771.

More expressions of opinion as to the value of property are not actionable; they are regarded as "trade talk" which every man of intelligence receives *cum grano salis*. *Gordon v. Butler*, 105 U. S. 553; *Mooney v. Miller*, 102 Mass. 217. In *Dillman v. Nadlehoffer*, 119 Ill. 567, 7 N. E. 88:

"The defendant represented to plaintiffs that said improvements were his own invention, and that the patents issued thereon were genuine and valid, and that they did not conflict with or infringe upon the patents or inventions of any one, and particularly those controlled by the Washburn & Moen Manufacturing Company and J. L. Ellwood or their licensees."

The court held that these were expressions of opinion merely not actionable in a court of equity in a suit for rescission. *Reeves v. Corning*, 51 Fed. 774. These principles are elementary and it is unnecessary to multiply authorities.

The fraudulent representations alleged in the bill and stated in the proof are numerous and complicated, but it will be seen at a glance that some of them are true, others, mere expressions of opinions, and others still, only repetitions of what had previously been stated. They may all be fairly condensed into the statement that the defendant made the false representation that his patents, applications and inventions covered an entirely new field and involved an entirely new principle, namely, that of grasping the teeth edgewise, and also a harrow frame of zigzag form. In other words, the defendant represented that he was the inventor of a zigzag harrow frame and the principle of clasping the teeth edgewise. Was this statement made? Was it false? Did the defendant know it to be false or did he make it in such terms as to produce the belief in the complainants' minds that he had personal knowledge of its truth? Did the defendant make it with intent to deceive? Did the complainants believe it to be true and rely on it to their injury?

In approaching the consideration of these questions it is wise at the outset to have in mind some general observations. *Imprimis*, this is not a controversy between a meek, innocent, ignorant and confiding party on the one side and a powerful, overreaching, shrewd and unscrupulous party on the other. It is not a dispute between the lamb and the wolf. These parties are all of them men of mature age and more than ordinary intelligence. The complainants for many years had been engaged in the manufacture of agricultural implements; they had manufactured and sold spring-tooth harrows and they were familiar with patents and patent litigation. Three days before the first license was signed one of the complainants had received a patent as inventor of an improvement on spring-tooth harrows. In short, it would be difficult to find parties better equipped in every way to take care of their own interests in a bargain. Again, the contracts were executory in character. They were to last from March, 1889, to January, 1895. During the five years and more that the licenses had to run a false statement regarding the patents would certainly be

discovered. With the field full of rival manufacturers and the records of the patent office open alike to all, it is hardly possible that five years could have rolled away without the fraud being exposed. Detection was almost certain to follow. Is it likely that an intelligent man would make false statements to procure the signature of another to an executory contract when, long before the benefit could be reaped by him, his fraud would be discovered and his contract voided? It should also be borne in mind that no property is so uncertain as "patent rights"; no property more speculative in character or held by a more precarious tenure. An applicant who goes into the patent office with claims expanded to correspond with his unbounded faith in the invention, may emerge therefrom with a shriveled parchment which protects only that which any ingenious infringer can evade. Even this may be taken from him by the courts. Indeed, it is only after a patentee has passed successfully the ordeal of judicial interpretation that he can speak with any real certainty as to the scope and character of his invention. Especially is this true of patents on spring-tooth harrows, which have for years been the subject of fierce and prolific litigation. Every one familiar with patents knows this and yet there is no class of people so apt to deal in hyperbole as patentees and those expert in patent matters. If the gentlemen whose vocation it is to express opinions as to the value of patents were held pecuniarily responsible for every ill-founded statement it is safe to infer that there would be a marked contraction either in the views or the incomes of a large number of mechanical experts.

The defendant is a prolific inventor of harrows, and of agricultural implements generally. Although it is highly probable that he took an optimistic view of his invention and indulged in a large amount of "trade talk" the court cannot believe that he made any false statements willfully and with intent to injure the complainants. A careful study of the record leads to the conclusion that the complainants must have misunderstood the defendant, that every presumption is against his having made the false statements before alluded to and that there was an entire absence of motive for the perpetration of such a fraud. The defendant has given his version of the conversations with the complainants and when the two statements are placed side by side it will be seen how little they differ and how easily the complainants might have misunderstood the defendant:

Complainants' Version.

"He said that his device covered two radical features in spring-tooth harrows, one of which consisted of the plan of holding the tooth by its edges instead of flatwise, and the other was the zigzag frame. That his inventions of holding the tooth by edges and of the zigzag frame were absolutely new and novel and could not be used by anybody else, in any form without infringing his patent."

Defendant's Version.

"I told him I was the inventor of a zigzag frame and spring tooth combined, that I was also the inventor of holding the curved spring tooth directly to its zigzag beams without the intervention of clips, tooth seats or any other toggling device, and that whoever built that harrow would not be liable to suits for infringement as were all who were using clips, curved seats," etc.

It will be observed that the main difference between the two statements is that complainants testify that La Dow said he was the first to make a zigzag frame and was also the first to make an edgewise clasp; while he testifies that he said he was the first to make a zigzag frame and an edgewise clasp in combination; and yet one statement is false and the other true. If the defendant in speaking of the two features of his invention used the words "in combination" there was no fraud. That the complainants are mistaken in their version seems probable from the following additional considerations:

The license is barren of anything to corroborate the complainants' theory. It recites that it is a license to make and sell "the harrow invented by said La Dow, which is represented by the sample furnished said E. Bement & Sons by La Dow." This was the sample "Steel King" which complainants had full opportunity to examine, did examine, and about which there was never the slightest concealment. Further on the license reserves to La Dow the right to give others the right "to use his invention of fastening teeth directly between opposing parts of a harrow frame without the use of a 'clip' when used in harrows in which the frame bars do not stand edgewise vertically." About the time of the first license both parties published circulars setting forth the peculiar excellences of the "Steel King" and neither states what the complainants now assert; on the contrary, the invention is described in conformity with the present contention of the defendant as follows:

"This harrow has no 'clips,' 'curved seats,' 'tooth fasteners,' nor 'trap' of any kind, but is a thoroughly practical, common-sense, every-day and every-year harrow, having its teeth attached directly between opposing sides of the frame and held in any desired position by the ribs of the channel steel frame, and having more adjustments, and those more easily made, than any other harrow in the world. The feature of attaching the tooth to the frame without a clip is of the greatest importance. This can readily be seen to be a bed-rock principle in harrows, which no amount of ingenuity on the part of other harrow inventors can evade, as the principle must necessarily apply to any manner of fastening the tooth which does not use a clip. The importance of getting rid of all toggling and clips is a self-evident fact."

Is it not reasonable to believe that if the complainants had supposed that they controlled broadly the principle of holding harrow teeth edgewise and also the zigzag frame as separate inventions, they would have made some allusion to it in these circulars? It is a matter of common knowledge that owners of patents do not usually understate their inventions, or establish their own reputation for diffidence and modesty, in their "circulars to the trade." The court does not overlook the fact that in a circular put out by complainants some months later—in January, 1890—a statement is made regarding La Dow's right to the broad principle of holding the teeth edgewise which conflicts with, and, to some extent, impairs the force of the presumption based upon the earlier circulars. But it taxes human credulity too far to believe that La Dow could have laid claim to a principle, which, when broadly considered, was one of the oldest and best known in the harrow art.

It should also be remembered that the complainants sought out the defendant; that the "Steel King" was only shown them after numerous other harrows had been examined and that from the moment it was seen by complainants' president he expressed his entire satisfaction with it and appears to have been eager and anxious to conclude an arrangement. It is very clear that before La Dow went to Lansing the bargain had been practically consummated with the single proviso that the harrow frame shown at Albany was to be expressed to Lansing and was to please all of the complainants when received. It had already pleased one of them. They were earnestly desirous to procure the right to make and sell the "Steel King" without a day's delay. It was not necessary to cajole them into a bargain as to the wisdom of which they were in doubt. It needed no false statements to induce them to take a license. Had there been any wavering or reluctance on their part there would be more plausibility in their present contention.

It remains to be considered whether the defendant made any false statement with intent that it should be acted on by the complainants and whether they did act on it to their damage, believing it to be true. The following propositions must be conceded: First. The complainants could not have relied upon any patent granted to La Dow subsequent to March 11, 1884, and prior to March 22, 1889, for it would have been stated in the contract. Second. They could not have supposed that the patents of March 11, 1884, covered the "Steel King" in all its details, because they were expressly informed by La Dow that the "Steel King" was a new invention which had been kept secret, they being the first manufacturers who had seen it, and that it was to be secured by patents subsequently granted. Third. The complainants had every possible opportunity to examine and test the sample harrow before making the first contract. The defendant's volume of patents containing a vast number of patents for harrows, including his own, was shown to and left with the complainants, certainly before the second contract was executed, and they might have examined the entire art as there set out had they seen fit. Fourth. The patents subsequently granted to La Dow fully covered the "Steel King." These patents must be assumed to be valid in this controversy and it cannot be successfully denied that the complainants were fully protected in the manufacture and sale of the "Steel King." No one else had attempted to make it. No one had sued the complainants for infringement.

How, then, can an intent to defraud be imputed to the defendant; how can it be said that the complainants relied upon false representations or that they suffered injury by so doing? As before stated, what they ardently wanted to secure was the right to make and sell the "Steel King." They secured that right. They made the harrow without molestation. Their success, considering that it was an entirely new tool, was phenomenal. The first year they made 875 harrows, the second year 4,435, the third year 5,617, and, during the first four months of 1892, prior to the commencement

of this suit, 3,341, or over 10,000 for 1892, if the same proportion continued for the remainder of the year. It was asserted at the argument and not denied that up to that time a harrow substantially the same in all respects had been made by the complainants. It is not easy to perceive what more could have been done even though defendant had been the inventor of the zigzag frame and also of the edgewise clasp and had told the complainants of it before they made the contract. There were no complaints at any time until after litigation began that the harrow was not meeting all the complainants' anticipations. It certainly was a success and almost justified the superlative praise lavished upon it by complainants. In June, 1889, they wrote:

"It looks as though the only thing in the market beyond controversy is the 'Steel King.' It is certainly the finest looking tool we have ever seen."

In May, 1890, over a year from the first contract, they wrote La Dow:

"We have not yet put out a tool which has been received with such universal satisfaction as the 'Steel King.' There is no doubt at all in our minds but that it will be the most universally used tool that has ever been put on the market. The two manners of putting in the teeth seem to make it all that even the most critical farmer requires."

Even after the complainants had been sued for royalties and were fully cognizant of all the facts regarding La Dow's invention their president in June, 1891, argued at the meeting of the harrow company, "that he had demonstrated the selling qualities of his harrows and he believed that he had the best harrow on the market."

These statements seem wholly inconsistent with the theory of fraud. Indeed, the impression produced on the mind of the court, after an examination of the testimony and the numerous exhibits, is that the contracts, though unilateral in some respects, and, perhaps, improvident, were nevertheless agreements, which, if carried out in good faith by the complainants, would have brought large profits to both parties. The failure to do this is, it is thought, to be attributed to the complainants' connection with the National Harrow Company. After they had joined that combination and the licenses had ceased to be of special value they sought to relieve themselves of a burdensome obligation by interposing a claim which would never have been heard of but for the changed relations of the parties.

Although the complainants' contention has been presented in a most able and persuasive argument the court is unable to accept the theory of fraud. Fraud cannot be inferred; it must be proved; and even though the court were in doubt it should hesitate long before striking down the character of one who has hitherto led an upright and blameless life.

But there is another insuperable barrier in the complainants' path. With full knowledge of the facts they acquiesced in and ratified the contracts. It is a fundamental principle of equity that a party who seeks to avoid a contract on the ground of fraud must

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disaffirm it at the earliest possible moment after the discovery of the fraud. He cannot thereafter act under the contract, accept its benefits himself or deprive the other party of them and repudiate it when it suits his convenience. He cannot reap the advantages derived from the contract and also those derived from a repudiation of the contract. He must elect whether he will treat the contract as void or valid. If he chooses the former he cannot thereafter deal with the property as his own or receive any consideration by virtue thereof. He must restore or offer to restore whatever benefit he has received. If he does not do so it will be presumed that he is satisfied with the contract. The contract must be treated as if it had never been made and the parties placed, as far as possible, in the position in which they were before it was executed. He who asks equity must do equity. It is not doing equity for a party to keep a contract so long as it is useful, retain everything of value received thereunder, and repudiate it only when nothing more can be made out of it. He cannot denounce a fraud of which he is the beneficiary. A court of equity will not deliver its judgment into hands which are tainted with the gains of fraud. Regarding this rule there can be no doubt. It is clearly stated by Judge Andrews in *Schiffer v. Dietz*, 83 N. Y. 300. On page 307 he says: "The plaintiff was entitled, on the discovery of the fraud, to demand a rescission of the sale and conveyance, and the restoration of the money and securities received by the defendant. But a party entitled to rescind a contract for fraud may deprive himself of this remedy by acquiescence; or where the transaction is a sale of property, by his dealing with the property as owner after the discovery of the fraud. A party claiming to rescind a contract for fraud must act promptly on discovery of the fraud, and restore or offer to restore, to the other party what he has received under it. He cannot thereafter deal with the other party on the footing of an existing contract, or with the property acquired under it as his own."

"When a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. * * * A court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done it will give such relief only where the clearest and strongest equity imperatively demands it." *Grymes v. Sanders*, 93 U. S. 55, 62.

"The general principle is, that he who seeks equity must do equity; that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle, that, as the transaction ought never to have taken place, the parties are to be placed as far as possible

in the situation in which they would have stood if there had never been any such transaction." *Neblett v. Macfarland*, 92 U. S. 101.

As soon as the party defrauded discovers the fraud he must act; that is, as soon as he has knowledge of the material facts which show the actual perpetration of the fraud. He cannot excuse his inaction by asserting that he did not know all of the evidence which tends to prove the main fact. *Bach v. Tuch*, 126 N. Y. 53, 26 N. E. 1019.

Prof. Pomeroy states the rule as follows:

"All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If after discovering the untruth of the representations he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from misrepresentations." *Pom. Eq. Jur.* § 897.

Judge Story says:

"In cases of alleged fraud in the sale of property, where the vendee seeks to defend against the securities, at law, or have them set aside by a court of equity, on the ground of fraud, it is incumbent upon him to interpose the objection at the earliest possible moment; and if, after he discovers the existence of the facts, which are claimed to constitute fraud, he continues to act under the contract, except for the mere purpose of preserving the property for the party ultimately entitled he will be held to have affirmed the contract, with full knowledge of all the facts." *Story, Eq. Jur.* § 1551.

In a case quite similar to the case at bar involving the question of fraudulent representations upon the sale of patents the supreme court of Illinois held that "it is not sufficient to allege that the patents are infringements upon others, and worthless, without showing that the complainants have ceased to use the patents or their right to use them has been questioned." *Dillman v. Nadle-hoffer*, *supra*. Delay will defeat the right to relief if the fraud was known to the party alleged to be defrauded or ought to have been known by the exercise of ordinary diligence. After knowledge of the facts which will enable him to take effectual action he must disaffirm the contract with reasonable promptness. He cannot willfully shut his eyes and ears to what he might have known and ought to have known. If, after knowledge which would enable him to disaffirm, he deals with the property as his own, accepts advantages for himself and deprives the other party of the advantages of ownership he cannot afterwards rescind. The election to rescind or not to rescind, once made, is final and conclusive. *Mining Co. v. Watrous*, 9 C. C. A. 415, 61 Fed. 163, 186; *Scheftel v. Hays*, 7 C. C. A. 308, 58 Fed. 457; *Pence v. Langdon*, 99 U. S. 578; *Rugan v. Sabin*, 3 C. C. A. 578, 53 Fed. 415; *Johnston v. Mining Co.*, 148 U. S. 360, 370, 13 Sup. Ct. 585.

Apply the rule to the case at bar. As soon as complainants knew that the contracts had been obtained by fraudulent repre-

sentations it was their duty promptly to rescind and return, or offer to return, the contracts and all benefits received thereunder. Assuming, for the moment, that fraudulent representations were made, when did the complainants learn of their falsity? The Hench and Dromgold harrow, upon which they chiefly rely to prove the fraud, was known to them in September, 1889. They also knew that Hench and Dromgold claimed to have a patent covering their harrow. This was but six months after the first contract and less than a month after the second. If the complainants had taken the least pains to follow up this information they would have learned all the important facts. Instead of doing so they wrote to the defendant and were informed by him that the Hench and Dromgold patent was "very weak." They say they relied upon the defendant's assurances. At this time the contract could have been rescinded without serious loss to the defendant and it may well be doubted whether the complainants, with this positive information before them, were justified in closing their eyes and resting in child-like confidence upon the statements of the one man in all the world who would be least likely to give them the desired knowledge. As was said in *Scheftel v. Hays*, 7 C. C. A. 308, 58 Fed. 457:

"The victim of a fraud, who has received notice enough to excite his attention and put him on his guard, cannot evade the duty of speedy and diligent inquiry by merely calling on the chief perpetrator, whose interest it is to conceal the facts, to reiterate or prove his false statements. * * * A diligent inquiry is an honest inquiry,—one reasonably calculated to discover, not to conceal the facts,—and an inquiry of the perpetrator of the fraud alone is one plainly calculated to conceal them."

From the autumn of 1889 until the winter of 1890 additional information came to the complainants from time to time which, upon their theory, was well calculated to put them upon inquiry. If, however, they still slumbered the letter of December 23, 1890, from the counsel for the National Harrow Company, must have been a rude awakening, for they were then informed, in brief, that defendant's patents were valueless. But assume that even this blunt declaration did not require the complainants to bestir themselves it certainly cannot be said that there was any excuse for inaction after June 18, 1891, for they admit that they then knew the substance of all the accusations against the La Dow patents. This was two years and three months from the date of the first contract, but it had yet three and a half years to run. At that time there was a meeting of the National Harrow Company for the purpose of apportioning its stock among the various members. A fierce attack was made upon these patents and substantially every argument was made against them that is now advanced. La Dow had commenced a suit against the complainants for royalties, the relations between them were strained and every consideration called upon the complainants if they intended to rescind the contracts to act promptly. Instead of withdrawing the contracts from arbitration, repudiating them upon the spot and denouncing La Dow as the perpetrator of a fraud they insisted that the contracts were of great value and covered the most useful harrow in the market.

The arbitrators, apparently, took this view, for the complainants were awarded \$29,200 for these contracts and an interest in three other patents, apparently of little value, two of them being re-issues,—one having expired. This amount was shortly afterwards increased to \$45,200 and the La Dow licenses, held in escrow, were delivered to the harrow company. In July, 1891, the complainants wrote to La Dow:

"We have assumed full responsibility for our contracts with you, i. e., in order to preserve peace and harmony with the National Harrow Co. we finally assumed the contract with you and relieved the National Harrow Co. from their agreements. [To pay royalties.]"

It might well be said, under the authorities cited, that here was an end of any attempt to rescind the contracts. With full knowledge of the fraud the complainants sold the contracts to the harrow company. But this is not all. On the 22d of October, 1891, the complainants served their answer in La Dow's suit for royalties. The defense was fraud, the allegations being substantially the same as those of the present bill. It was not possible to return the licenses at that time for they were held by the harrow company, but the answer contained no offer of restitution of any kind. The suit was tried in March, 1892, and a verdict directed for La Dow on the ground that Bement & Sons could not avoid a contract on the ground of fraud which they had sold for a valuable consideration to a third party who was still the owner. After this trial the complainants obtained a written instrument, signed by the president and secretary of the harrow company, reassigning the licenses to them. Thereafter, and before the commencement of this suit, in April, 1892, the complainants wrote the defendant a letter in which they offered to tender back the licenses "and all rights thereunder." This was the first and only tender. It was made three years after the date of the first license and ten months after the complainants, with admitted knowledge of the facts constituting the fraud, had ratified the licenses by selling them. It was then too late. But the tender was insufficient for other reasons. The complainants had enjoyed the sole use of defendant's patents for three years, they had sold the licenses for a large sum, \$29,200 or \$45,200; they had kept on manufacturing the "Steel King" harrow in ever increasing numbers, even up to the commencement of this suit; they had received annual dividends upon their stock in the harrow company; but they did not tender to the defendant dividends, or profits, or avails of the sale, or offer to indemnify him for the three years which the licenses had cut out of each of his patents. They kept all the benefits which they had received from the transaction and offered nothing in return. The advantages received from the defendant were, in any view, of great value, and these it was incumbent upon them to give up. They cannot satisfy the demands of equity by retaining the substance and returning the shadow. The court does not overlook the attempt to show that the award of \$45,200 was, in part at least, for the good will transferred by complainants to the harrow company. The evidence, oral and writ-

ten, is, however, overwhelmingly against this contention. Although something may have been allowed for the other interests alleged to have been previously transferred, it is clear that the award was based principally upon the La Dow licenses and that under the terms of the arbitration the question of good will could not have been considered. The assignment by the complainants to the harrow company of June 17, 1891, covers, apparently, only the La Dow licenses and patents, and there is nothing to show that any argument was made before the arbitrators based upon the other patents owned by the complainants. The amount received is, however, not material. Beyond question the complainants received something for the licenses in question and have kept it to the present time. For the reason, then, that they have accepted and retained the benefits from the contracts and have failed to disaffirm them, after full knowledge of the facts, the complainants are not in a position to recover. It follows that the bill must be dismissed.

LA DOW v. E. BEMENT & SONS.

(Circuit Court, N. D. New York. March 4, 1895.)

No. 6,054.

EQUITY—CROSS BILL—AFFIRMATIVE RELIEF.

Upon the facts as disclosed in the suit of Bement v. La Dow, 66 Fed. 185, *held*, that defendant was entitled, upon a cross bill praying such relief, to have the license to complainant declared valid, and to an accounting for the royalties.

This was a cross suit by Charles La Dow, defendant in the suit of Bement v. La Dow, 66 Fed. 185, against E. Bement & Sons, a corporation, the complainant in that suit.

Henry J. Cookinham, for complainant.
Alden Chester, for defendant.

COXE, District Judge. The defendant in the original suit has filed a cross bill in which he prays that the licenses in question may be declared valid and that the complainants in the original suit may be directed to account for and pay over the royalties due on such licenses. The court sees no reason why the prayer of the cross bill should not be granted, but as the subject was not discussed at the argument any question arising on the cross bill may be reserved for decision until the settlement of the decree.

HAGGIN v. LEWIS et al.

(Circuit Court, D. Montana, S. D. September 21, 1894.)

1. CIRCUIT COURT—JURISDICTION—REMOVAL—FEDERAL QUESTION.

A cause cannot be removed from a state court to a circuit court of the United States on the ground that a federal question is involved, unless that appears by plaintiff's statement of his own claim.

2. MINING CLAIMS—QUIETING TITLE—FEDERAL QUESTION.

In a suit to quiet plaintiff's title to certain placer mining grounds, for which he has a placer patent, the claim of defendant to a portion of the premises by reason of a location made by him, after issue of the patent, on a vein of quartz known to exist there before application for the placer patent, involves an interpretation of the federal statute which excludes known lodes or veins of quartz from patents for placer mining grounds.

Suit by James B. Haggin against William T. Lewis and others.

W. W. Dixon, M. Kirkpatrick, and Wm. Scallon, for plaintiff.

Forbis & Forbis, Ella Knowles, and H. J. Haskell, for defendants.

KNOWLES, District Judge. This is a cause commenced in the district court of the Second judicial district for the state of Montana. The action is one in equity, and has for its purpose the quieting of the title of the plaintiff in and to certain placer mining ground situate in the county of Silver Bow, Mont. The cause was removed to this court from said district court on the petition of several of the defendants on the ground that the determination of the cause involved a ruling upon a federal question. The plaintiff has filed his motion to remand said cause on the ground that this court, as it appears from the record, has no jurisdiction of the cause. The petition for removal set forth as the question involved in the dispute between plaintiff and defendants the construction of the statute of the United States excluding known lodes or veins of quartz from patents for placer mining ground. While there are allegations in the petition for removal which may be treated as legal conclusions, and hence not proper to be considered, still there is a statement of facts in the said petition which, I think, shows that a construction of said statute would necessarily arise in the determination of said suit. It is alleged:

"That subsequent to the issuance of the said patent this defendant made a location upon the said premises for quartz lode purposes, and that he made a location on a vein there known to exist prior to the application for the placer patent under which the plaintiff claims, and that under and by virtue of such location this defendant now claims to be the owner of a portion of the premises described in plaintiff's complaint; that the plaintiff disputes your petitioner's rights thereto, and denies the validity of your petitioner's location of a quartz lode claim upon the said placer claim."

Plaintiff, in his complaint, alleges title in himself, and possession of his placer claim, which it appears from the petition of defendants includes his quartz location. I think, considering the facts stated, a federal question is presented. I do not see how it can be determined without an interpretation of a federal statute. The foundation of defendants' right rests upon such a statute. Was the ground claimed by defendants excluded, by virtue of the provisions of a

federal statute, from the grant to plaintiff? This is the issue presented. It is urged, however, that, as the complaint does not in any manner show that this federal question is presented, it does not appear that there is any such question at issue; that the complaint must, of itself, unaided by petition for removal or answer, show that such a question will arise for determination on the trial of the cause, and must there be decided. This view is undoubtedly maintained in the case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654. The syllabus of that case is as follows:

"Under Act Aug. 13, 1888, c. 866, the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim."

The views expressed in the opinion fully support this view. In fact, in the opinion, the supreme court, speaking by Justice Gray, say of one of the bills then before it:

"In the third bill no mention is made of the constitution or laws of the United States, or of any right claimed under either; and no statement in the petition for removal or in the demurrer of the defendant corporation can supply that want under the existing law of congress."

There is nothing in the bill of complaint in this case that shows any right claimed under the constitution of the United States or under any federal law, hence I do not see how escape can be made in this case from the rule expressed in the said case by the supreme court. That I have not mistaken the rule expressed by the supreme court appears, I think, from the view expressed in the dissenting opinion of Justice Harlan to the decision above named, in which dissenting opinion Justice Field concurred. In his opinion, Justice Harlan says:

"The opinion of the court proceeds upon the ground that, while a plaintiff, if his cause of action arises under the constitution or laws of the United States, or under some treaty with a foreign power, may invoke the original jurisdiction of a circuit court of the United States, a defendant is not entitled, under the existing statutes, to remove from the state court into the circuit court of the United States any suit against him in respect to which the original jurisdiction of the federal court could not be involved by the plaintiff, even when his defense goes to the whole cause of action set forth in the bill, declaration, or complaint, and is grounded entirely upon the constitution of the United States, or upon an act of congress, or upon a treaty between the United States and a foreign power."

For these reasons, it is ordered that the cause be, and the same is hereby, remanded to the state court from which it was transferred.

ENTERPRISE MIN. CO. v. RICO-ASPEN CONSOLIDATED MIN. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1895.)

No. 390.

1. TUNNEL MINING CLAIMS.

From the time of the location and commencement of his tunnel, under section 4 of the act of May 10, 1872 (Rev. St. § 2323), the owner has the inchoate right to the possession of every blind vein or lode within 3,000

feet from the face of such tunnel on the line thereof that was not known to exist when the tunnel was located and commenced, contingent only upon the diligent prosecution of the work on the tunnel and the subsequent discovery of the vein or lode therein.

2. SUBSEQUENT DISCOVERY FROM SURFACE.

No discovery or location of such veins or lodes from the surface subsequent to the location and commencement of the tunnel can deprive the owner of the tunnel claim, who diligently prosecutes his work therein, of these rights.

3. EXTENT OF CLAIM.

Upon the discovery of such a vein in the tunnel, while the work upon it is being prosecuted with reasonable diligence, such owner is entitled to the possession of such lode or vein to the same extent along the lode or vein as if discovered from the surface. He is entitled to the possession of any 1,500 feet in continuous length along such lode or vein which includes his point of discovery in the tunnel. The limitation of the extent of the right of the owner of a tunnel claim to the veins discovered therein to 250 feet each way from the tunnel, imposed by section 5 of the act passed by the Colorado legislature in 1861 (Sess. Laws Colo. 1861, p. 166; Mills' Ann. St. § 3141), was removed by the act of congress of May 10, 1872 (17 Stat. 92, c. 152), and the act of the legislature of Colorado of 1874 (Sess. Laws Colo. pp. 185, 187, 190; Mills' Ann. St. § 3148).

4. ADVERSE CLAIM—ESTOPPEL.

It is the duty of the owner of the tunnel claim to present and litigate his adverse claim to any such blind vein or lode that has been discovered and is known to exist within the mining claim located from the surface, when the owners of the latter make application for their patent under sections 6 and 7 of said act (Rev. St. §§ 2325, 2326); and if, in the absence of fraud or mistake, he fails to do so, his rights as against such claimants will be lost. When, however, the blind lode or vein is not known to exist, and has not been discovered when the application for a patent is made, and the claim of the locators from the surface lies parallel to the line of the tunnel, these sections of the act have no application, because it is impossible, in such a case, to fairly litigate the contingent inchoate right of the owner of the tunnel, and he will not be estopped by his failure to present an adverse claim.

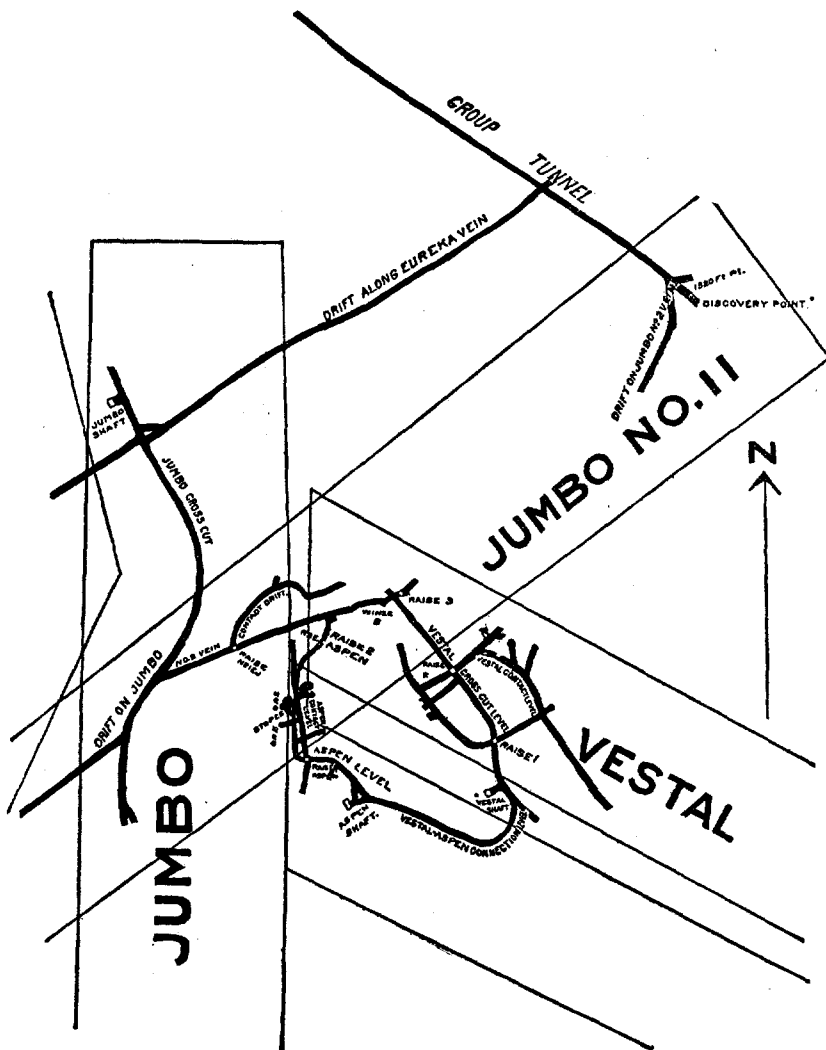
Appeal from the Circuit Court of the United States for the District of Colorado.

The appellant, the Enterprise Mining Company, a corporation, is the owner of the Group tunnel, a tunnel mining claim, under section 4 of the "Act to promote the development of the mining resources of the United States," of May 10, 1872 (17 Stat. 93, c. 152; Rev. St. § 2323). It discovered a blind vein in this tunnel, which was not known to exist when the tunnel site was located or when the excavation of the tunnel was commenced. This vein is called the Jumbo No. 2 vein, and it crosses one corner of the Vestal lode mining claim, which is based on a discovery from the surface subsequent to the commencement of the tunnel, and is owned by the appellees the Rico-Aspen Consolidated Mining Company, a corporation, and its associates. The controversy in this case is over ore in this Jumbo No. 2 vein, within the limits of the Vestal claim. The appellees filed a bill to enjoin the Enterprise Company from removing it, and the Enterprise Company answered and filed a cross bill, praying for like relief against the Aspen Company. On the final hearing, the court below dismissed the cross bill, and entered a decree for the relief sought by the original bill. The appeal is from this decree.

This decree was rendered on the theory that the Enterprise Company could not maintain its claim to the ore here in question if the allegations of its pleadings were conceded to be true. The decree, therefore, has the effect of a decision sustaining a demurrer to the pleadings of the appellant. Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co., 53 Fed. 321. It may be that, upon a subsequent trial of the issues of fact in this case, the court below or the jury to which it may remit these issues will find them otherwise than as we assume them to be in the decision of this case. It is not intended to de-

termine such issues here. We must consider the case on the assumption that the allegations of the pleadings of the appellant are true. Upon this assumption the facts material to the decision of the questions presented by this record are these:

The course of the tunnel is from northwest to southeast. The Vestal lode claim lies nearly parallel to the line of the tunnel, but its nearest corner is more than 300 feet distant from the tunnel, and is about 1,500 feet southeasterly of a line drawn across the face of the tunnel at right angles to its course. The general course of the Jumbo No. 2 vein is nearly at right angles to the line of the tunnel, and, after it crosses the Vestal claim, it extends into the Jumbo lode mining claim, which is owned by the appellant. The relative location of the tunnel and Jumbo No. 2 vein and the Vestal and Jumbo lode mining claims appears from the accompanying plat:



In July, 1887, the line of the Group tunnel was duly located, and the work of excavation commenced. When it had been excavated 400 feet, and in April, 1888, the Vestal lode mining claim was first located. This claim is 1,500 feet long and 300 feet wide. In April, 1890, application was made by the owners of this claim for a patent, and it was entered at the land office June 30, 1890, and was patented February 6, 1892. At the time of its entry at the land office, no discovery of the Jumbo No. 2 vein had been made, and the breast of the tunnel was 750 feet distant from the nearest portion of the Vestal claim. No vein or lode which extended in such a course as to cross the end lines of the Vestal claim could cross the line of the tunnel without a radical change of its course. The Jumbo No. 2 vein does not appear at the surface of the earth, and it was first discovered in the Jumbo lode mining claim September 1, 1891, at a distance of at least 800 feet from the line of the tunnel. At the time of this discovery, the tunnel had been excavated about 1,500 feet. After this discovery, the excavation of the tunnel was pressed forward, in expectation of finding this vein in it; and on June 15, 1892, when the tunnel had been excavated 1,920 feet from its portal, this vein was discovered therein. Immediately upon the discovery of the vein, the Enterprise Company caused the boundaries of the claim, 1,500 feet long and 300 feet wide, to be marked upon the surface of the earth, and caused a certificate of location to be duly recorded, in which it claimed 54 feet along the vein to the northeasterly of the tunnel, and 1,446 feet southwesterly thereof. This claim is called Jumbo No. 2 on the plat. That portion of this vein within the limits of the Vestal claim is about 750 feet from the line of the tunnel.

Charles H. Toll and Joel F. Vaile (Henry M. Teller, Edward O. Wolcott, and Adair Wilson were with them on the brief), for appellant.

Charles J. Hughes, Jr., and C. S. Thomas (R. S. Morrison was with them on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Three questions are presented by this case: (1) Are the owners of a valid tunnel mining claim, under section 4 of the act to promote mining of May 10, 1872 (17 Stat. 92, c. 152; Rev. St. § 2323), who have discovered a blind vein in their tunnel, and have duly located and claimed it, entitled, as against the owners of a lode mining claim located from the surface after the location of the tunnel site, but before the discovery of the vein in the tunnel, to the possession of the vein or lode thus discovered, when such vein was not known to exist prior to the location of the tunnel, but was first discovered in another lode mining claim before its discovery in the tunnel? (2) Are the owners of a tunnel mining claim estopped to maintain their right to a blind vein discovered in their tunnel after a junior lode mining claim discovered from the surface is patented, because, at a time when such blind vein had not been discovered and was not known to exist, they permitted a patent to issue for such claim, which lay more than 300 feet distant from the line of their tunnel, and nearly parallel to it, without making any adverse claim, under section 6 of the act of May 10, 1872 (now section 2325, Rev. St.)? (3) If the owners of a tunnel mining claim are entitled to the possession of any portion of such a vein, to what extent are they entitled to it?

The answers to these questions depend chiefly, if not altogether, upon section 4 of the act of May 10, 1872 (now section 2323, Rev. St.), which reads as follows:

"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

The striking characteristic of this section of the act is that it gives the right to the possession of certain veins or lodes to the diligent owner of a tunnel before his discovery or location of any lode or vein whatever, contingent only upon his subsequent discovery of such veins in his tunnel. Veins or lodes discovered on the surface or exposed by shafts from the surface must be found before any right to them vests (Act May 10, 1872, §§ 2, 5; Rev. St. §§ 2320, 2324); but this section declares that the owners of a tunnel, by simply locating and diligently prosecuting it, without the discovery of any vein or lode whatever, "shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface."

It is contended that the clause "to the same extent as if discovered from the surface" means that, upon a discovery in the tunnel, the extent of the benefit conferred is to be measured by the other provisions of the law concerning surface locations. But this section itself demolishes this contention. The right to the possession of a vein discovered from the surface would not antedate the discovery, but this section unquestionably gives such inchoate right to the owner of a tunnel before the discovery of any vein or lode. Again, a prior surface location of such a vein on the line of the tunnel after the commencement thereof would not be invalid against a discovery from the surface, but this statute declares that such locations shall be invalid as against the rights of the owner of the tunnel who subsequently discovers the vein therein. This section of the statute, then, and not the provisions of the law relative to surface locations, must be taken to be the measure of the right and title to a vein which the owner of a tunnel acquires by its discovery, and it certainly gives him a far greater and more valuable right than is granted to a prospector upon the surface. The clause "to the same extent as if discovered from the surface" is evidently used in its natural, customary sense, and it measures the extent, the distance along the lode or vein, to which the right of possession given by the statute extends, and not the general benefits conferred by the discovery. *Ellet v. Campbell* (Colo. Sup.) 33 Pac. 521, 526.

It is argued that the owner of a tunnel acquires no right to a vein which he finds in his tunnel when such vein has been discovered

from the surface after the location and commencement of the tunnel, and before the discovery of the vein therein, because in such a case the vein was "previously known to exist" when it was found in the tunnel, and hence was not discovered therein. But discoveries from the surface are prerequisites to locations based thereon, and yet this statute makes such locations of veins on the line of the tunnel made by other parties than its owners after its commencement void as against such owners. Thus, the statute itself declares that the subsequent discovery and location shall not deprive the owners of the tunnel of their right to the possession of the veins guaranteed to them by the statute if they afterwards find them in the tunnel; much less can discovery without location have such an effect. From this provision of the statute and the context in which this clause appears, it is clear that the words "not previously known to exist" refer to the time of the location and commencement of the tunnel, and not to the respective times of the discoveries of the various veins in the tunnel. It is the right to the possession of veins not known to exist before the owners of the tunnel located and commenced to excavate it that is secured to them by this statute if they subsequently find them in their tunnel, and not the right to those only that were not known to exist when they reached them in the tunnel.

Nor can the position that the appellant here acquired no right to the vein in controversy, because its discovery in the tunnel was not upon unappropriated public land, be successfully maintained. This position rests entirely upon the claim that the place in the tunnel where the vein was discovered had been appropriated by the Hiawatha lode mining claim. That claim extended diagonally across the line of the tunnel, and had been located from the surface after the commencement of the tunnel. It was then located on the line of the tunnel, and was invalid as against the owner of the tunnel by the express terms of the section we are considering. No appropriation of the public land on the line of this tunnel that would deprive the owner of his right to discover and possess this vein could be effected by a discovery and location from the surface after the location and commencement of the tunnel, in the face of the express declaration of this section that such a surface location shall be void.

The argument in which counsel for appellees seem to have the most confidence, however, is that a general view of the acts of congress relative to mining shows that the policy of the United States is to restrict the amount of the public lands that may be reserved or acquired for mining purposes to small tracts, often not exceeding 1,500 feet in length and 600 feet or less in width, as in lode claims located from the surface (Act May 10, 1872, § 2; Rev. St. § 2320); that, if the claim of the appellant that it is entitled to 1,500 feet in length of every vein or lode it discovers in its tunnel is sustained, a tunnel owner may, by locating and lazily prosecuting a tunnel, practically reserve from development and monopolize a tract of land 3,000 feet long and 3,000 feet wide; and that such a reservation would be against public policy, and cannot have been the in-

tention of congress in the enactment of this section. It must be borne in mind, however, that it is only the right to veins that strike the line of the tunnel, and only such of those veins as are discovered in the tunnel, that the owner gains any inchoate right to the possession of, if this claim of the appellant is sustained. Others may discover and hold all veins within 1,500 feet of the line of the tunnel that do not strike or cross its line, and all that do strike it that are not discovered in it. Nor can the owner of such a tunnel preserve his rights to undiscovered veins by lazy and perfunctory work. It is true that this section 4 provides that he shall be deemed to have abandoned his rights to undiscovered veins if he fails to prosecute the work on his tunnel for six months; but it also provides that he cannot preserve these rights against subsequent prospectors and locators unless he prosecutes the work upon his tunnel with reasonable diligence. There is a wide margin between the line of abandonment and that of reasonable diligence, and we have no doubt that the courts will so apply the rule of diligence, under this section, that the prompt and energetic prosecutor of a tunnel will receive the just rewards the act of congress guaranties to his diligence, while the slothful and negligent will not be permitted to deprive other prospectors of the rights or privileges the act secures to them.

There is no tenable middle ground under this section between a holding that the diligent owner of a tunnel is entitled to the possession of all the blind veins he discovers in his tunnel to the same extent along the veins as if he had discovered them at the surface, and a holding that by the discoveries and locations of others, subsequent to the commencement of his tunnel, and before it reaches the veins at all, he may be deprived of every portion of them, except, possibly, the small segments within the bore of the tunnel. The latter view seems to have been adopted in *Tunnel, etc., Co. v. Pell*, 4 Colo. 507, and perhaps in *Mining Co. v. Brown*, 19 Pac. 218, 7 Mont. 550; but if we were to consider here the public policy of the nation, and to attempt to derive from that a proper construction of this section of the act, we should be forced to a different conclusion. We should be constrained to hold that such a construction of this section would not only be contrary to public policy, but would defeat the evident purpose of congress in the enactment of this law. It has been the settled policy of the United States, from the passage of the first act of congress opening the mineral lands of the nation to exploration and occupation on July 26, 1866, to the present time, to encourage the discovery and development of the mineral resources of the country. The government has practically offered the mineral deposits in the public lands as a reward for their discovery and appropriation to private use. By the act of May 10, 1872, the prospector who discovers a mineral lode or vein on the surface or from the surface is given the right to 1,500 feet of the vein or lode for a mere nominal consideration. Such veins frequently appear on the surface of the earth. They are often known to exist before any labor is performed on them. The labor, expense, and risk of loss in the discovery and development of such veins from the surface are light, indeed, in comparison to those required upon a tunnel that is run to discover unknown

veins. The work of driving such a tunnel thousands of feet into the side of a mountain, for the purpose of discovering a vein or lode that is not known to exist at all, is an extremely hazardous and expensive undertaking. This is common knowledge, and congress must be taken to have had this knowledge when they enacted this law. They must have known that such a hazardous enterprise was not likely to be undertaken unless rewards commensurate with the risk and expense were offered. In view of these facts, can it be successfully maintained that, while they secured to the discoverer at or from the surface 1,500 feet of his vein, they guarantied to those who drove a tunnel thousands of feet into the rocks of a mountain nothing but the segments of the veins they found within its bore? We think not. We are of the opinion that by section 4 of this act they intended to and did guaranty to the owners of such a tunnel the possession of all the veins they discovered therein to the same extent along the veins as if they had discovered them from the surface, and that this guaranty was in full accord with the settled policy of the government to suitably reward those who discover and develop the mineral resources of the nation.

Moreover, it is not necessary to resort to public policy to find a proper construction for this section. It construes itself. A careful study of it compels the conclusion that inchoate rights to undiscovered veins were thereby guarantied to the diligent owners of tunnels contingent only upon their discovery therein. The last clause provides that failure to prosecute work upon the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of the tunnel. How could such a right be abandoned if it did not exist? The second clause provides that locations by others on the line of the tunnel after the commencement thereof shall be invalid. Why should they be declared invalid unless to secure to the owners of the tunnel their rights to the veins thus discovered and located by others, until these owners of the tunnel could reach and discover them therein? And the first clause of the section declares that:

"The owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface."

The guaranty of that clause is plain and certain, and our conclusion is that from the time of the location of a tunnel under section 4 of the act of May 10, 1872, its owner has the inchoate right to the possession of every vein or lode within 3,000 feet from the face of such tunnel on the line thereof that was not known to exist when the tunnel was located and its excavation was commenced, contingent only upon the diligent prosecution of the work on the tunnel and the subsequent discovery of the vein or lode therein. Upon the discovery of such a vein in the tunnel while the work is being prosecuted with reasonable diligence, such owner is entitled to the possession of such lode or vein to the same extent along the lode or vein as if discovered from the surface. No discovery or location of such veins or lodes subsequent to the location and com-

mencement of the tunnel can deprive the owner of the tunnel who diligently prosecutes his work therein of these rights. *Back v. Mining Co. (Idaho)* 17 Pac. 83, 85; *Mining Co. v. Brown (Mont.)* 28 Pac. 732, 734.

Was the inchoate right of the owners of this tunnel to the possession of the then undiscovered Jumbo No. 2 vein lost by their failure to make a claim adverse to that of the owners of the Vestal lode mining claim when the latter applied for their patent, in 1890? Sections 6 and 7 of the act of May 10, 1872 (now sections 2325, 2326, Rev. St.), provide, in effect, that any one who has located a claim under that act may file an application for a patent to his claim, together with a plat and certain field notes, notices, and affidavits; that for 60 days the register of the land office shall publish and post a notice that such application has been made; and that, if no adverse claim has been filed at the expiration of said 60 days, it shall be assumed that the applicant is entitled to a patent, and that no adverse claim exists. If an adverse claim is properly filed, proceedings in the land office are stayed until the trial and decision by a court of competent jurisdiction of the question, who is entitled to the right of possession of the claim? and the patent issues to the claimant who is adjudged to have that right. There is no doubt that the object of these provisions of the act of congress is to require the conflicting claims of all parties to be adjusted before the patent issues, so far as that can justly be done at the time the application for the patent is made. The proceedings are judicial in their character, and bring all parties who have known existing adverse claims into court. If such parties stand by, and, in the absence of fraud or mistake, permit the statutory time for filing adverse claims to run without presenting their claims, their rights, so far as they might then have been determined in such proceedings, are forever lost. *Eureka Consol. Min. Co. v. Richmond Min. Co.*, Fed. Cas. No. 4548, 4 Sawy. 302; *Kannaugh v. Mining Co.*, 16 Colo. 341, 27 Pac. 245. Thus, in *Back v. Mining Co.*, 17 Pac. 83, the supreme court of Idaho held that the owner of a tunnel mining claim had the right to make an adverse claim against one who applied for a patent to a lode mining claim which was located across the line of the tunnel, and was based on a discovery made in a shaft sunk directly over the line of the tunnel. In *Ellet v. Campbell*, 18 Colo. 510, 33 Pac. 521, after the owners of a tunnel had discovered a blind vein therein, and had located and claimed it, others discovered the same vein from the surface at a distance of some 200 feet from the line of the tunnel, located their claim on it, and applied for a patent for it, and the owners of the tunnel were permitted to file their adverse claim and to litigate the right of possession. In *Mining Co. v. Brown (Mont.)* 28 Pac. 732, after the location and commencement of a tunnel, one discovered a blind lode from the surface, located a mining claim upon it which intersected and crossed the line of the tunnel, and then applied for a patent. The owner of the tunnel, who had not yet driven his tunnel through the ground covered by this junior claim, made an adverse claim under this act; and upon his complaint the supreme court of Montana enjoined the applicant from

prosecuting his proceedings for a patent until the owner of the tunnel could, in the use of reasonable diligence, drive his tunnel a sufficient distance to demonstrate whether or not the lode claim would be discovered therein. Cases of this character fall within the letter and the spirit of the provisions of this act of congress. In each of these cases the blind vein was known to exist when the application for a patent was made; in each of them the vein had been discovered and located; and in each of them the claimant who had discovered it from the surface admitted that it crossed the line of the tunnel. As the vein, its strike, and the grounds of their adverse claims to it were known to each of the respective parties in each of these cases, there was no reason why their claims should not be adjudicated before the patent issued.

But can these provisions for the presentation and adjudication of adverse claims have any just application to such an unknown, contingent claim as that which the owners of this tunnel had against the owners of the Vestal claim when the latter applied for their patent? The Vestal claim was not based on the discovery of the then unknown Jumbo No. 2 vein. It did not cross the line of the tunnel. It lay so nearly parallel to it that no vein that crossed the ends of that claim could strike the tunnel without a radical change of its course, and the presumption was that the strike of the vein that these claimants had discovered was lengthwise, and not crosswise, of the claim they had located. The line of the tunnel was staked off on the surface of the earth, and the legal record of their claim to it had been made by its owners long before the owners of the Vestal made their discovery and location. The act of congress declared that the owners of this tunnel should have the right to all the unknown veins they should discover in their tunnel. These facts and these provisions of the law the owners of the Vestal claim knew, and they gave no notice of any claim to any vein guarantied to the owners of the tunnel by this law. Why, then, should the latter be estopped to claim the veins that cross the Vestal location which they have since discovered because they did not adverse the claim of the owners of the Vestal, presumptively based on a parallel vein? On the other hand, when the application for the patent of the Vestal claim was made, and when the claim was entered for patent at the land office, the breast of the tunnel was many hundred feet distant from the point where the Jumbo No. 2 vein was finally discovered in the tunnel. If the owners of the tunnel had then made their adverse claim to an undiscovered vein that might at some future time be discovered in the tunnel, and that might pass through the Vestal location, how could they have proved their "right to the possession" of any portion of the Vestal claim under section 7 of the act of May 10, 1872 (now section 2326, Rev. St.)? They did not know, and no one knew, that any such vein passed through the Vestal location, or that any such vein would ever be discovered in the tunnel, or even that any such vein existed. The law does not require an impossibility of any man. It does not require him to know the unknown; or to demonstrate that which is incapable of proof; and we are of the opinion that the owners of this tunnel

ought not to be and were not estopped from enforcing the rights guarantied to them by the act of congress, because they did not make and maintain their claim to those rights at a time when it was impossible for them to establish them, and when no one knew that they existed. In our opinion, sections 6 and 7 of the act of May 10, 1872, have no application to cases of this character, in which the existence of the adverse claim is unknown and incapable of fair adjudication until after the land is entered for patent; and we think the owners of the Vestal claim took their patent subject to the right of the owners of the tunnel to the possession of any unknown veins in that claim subsequently discovered in the tunnel, just as they took it subject to the right of the owner of an adjoining mining claim, who never made any adverse claim to their location, to follow on its dip through their patented territory any vein which has its apex in his claim, and just as they took it subject to the right of a junior locator of a cross vein, who has made no adverse claim, to remove from the territory covered by their patent the ore in that vein not within the space of intersection. *Mining Co. v. Campbell*, 135 U. S. 286, 301, 10 Sup. Ct. 765; *Hall v. Mining Co.*, *Morr. Min. R.* (3d Ed.) p. 282; *Branagan v. Dulaney*, 8 Colo. 408, 412, 8 Pac. 669; *Lee v. Stahl*, 9 Colo. 208, 210, 11 Pac. 77; *Morgenson v. Milling Co.*, 11 Colo. 176, 179, 17 Pac. 513.

The next question for consideration is, to what extent are the owners of a tunnel entitled to a blind vein discovered therein? The appellant claims the possession of the vein in dispute for a distance of 1,500 feet, and has duly located and claimed this 1,500 feet so that 54 feet of its claim lie northeasterly of the line of the tunnel, and 1,446 feet southwesterly of it. In 1861, before congress had enacted any law establishing and defining the rights of those who discovered mineral deposits on the public lands, the legislature of Colorado passed an act which provided that any person or persons engaged in working a tunnel under the provisions of that act should be entitled to 250 feet each way from said tunnel on each lode discovered (*Sess. Laws Colo.* 1861, p. 166; *Mills' Ann. St.* § 3141); and the court below held that this statute limited the extent of the right of the Enterprise Company to the possession of this vein, and upon that ground entered the decree against the appellant. But the second section of the act of May 10, 1872, provides that a mining claim located after that date "may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode." In 1874 the legislature of Colorado passed "An act concerning mines." Section 1 of that act reads: "The length of any lode claim hereafter located may equal but not exceed fifteen hundred (1,500) feet along the vein." Section 7 provides that any open cut, cross cut, or tunnel which shall cut a lode at the depth of 10 feet below the surface shall hold such lode as if a discovery shaft were sunk thereon. And section 18 reads: "All acts or parts of acts in conflict with this act are hereby repealed." *Sess. Laws Colo.* 1874, pp. 185, 187, 190; *Mills' Ann. St.* §§ 3148, 3154. If the act of 1861 limited the length of a lode claim to 250 feet on each side of the tunnel, it was clearly repealed by this act of 1874; and the

appellant was entitled under the laws of Colorado, as well as under the act of congress, to the possession of the vein in question to the extent of 1,500 feet in length. *Ellet v. Campbell* (Colo. Sup.) 33 Pac. 523, 528.

It is urged that, if the owner of the tunnel is entitled to the possession of the mineral to the extent of 1,500 feet along the vein or lode, he is nevertheless restricted to 750 feet on one side and the like amount on the other side of his tunnel. This contention finds no support in the laws. Section 4 of the act of May 10, 1872, as we have held, entitles him to the possession of the vein to the same extent along the vein or lode as if he had discovered it from the surface. If he had discovered it from the surface, he could have located his claim upon and could have held (if he had the superior title, as the appellant has here) any 1,500 feet along the vein that included his discovery shaft. It follows that the appellant had the right to any 1,500 feet of this vein that included its point of discovery in the tunnel, and that its location and claim of possession of 54 feet of the vein northeasterly and 1,446 feet southwesterly of this point of discovery must be sustained.

Finally, counsel for appellees insist that the appellant is estopped to claim any of the ore within the boundaries of the Vestal claim because on March 3, 1890, some of the appellees agreed with the then owners of the Hiawatha lode mining claim that neither they nor their heirs or assigns would ever make any claim to any ore within the Hiawatha location. But there was no covenant in this agreement by any of the parties to it that they would not claim the ore within the Vestal location, and this contract is utterly immaterial to the present issue. They also claim that a like estoppel arises from a certain contract dated July 23, 1890, between certain parties who claim to be the owners of certain lode mining claims, including, among others, the Vestal claim; but none of the parties to this second contract ever had any interest in the Group tunnel or in the Jumbo No. 2 claim upon which the rights of the appellant rest, nor were either of these claims mentioned in the contract. Counsel say in their brief that the Swickhimers, who were parties to this contract, were the principal grantors of the appellant, and that the contract runs with the land, and in that way estops the appellant; but they have failed to call our attention to any evidence that these Swickhimers were the grantors of the appellant, and, after a patient search through this voluminous record, we are unable to find any such evidence. From this record these contracts do not appear to affect the rights of the appellant in any way, and they do not seem to have been considered in the court below.

The result is that this case must be reversed, and remanded to the court below, for further proceedings not inconsistent with the views expressed in this opinion; and it is so ordered.

DEL MONTE MINING & MILLING CO. v. NEW YORK & L. C. MIN. CO.

(Circuit Court, D. Colorado. March 13, 1895.)

No. 3,127.

1. MINES AND MINING—RIGHT TO FOLLOW DIP—OVERLAPPING LOCATIONS.

A controversy arising from overlapping locations, after being carried on both before the land office and the courts, was compromised by allowing one of the locations to patent most of the disputed land. A company was then organized, representing both parties to the dispute, and the land was conveyed to it. *Held*, that this company could not refer its title to either or both of the contending locations, at its election, so as to give it the right to follow the dip within the end lines of either location at will, but, on the contrary, it must derive its rights in this respect solely from the location under which the patent was obtained.

2. SAME—VEIN PASSING THROUGH SIDE LINE.

The fact that the apex of a vein, on its strike, passes through one end line and one side line of the location, does not cause both of these lines to be regarded as end lines, so as to destroy the parallelism, without which there is no right to follow the dip laterally beyond the boundaries of the claim. On the contrary, the owner of such a claim will have a right to follow the dip, within his own original end lines, so far as he holds the outcrop within his location.

This was a bill by the Del Monte Mining & Milling Company to enjoin the New York & Last Chance Mining Company from working within complainant's claim.

Thomas, Hartzell, Bryant & Lee and H. G. Lunt, for complainant.
Wolcott & Vaile, for respondent.

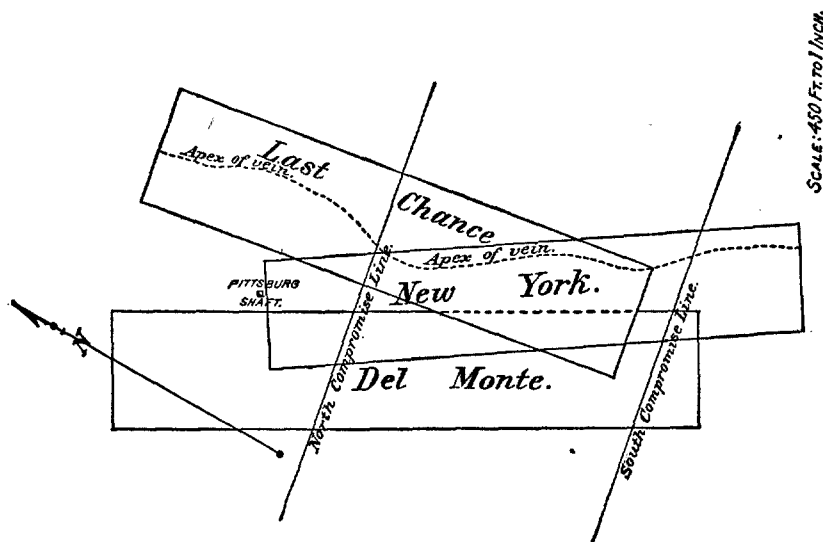
HALLETT, District Judge. Complainant seeks to enjoin work on a mine called "Del Monte," situate in Sunnyside mining district, Mineral county. The mine is on Bachelor Mountain, near the crest thereof, and the location follows the general course of the crest from north to south. Respondent's property is adjacent, and somewhat below complainant's claim on the side of the mountain. The relative position of the claims is shown in the accompanying diagram much better than can be explained otherwise.

The diagram shows also the apex of the vein as claimed by respondent. But it should be observed that this marks only the foot wall of the lode, and the position of the hanging wall is the subject of much controversy in the suit.

Respondent's territory is within the lines marked "North Compromise Line" and "South Compromise Line." Respondent holds this territory under the New York and Last Chance locations, which are shown on the diagram. Each party holds by patent, and there is no dispute as to surface lines. Respondent, claiming to have the apex and outcrop of the lode within its territory, asserts the right to follow the lode on its dip beneath the surface of the Del Monte location. Complainant's position is that respondent has no extralateral right—First, because it has not the whole of the vein within its territory, the hanging wall being within the Del Monte territory. Upon this proposition the testimony is highly conflicting, and of a character to be submitted to a jury, with a view to ascertain the fact; but it is not regarded as sufficient to

establish the fact. In the present inquiry the outcrop of the lode will be taken to be within respondent's territory, and on the line of the foot wall as shown on the diagram.

The second point against respondent's claim of extralateral right is that the outcrop of the lode does not follow the New York location from end to end, but passes out of the east side of the claim near the north end, as shown on the diagram. Respondent admits that the main lode has this course and direction, but it also maintains that one fork of the lode, leaving the main lode at or near the point of divergence, continues through the north end of the claim and across the north end line, at or near the Pittsburgh shaft. The proof of this condition is no more satisfactory than that which relates to the width of the lode. While there is some evidence as to the existence and extent of a branch or fork of the lode at the northern end of the



claim, which may be proper for the consideration of a jury, I am compelled to say that the fact is not established; so that, for the purpose of deciding the motion now under consideration, we must take the line of outcrop to be as marked on the diagram, and extending from the south end line of the New York location to a point some 280 feet south of the northeast corner, where it diverges into the Last Chance location.

So understood, the question is whether respondent can follow the lode on its dip outside its own territory, and within the lines of the Del Monte claim, extended down vertically. Some years back, and before patents were obtained, these locations were held by different owners, between whom a controversy arose as to the ownership of the territory common to both locations. Upon the application of the owners of one of the claims for patent, the owners of the other claim made adverse claim in the land office,

pursuant to the act of congress governing such matters. Thereupon the controversy was renewed in court, and was there pending for a considerable time without trial or judgment. The parties then came to an agreement by which the New York location was allowed to patent the greater part of the territory in dispute, as indicated on the diagram, and the New York & Last Chance Mining Company, respondent in this suit, was organized to represent the parties respectively, and the ground in dispute was conveyed to respondent in settlement of the controversy. A title so arising may, it is said, be referred to one or the other or both of the contending locations, and respondent may follow the end lines of one or the other location in its election. This, however, cannot be accepted. As respondent's territory was patented under the New York location, the lines of that location must control all questions of ownership. The controversy prior to patent is of no weight whatever as to any right arising under the patent for one claim or the other. If the strike of the lode in the New York location kept its course from end to end of the location, the right to follow the lode outside the location would not be denied. As, however, it departs on its strike from the location on the east side, and not from the north end, it is said that the claim has no end lines, or, at all events, none that can be recognized as limiting the right to any part of the vein outside of the exterior lines of the claim. This is asserted as a proposition of law deducible from several decisions of the supreme court that the lines of a location crossed by the apex of a vein on its strike shall, as to such vein, be regarded as end lines, whatever their position may be; and, if this proposition be accepted, the south end line and east side line, intersected by the outcrop of this lode, are not parallel to each other, as demanded by section 2320 of the Revised Statutes. This, however, has not been the interpretation of the law in the supreme court, or in any court, so far as we are advised. It is true that in the Flagstaff Case, 98 U. S. 463, and recently in the Amy-Silversmith Case, 152 U. S. 223, 14 Sup. Ct. 510, the supreme court declared that the side lines of a location shall be end lines whenever the lode, on its strike, crosses such lines; but these decisions do not affirm that all lines of a location crossed by a lode on its strike shall be end lines. The most that can be deduced from them is that opposite lines, parallel to each other, when crossed by the lode, shall be end lines. The case presented is not within the principle of these decisions. We have a lode extending on its strike on the general course of the location, and within its side lines, a distance of 1,070 feet. It is conceded that the south end line of the location is well placed, and all parts of the lode covered by the location are within the end lines as fixed by the locator. The difficulty arises from the circumstance that the location extends in a northerly direction about 280 feet beyond the point where the lode diverges from the side line. No reason is perceived for saying that this mistake in the length of the location should defeat the right to follow the vein on its dip outside the location. It is said that we cannot make a new end line at the point of divergence or elsewhere, because the court cannot make

a new location, or in any way change that made by the parties. *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 118 U. S. 196, 6 Sup. Ct. 1177. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line; and, if there be magic in the word "line," it will be better not to use it.

In this instance, as in most controversies between adjacent owners, it is necessary to ascertain what part of the lode is within the New York location, and this, according to the map, appears to be 1,070 feet. At all points on the dip of the lode into the mountain westwardly we can ascertain the length of the lode within the end lines by measuring the same distance from the south end line produced. In this proceeding there is no departure from the end lines of the New York location as fixed by the locator, and there is no new line of location drawn for any purpose whatever. We keep entirely within the end lines of the location as required by the statute, and the circumstance that we are somewhat short of the north end line does not in any way affect the principle to be followed in construing the statute. The same rule would be adopted if the lode were physically shorter than the location. Let it be assumed that upon a lode of the length of 1,000 feet (which is not an extraordinary occurrence) a location shall be made of the length of 1,500 feet, extending 250 feet in each direction beyond the ends of the lode. Would any one deny the right of the locator to follow the lode within his end lines, upon the ground that the lode did not come to either of such lines? I think not. The case is not different when the lode intersects one end line and not the other, but keeps within the location for a considerable distance. In that case, as in the accepted case of a lode traversing the location from end to end, the locator ought to be allowed to follow his lode into adjoining territory, so far as he may within his end lines, and so far as he holds the outcrop in his location. Upon this construction of the statute respondent is entitled to so much of the lode upon its dip as lies between the south compromise line and the point of divergence of the apex of the vein from the New York location. This point, as nearly as can be determined at this time, is 1,070 feet from the southeast corner, or, proceeding in the other direction, 280 feet from the northeast corner. Following the course of the end lines of the New York location in a westerly direction from this point, there is a considerable space, which widens in the westward course between the line last mentioned and the north compromise line. To this respondent is not entitled, as against complainant, the owner of the Del Monte claim. So much of the territory last mentioned as lies west of the east side line of the Del Monte location is subject to the prayer of the complainant's bill. The engineers will be able to state the boundaries in detail, and an order may be entered allowing the injunction as to that part. As to the territory south of that last mentioned, the motion will be denied.

HUDSON et al. v. RANDOLPH.

(Circuit Court of Appeals, Fifth Circuit. November 27, 1894.)

No. 210.

1. EQUITY—JURISDICTION—SUIT TO RECOVER POSSESSION OF LAND.

While a suit in equity cannot be maintained by the holder of a legal title to recover possession of land, though coupled with a demand for an accounting as to rents and profits, or for the removal of clouds upon the title, yet, where the bill presents a case of fraud or mistake, or sets up a right to redeem from a mortgage, and it appears that the complainant has not an adequate and complete remedy at law, it may be maintained and possession of the land may be decreed.

2. EQUITY PLEADING—PLEA.

A plea to a bill in equity which states nothing but conclusions of law, and which goes to the whole bill, but is accompanied by an answer to the whole bill, is properly disregarded.

3. EQUITY PRACTICE—AMENDMENT OF ANSWER.

The granting of leave to amend an answer, after a master's report has been filed, and the cause heard on exceptions thereto, is wholly within the discretion of the court.

4. RECORD OF DEEDS—WHAT CONSTITUTES—TEXAS STATUTE.

The statutes of Texas (Sayles' Civ. St. arts. 4299, 4334) provide that "every instrument * * * shall be considered as recorded from the time it was deposited for record. * * * Every conveyance * * * acknowledged * * * according to law, and delivered * * * to be recorded, shall take effect * * * from the time when such instrument shall be so acknowledged * * * and delivered * * * to be recorded, and from that time only." *Held* that, under these statutes, the filing of a deed or mortgage for record, and not the subsequent actual recording of the same, constitutes the constructive notice to third persons contemplated by the statute; and that, accordingly, an error of the recording officer in copying the description in a deed or mortgage does not nullify its effect as notice.

5. PRINCIPAL AND AGENT—WHEN PRINCIPAL NOT CHARGEABLE WITH AGENT'S KNOWLEDGE.

Where an agent and parties dealing with him have colluded for fraudulent purposes, the principal is not bound by uncommunicated knowledge of the agent. *Investment Co. v. Ganzer*, 11 C. C. A. 371, 63 Fed. 647, followed.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This was a suit by L. V. F. Randolph against C. P. Hudson and the Scottish-American Mortgage Company, Limited, for the recovery of land, an accounting, and other relief. The circuit court rendered a decree for the complainants. Defendants appeal.

Lauch McLauran and W. B. Gano, for appellant.

Girault Farrar and W. S. Simkins, for appellees.

Before PARDEE, Circuit Judge, and LOCKE, District Judge.

PARDEE, Circuit Judge. The appellant C. P. Hudson assigns as error in the proceedings in the circuit court that the court overruled the demurrer to the complainant's bill, contending that, on the face of the bill, the court was without jurisdiction in equity to grant relief. If the bill is viewed purely as one brought by the holder of the legal title to real estate against parties in pos-

session, to recover possession with rents and profits, and to remove clouds from title, the assignment of error is well taken. It has been settled since *Hipp v. Babin*, 19 How. 271, that the holder of a legal title cannot maintain an action to recover possession of the property, although coupled with a demand for an accounting as to rents and profits. It is also settled that the holder of a legal title out of possession cannot maintain a suit in equity in the courts of the United States against one in possession, to recover the property and to remove clouds from the title. *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276. See, also, *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977. But it is also settled that in cases of fraud, error, or mistake, presenting a case for equitable relief within the generally recognized rules of equity, the court is not ousted of jurisdiction, because the complainant may have a remedy at law, unless that remedy at law is complete and adequate. *Kilbourn v. Sunderland*, 130 U. S. 505-515, 9 Sup. Ct. 594; *Gormley v. Clark*, 134 U. S. 338-349, 10 Sup. Ct. 554; *Tyler v. Savage*, 143 U. S. 79-95, 12 Sup. Ct. 340. In *Kilbourn v. Sunderland*, *supra*, the court, through Mr. Chief Justice Fuller, says, in relation to the case then in hand: "There cannot be any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law' (1 Story, Eq. Jur. § 450); and, as the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud had in equity a more extensive signification than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection, we concur with the supreme court of the district in sustaining the jurisdiction,"—all of which, we think, may be said of the matters presented by the bill in this case.

A careful scrutiny of the bill in this case, in the light of the subsequent pleadings and the admitted facts, shows a case where the complainant, although the holder of the legal title, and seeking to recover possession, rents, and profits, and to remove clouds from title, is also seeking discovery and an accounting as to a certain mortgage upon the property which, by the machinations of the defendants, has been merged, through an alleged fraudulent foreclosure, into a superior title, when in fact it is not a legal title, and, if anything, is a mortgage, upon which payments have been made, and under which the complainant, as the holder of the legal title, is entitled to redeem when the validity of the mortgage and the amount due thereon shall have been ascertained by proper discovery. It requires no difficult construction of the bill, in connection with that part of the prayer for an accounting of the amount due upon the mortgage to the Scottish-American Mortgage Company, Limited, and for a decree permitting the complainant to be allowed to redeem, to hold the complainant's bill to be a bill to redeem, as well as to recover possession and to remove clouds from title. As was said in *Tyler v. Savage*, *supra*, "Thus, there were in the case, as ingredients to support the jurisdiction of

equity, discovery, account, fraud, misrepresentation, and concealment," may be said in the present case. It seems only necessary to notice, further, that, in the light of the pleadings and facts in the case, it cannot be pretended that the complainant has an adequate remedy at law.

The appellant C. P. Hudson also contends that the court below erred in not granting his motion to take the document filed by him, in connection with his answer, and called a "plea," as confessed, and thereupon dismiss the complainant's bill. The so-called "plea" states nothing but conclusions of law, and is but a recapitulation of the grounds urged in the demurrer, overruled by the court, and, as such, was properly disregarded. In addition to this, it may be noticed that, considered as a plea, it went to the whole bill, and, under well-recognized rules of equity pleading, it was waived when the pleader filed an answer to the whole bill.

The appellant also complains that after the master's report, and when the cause had been heard upon exceptions thereto, but before the court had rendered a decree upon said exceptions, he asked for leave to amend his answer to the cross bill of the Scottish-American Mortgage Company, Limited, and also to amend his cross bill in the case, as per drafts tendered, which the court overruled and refused. As we understand the practice, the granting of leave to amend, coming at that stage of the case, was wholly within the discretion of the court. Further than this, we may say that we have considered the amendments proposed in behalf of C. P. Hudson, and, under the view we take of the case, the same are immaterial. On the evidence and admissions submitted in the cause, we conclude, as evidently did also the master and the judge of the court below, that the equities were entirely against the claims and demands of C. P. Hudson; and we further conclude, on the merits of the case, that the decree appealed from is in no respect erroneous, so far as C. P. Hudson is concerned.

The first question raised by the appeal of the Scottish-American Mortgage Company, Limited, is whether the complainant, Randolph, who acquired a lien on the lands in controversy August 15, 1885, is charged with constructive notice of a deed of trust executed by A. J. Hudson and wife to the Scottish-American Mortgage Company, Limited, on December 12, 1883, to secure the payment of a certain promissory note given by said Hudson, of even date with the trust deed, payable on the 12th day of December, 1888, to the order of the Scottish-American Mortgage Company, Limited, at the bank of Montreal, city of New York, for the sum of \$5,000, with interest thereon at the rate of 11 per cent. per annum until fully paid. It is claimed by the complainant that although this deed of trust mortgaging the lands in controversy for the payment of the said note, and sufficiently describing the same, was duly executed, acknowledged, and proved, and was filed for record on December 19, 1883, and thereafter, on December 22, 1883, was recorded in the proper office of Johnson county, yet, as the record as made did not describe the lands in controversy, but was insufficient to describe any lands, the complainant was not charged with notice, constructive or otherwise,

of the said trust deed. It seems that, although the trust deed deposited for record with the clerk of the county court of Johnson county contained a full and accurate description of the lands conveyed, yet the record actually made by the clerk by omitting part of one of the calls left the description vague and uncertain, if not meaningless. The question is, therefore, squarely presented, whether, under the registration laws of the state of Texas, the filing of a deed or mortgage for record in the proper office, or the record made by the subsequent recording of the same, constitutes the constructive notice to third persons contemplated by the statute.

The statutes of the state of Texas bearing on the subject are as follows (Sayles' Civ. St. arts. 4299, 4334):

"Art. 4299. Record Takes Effect, When. Certificate of. Every such instrument of writing shall be considered as recorded from the time it was deposited for record; and the recorder shall certify under his hand and seal of office to every such instrument of writing so recorded, the hour, day, month and year when he recorded it, and the book and page or pages in which it is recorded; and when recorded deliver the same to the party entitled thereto or to his order."

"Art. 4334. Delivery of Deed to Clerk Operates as Notice. Every conveyance, covenant, agreement, deed, deed of trust or mortgage in this chapter mentioned, which shall be acknowledged, proved or certified according to law, and delivered to the clerk of the proper court to be recorded, shall take effect and be valid as to all subsequent purchasers for a valuable consideration, without notice, and as to all creditors, from the time when such instrument shall be so acknowledged, proved or certified, and delivered to such clerk to be recorded, and from that time only."

The letter of these statutes seems to be very plain, and to leave little room for construction. By article 4299, "every such instrument of writing shall be considered as recorded from the time it was deposited for record"; and by article 4334, "every," etc., "shall take effect and be valid * * * from the time when such instrument shall be so acknowledged, proved or certified, and delivered to such clerk to be recorded, and from that time only."

The ruling of the learned master in the circuit court, and the adoption of his ruling by the court, against the letter of these statutes, render it necessary to consider the adjudged cases in the supreme court of Texas where the matter in hand has been considered.

In *Throckmorton v. Price*, 28 Tex. 605, where the case showed that a deed of trust, duly executed and acknowledged, was delivered to the county clerk for record, but, at the time of the subsequent incumbrance, had not been recorded at all, the court held that every instrument is considered as recorded from the time it is filed for record; and that, by virtue of the registration laws, the filing of a deed for land with the county clerk for record is equivalent to the actual registration of the deed at the time it was so filed; and that a party filing his deed for record is not bound to see that the clerk performs his duty by actually recording it, nor is he responsible to other parties for the clerk's neglect of his duty, or failure to comply with the requirements of the statute with respect to the registration of the deed.

In *Taylor v. Harrison*, 47 Tex. 457, where the question was as to

the notice resulting from the record of a deed duly executed and recorded, but without the authentication required by law, the court held that while the record of a deed duly acknowledged or proved for record is, by the statute, notice to subsequent purchasers and creditors of such facts as they would have learned from the record had they examined it, yet the record of a deed duly executed and recorded, without the authentication, is imperfect; such omission being fatal to the effect of the registry, and such imperfect record not being notice. In this case, the court, without referring to *Throckmorton v. Price*, but evidently speaking only as to the case then before it, uses language to the effect that purchasers and creditors are only charged by construction with notice of the facts actually exhibited on the record, and not with such as might have been ascertained by such inquiries as an examination of the record might have induced a prudent man to make. And running through the opinion of the court is the proposition that constructive notice to purchasers and creditors arises from the record, rather than from the conveyance itself, when properly executed, proved, and filed for record.

In *McLouth v. Hurt*, 51 Tex. 115, where the question was what the actual record showed, there being no question as to any difference between the actual record and the deed filed for record, the court held, generally, on the question of registration, that registration is constructive notice only of what appears on the face of the deed as registered; but the same court, in the same volume of Reports, in the case of *Fitch v. Boyer*, Id. 336-349, cited *Throckmorton v. Price* with approval.

In *Crews v. Taylor*, 56 Tex. 461, which was a case in which a county clerk was sued with his sureties for damages for failure to record and index a certain mortgage which had been delivered for record, the court held the clerk liable to a subsequent purchaser in damages, holding, as to the matter in hand, that, as a matter of law, the depositing of a mortgage with the clerk for record from that time constituted constructive notice of its contents to all persons.

In *Freiberg v. Magale*, 70 Tex. 116, 7 S. W. 684, where the question was as to the validity of a chattel mortgage, the court held that:

"When the mortgage was properly deposited with the county clerk and filed, the duty of the mortgagee as to protecting creditors of the mortgagor, and purchasers and lien holders claiming under him, ceased, and he was not bound to see that the clerk performed his duty in making the entries and index required by the statutes; notice dating from the time the mortgage is filed, and not from the time the index and entries are made."

In the case of *Cattle Co. v. Chisholm*, 71 Tex. 523, 9 S. W. 479, where the question was with regard to the admissibility in evidence of the certificate of record of a deed which did not show the deed to have been properly recorded, while it was held that the certificate of record presented was properly excluded, yet the court also held that no question of notice was involved in the case, and that, upon a question of notice, the filing for record in the proper office is equivalent to proper registration; citing *Throckmorton v. Price*, *supra*.

In *Bassett v. Brewer*, 74 Tex. 554, 12 S. W. 229, where the question was whether a material man's indebtedness, verified in the form prescribed by law, took effect from the time it was filed for registration, the court approved the ruling in *Throckmorton v. Price*, and held that the material man's lien attached from the time it was filed for record, and, in relation thereto, said:

"Nothing more can be reasonably required of the person desiring to fix the lien by his registry than to deliver to the officer the sworn account of the demand due him to be filed and recorded. It is no part of his duty to see that the clerk does his by an actual record of it."

In *Weber v. Morse*, 21 S. W. 609, the court of civil appeals in Texas, construing article 4292 of the Revised Statutes of Texas, providing that, where county records are destroyed, deeds which are preserved shall be recorded within four years, in order that the first record shall be effective, held that, where said deeds are not so recorded after the destruction of the record, the first record does not constitute a notice as against a bona fide purchaser, and that if the record of a deed is partially destroyed, so as not to show that the deed was properly acknowledged for registration, such record does not charge subsequent purchasers with constructive notice of the deed, and, in reaching the conclusions mentioned, quotes from *Taylor v. Harrison*, *supra*, and speaks generally as though in all cases the question of notice was to be determined upon the actual record made by the clerk.

It is evident from the consideration of these cases that the construction of the registration law of Texas, as given in *Throckmorton v. Price*, *supra*, has not been departed from by the supreme court of Texas; and, considering the questions raised in the several cases, it is easy to harmonize the rulings and the language of the judges. At all events, *Throckmorton v. Price* has not been overruled, and we adopt the reasoning of Chief Justice Gould, as follows:

"But for the registration law, the older title would obviously convey the better right; and it is the uniform provisions of these laws that such instruments as must be recorded shall be valid as to all subsequent purchasers for a valuable consideration without notice, and as to creditors from the date when such instrument shall be properly acknowledged, proved, or certified, and delivered to the clerk for record, and from that time only. Oldh. & W. Dig. arts. 1726, 1727, 1730, 1731. And, lest there should be any doubt in the matter, it is further enacted that any instrument required to be recorded shall be considered as recorded from the time it was deposited for record with the clerk. Oldh. & W. Dig. art. 1709. And, to enable all persons who may wish to examine the office to ascertain what instruments have been deposited for record, it is also made the duty of the clerk (Oldh. & W. Dig. art. 1707), when any instrument has been deposited for record, to enter in alphabetical order in a book to be provided for that purpose, the names of the parties to such instrument, the date and nature thereof, and the time of its delivery for record. And, as a further facility and security for persons wishing to make an examination in the office of the recorder for instruments required by law to be recorded, the clerk, after recording any such instrument, is directed to enter the same in the index books which he is required to keep of recorded instruments. Oldh. & W. Dig. arts. 1710-1712. If the clerk has neglected to comply with these plain and simple requirements of the statutes, and appellees have been thereby misled to their injury, they cannot claim redress for such injury from appellants, who have been in no default. The law did not impose upon them the responsibility of seeing that the duties prescribed by the statute for the protection and security of other parties were in fact

faithfully discharged by the clerk. Registration laws of a general similarity to ours have been enacted in most of the other states; yet we have been able to find no case in which the first deed has been postponed in favor of the second from the failure of the clerk to record the prior deed as directed by the statute, while the contrary has been frequently decided. In Kentucky it is emphatically declared that deeds lodged for record are valid against subsequent purchasers and creditors. *Bank v. Haggin*, 1 A. K. Marsh, 306. And in Connecticut it is said: 'If a deed, after it is received and entered up "Received for record," remain unrecorded, through no fault of the grantee, until an attachment of said land, it shall not prejudice the grantee.' *Franklin v. Cannon*, 1 Root, 500; *Hartmeyer v. Gates*, Id. 61; *McDonald v. Leach*, Kirby, 72; *Judd v. Woodruff*, 2 Root, 298. The same principle is also recognized in Alabama. *McGregor v. Hall*, 3 Stew. & P. 397."

The next question presented is whether the lien given by the deed of trust to secure the payment of the \$5,000 note, all as above described, has been paid or otherwise extinguished. The evidence in the case fully warrants the finding that the attempted foreclosure of the said deed of trust before it became due, the pretended purchase by Simpson, the trustee, through Robertson, and the subsequent conveyance to C. P. Hudson, and all the doings in that behalf, were for the purpose of hindering, delaying, and defrauding Randolph in the collection of his claim against A. J. Hudson. The natural result of setting aside and holding for naught the pretended foreclosure and the subsequent conveyances thereunder would be to reinstate the deed of trust held by the Scottish-American Mortgage Company, Limited, and leave the same, as it was before, a prior lien on the lands in controversy.

In this connection, it may be well to notice that one of the main grounds, if not the main ground, for setting aside the pretended foreclosure attempted by the trustee Simpson in 1886, is the want of authority on the part of the said Simpson from the Scottish-American Mortgage Company, Limited, to declare the principal of the note due, and proceed to the foreclosure. The contention of the complainant in the court below, as well as that of the defendant C. P. Hudson in his cross bill, is that the Scottish-American Mortgage Company, Limited, although it had no actual knowledge of the proceedings of Simpson, is, nevertheless, bound by the same, because a principal is bound by the acts and knowledge of his agent; and the complainant further claims that, as the proceedings in question were for the purpose of hindering, delaying, and defrauding him in the collection of his demand against A. J. Hudson, the Scottish-American Mortgage Company, Limited, is estopped from claiming the nonpayment of the mortgage debt. In the case of *Investment Co. v. Ganzer* (decided at the last term of this court) 11 C. C. A. 371, 63 Fed. 647, on a review of the authorities, it was held that although, as a general rule, the principal is bound by the knowledge of his agent and by his acts within the scope of his authority, the principal is not bound by the uncommunicated knowledge of his agent, where the agent and parties dealing with him have colluded for fraudulent purposes, for in such a case the agent cannot be presumed to have communicated his own delinquency to the principal. As a matter of fact, the present record shows that neither the Scottish-American Mortgage Company, Limited,

nor its authorized agents other than Simpson, had any actual knowledge with regard to the proceedings of Simpson other than as represented by him, to wit, that the note was outstanding; the interest promptly paid; that there had been a renewal of two years from 1888 to 1890; and that \$2,500 had been paid upon the principal. The ratification by the mortgage company of the acts of Simpson, as claimed by appellant C. P. Hudson, because the mortgage company has not returned the alleged payment of \$2,500 credited by Simpson on the books as paid by A. J. Hudson, is not supported by facts in the case. The proof shows that the mortgage company did not discover the fraudulent acts and conduct of Simpson until the jurisdiction of the court *a qua* had fully attached, and there was nothing left for the already impleaded company to do, save make a full disclosure, and pray for equity. Under these circumstances, as we view the law, we are constrained to hold that, as to the Scottish-American Mortgage Company, Limited, the lien created by the deed of trust, December 12, 1883, has not been extinguished any further than the note to secure which it was given has been paid, and that of this lien the appellee Randolph, complainant in the court below, is charged with constructive notice under the registration laws of the state of Texas.

The second assignment of error on the part of the appellant mortgage company is as follows:

"The court erred in not holding with this respondent, the Scottish-American Mortgage Company, Limited, that it held a valid lien upon the lands in controversy in this case under the deed of trust dated December 12, 1883, and that it was entitled to a foreclosure to pay the balance of said note of \$5,000, to wit, \$2,500, with interest from December 1, 1890, as against all the parties to this cause; and in refusing to sustain this respondent's fifth exception to the master's report, which exception is as follows: 'The said report should have shown, and the said master should have found, that this defendant the Scottish-American Mortgage Company, Limited, held a valid lien upon the lands in controversy in this case under the trust deed of December 12, 1883, and this defendant, the said company, was entitled to a foreclosure of the said lien to pay the balance of the said note for \$5,000, to wit, \$2,500, and interest on the same from the 1st day of December, 1890, as against all the parties to this suit; whereas the said master, in his said report, deprives this defendant, the said Scottish-American Mortgage Company, Limited, of its security for the said debt.'"

This assignment of error must be sustained, and the decree of the court appealed from corrected accordingly.

The decree appealed from should be reversed as to costs of court, and otherwise amended as follows: Strike out the last clause thereof relating to costs, and insert: "It is further ordered, adjudged, and decreed that the complainant, L. V. F. Randolph, shall take the title and possession of the said lands described as aforesaid, subject to the valid lien held by the cross complainant, the Scottish-American Mortgage Company, Limited, upon the same, under the deed of trust executed by A. J. Hudson and wife on December 12, 1883; and, further, it is adjudged that there is due upon the note secured by the said deed of trust to the Scottish-American Mortgage Company the sum of \$2,500, with interest thereon at the rate of eleven per cent. per annum from December 1, 1890, until paid." It is fur-

ther ordered, adjudged, and decreed that the said L. V. F. Randolph, A. J. Hudson, and others, defendants, do pay into the registry of the court, for the use and benefit of the said Scottish-American Mortgage Company, Limited, the said sum of \$2,500, with 11 per cent. per annum interest thereon from December 1, 1890, together with all costs incurred in the prosecution of said cross bill, to be taxed by the clerk within 30 days from the date this decree is entered, in default of which payment, on the application of the Scottish-American Mortgage Company, Limited, or its solicitor of record, an order of sale may issue commanding and directing A. S. Lathrop, Esq., standing master, to sell, after 30 days' advertisement in some newspaper of general circulation published in Johnson county, state of Texas, the lands described in this decree, or so much thereof as may be necessary to pay and satisfy the said lien, interest, and costs; said standing master to make report of his doings in the premises, and to pay into the registry of the court the proceeds of such sale, to be distributed in accordance with this decree, and under such further orders of the court as may be necessary. It is further ordered, adjudged, and decreed that the respondents James B. Simpson and C. P. Hudson do pay the costs of this suit, and that the complainant, L. V. F. Randolph, do have his writ of possession for the land above described, and his execution as at common law for the amount herein adjudged against the respondents James B. Simpson and C. P. Hudson, and that the clerk do have his execution for costs of suit against the parties adjudged to pay the same. And it is so ordered, the costs of appeal, including the costs of transcripts, to be adjudged, one-half against the appellee L. V. F. Randolph, and the other half against the appellant C. P. Hudson.

KNEVALS v. FLORIDA CENT. & P. R. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. May 29, 1894.)

No. 179.

1. EQUITY JURISDICTION—REMEDY AT LAW—TRUSTS.

Complainant, holding corporate stock by assignment from pledgees thereof, filed a bill as their trustee, claiming that land held by defendant under a foreclosure sale of the property of the corporation did not pass by such sale, and was still liable for the debts of the stock. *Held*, that a court of equity had not jurisdiction on the ground of the trust alleged, as such trust did not relate to the subject of the suit, and the suit was virtually one to determine the legal title to land in defendant's possession.

2. SAME—PROPERTY OF DISSOLVED CORPORATION.

The evidence in such suit showed that the assignment of the stock to complainant was absolute, reserving no equities. *Held*, that jurisdiction in equity could not be maintained on the ground that the suit was to recover property of a dissolved corporation, as charged with an implied trust, the question between complainant and defendant being merely the enforcement of a legal title.

3. RAILROAD COMPANIES—SALE ON FORECLOSURE OF MORTGAGE—BURDEN OF PROOF.

On a general foreclosure sale of property of a railroad company, certain land belonging to it passed to the purchasers, and remained for years under

their control. *Held*, that the burden was on one alleging that it did not pass to show that it came within some exception.

4. SAME—DECREE FOR SALE.

A decree in a foreclosure suit, after declaring that complainant had a first lien on "the railroad and all property, rights, and franchises thereto appertaining," ordered a sale, mentioning only the railroad. *Held*, that this covered the entire property of the company connected with the use and purpose of the road.

5. SAME—BONDS AND MORTGAGES—LAND APPERTAINING TO RAILROAD.

The statute under which state bonds were issued to aid a railroad made them a lien on the road and on all property of the company, real and personal, appertaining thereto, which it had or might afterwards acquire. With part of the proceeds of such bonds, the company purchased land for terminal facilities, and occupied for such purposes part of the land and an extension thereof built out into the water on which it fronted, using such extension more than the original land; but no intention was shown to abandon the appropriation to such purposes. *Held*, that no part of the land should be excepted from the lien of the bonds, although certain portions might be detached and sold without causing immediate inconvenience to the railroad.

6. ESTOPPEL—REPRESENTATIONS—ACQUIESCENCE.

At a foreclosure sale of property of a railroad company, one who, after the decree of foreclosure, had bought nearly all the stock, and had become president of the company, purchased the property as sold. In articles of association of a new company, he recited that he and his associates had purchased all the franchises, rights, privileges, and property, of every description whatever, belonging to the old company, and he conveyed the same to the new company by deed in like terms; and the new company issued and sold bonds to a large amount, into the security for which this property entered. During the seven years following, numerous transfers of the property occurred, he acquiescing in the possession and control thereof by the purchasers. *Held*, that one taking, under assignment from him, his shares in the old company, was estopped from claiming that a very valuable portion of the property of that company did not pass by the foreclosure sale.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

This is a suit by a bill in equity by Sherman W. Knevals to recover certain lots of lands in the city of Jacksonville, Fla., now held as the property of the Florida Central & Peninsula Railroad Company. The circuit court dismissed the bill, and complainant appeals.

On June 24, 1869, the legislature of Florida passed an act entitled "An act to perfect the public works of the state;" and on February 28, 1870, this act was amended. These acts authorized the Jacksonville, Pensacola & Mobile Railroad Company, a company incorporated by the laws of that state for the purpose of building a railroad west from Quincy, Fla., to extend its road through to Mobile, Ala., and in order to assist in building a continued line of road from Jacksonville, Fla., provided an exchange by that company of its bonds for a like amount of state bonds, and further provided that "the state of Florida shall by this act have a statutory lien * * * on the part of the road for which the state bonds are delivered, and on all the property of the company real and personal appertaining to that part of the line which it may now have or may hereafter acquire, together with all the rights, franchises and powers thereto belonging." And in a subsequent section it was provided that the governor should deliver to the president of said company coupon bonds of the state, to the amount of \$16,000 per mile, upon receiving from him first mortgage bonds of like amount on any part or portion of the road between Quincy and Jacksonville. The portion of this road from Lake City to Jacksonville was, at that time,

the property of the Florida Central Railroad Company. Subsequently, the Florida Central Railroad Company issued its bonds to the amount of \$1,000,000, and they were exchanged for the same amount of bonds of the state, which were delivered to the president of the Jacksonville, Pensacola & Mobile Railroad, and sold by the officers and agents of such road. In the resolutions of the board of directors authorizing the issue of these bonds, they excepted from the lien so created certain lots situated in the city of Jacksonville, not used for depot purposes. Subsequently, in 1877, in negotiating a loan, there was excepted from the mortgage to secure the same a portion of the same lots, making the boundary line of the mortgaged property 125 feet south of Bay street, instead of along that street, which was the boundary of the railroad property. The state bonds exchanged for the railroad bonds having been sold, and the railroad having defaulted in payment, in a suit brought by the purchasers and holders of such exchanged and outstanding state bonds in the case of J. Fred. Schutte and others, complainants, v. The Jacksonville, Pensacola & Mobile Railroad Company and The Florida Central Railroad Company et al., in the circuit court of the United States for the Northern district of Florida, 31st of May, 1879, it was declared by Mr. Justice Bradley that the complainants in that suit had a first lien upon the railroad running from Lake City to Jacksonville, and all property, rights, and franchises thereto appertaining, to the amount of said bonds; and the same was advertised and sold, under said decree, by the special masters, on the 6th day of January, 1882, and a deed of conveyance made, on the 18th of that month, of "the Florida Central Railroad and all its property, privileges, rights, and franchises." At that time a part of the property of said railroad consisted of the several lots of land heretofore mentioned as situated in the city of Jacksonville, a portion of each of which was used for railroad purposes and terminal facilities, but which were more extensive than was required for that purpose at that time. Subsequent to the decree of Mr. Justice Bradley in the said Schutte Case, and previous to the sale under it, an arrangement was entered into between certain parties,—Sir Edward James Reed, Philip Roddy, and C. L. Willard,—for the purpose of securing possession of the stock of the Florida Central Railroad Company looking to a reorganization of it, in which it became necessary to procure more money, which they did by borrowing, December 5, 1881, \$80,000 from Donnell, Lawson & Simpson, a firm of bankers in New York, pledging, as collateral security for the payment of the same, \$138,000 of the first mortgage bonds of the Florida Transit Railroad Company, another railroad company of that state, and reserving in the agreement of pledge the right, at any time, to substitute for such security 5,110 shares of the capital stock of the Florida Central Railroad Company, or \$380,000 of the first mortgage bonds of said Central Railroad Company, and authorizing said Donnell, Lawson & Simpson to sell the collaterals so pledged, without notice, at the board of brokers, and become purchasers at said sale. A little more than a month after this loan and deposit of collaterals was made, the road was sold under the aforesaid decree, and Reed became purchaser, and finally, in the reorganization of the new company, the Florida Central & Western, which followed, he became president, and Lawson, of the firm of Donnell, Lawson & Simpson, one of the directors. Subsequently the road was in the possession of several receivers and trustees, and was finally sold to other parties, from whom it passed to the present owner, the appellee herein. The possession of the lots in question passed with the title of the road, and they have ever since been used, occupied, leased, or rented by the company owning the road, and treated and considered as being property of the company and belonging and appertaining to it.

Whether the loan of the \$80,000 borrowed from Donnell, Lawson & Simpson was ever paid is in question. It was denied in the general denial of the allegations of the bill, and no direct evidence given in regard to it. Nor does it appear what disposition was ever made of the collaterals deposited with them, or whether any substitution of stock or bonds of the Florida Central Railroad Company was made for the bonds of the Florida Transit Railroad Company which the articles of agreement show to have been pledged. The evidence shows that the bonds originally deposited were in their hands as late as 8th of July, 1882, and any substitution or pledge of

the stock must have been made, if at all, after that. The only thing positive is complainant's possession of the agreement acknowledging the loan and pledging the collaterals, and the possession of 700 shares of the stock of the company. The complainant, by his bill, alleged that he was a creditor of Donnell, Lawson & Simpson, and that he had received a transfer of the obligation or agreement of Reed, Roddy, and Williard with them, and filed this bill as their trustee, and acting in behalf of all the stockholders of the Florida Central Railroad Company, and claimed that, under the collaterals deposited to secure the debt, he was holder of 700 shares of the stock of the Florida Central Railroad, as originally organized, and that he had an equitable claim upon 4,410 more shares of said stock, and that the lots in question, situated in Jacksonville, although the property of said Florida Central Railroad Company, did not appertain to the railroad, and did not pass to the purchaser by the foreclosure sale, and were still liable for the debts of said stock and his claim, and prayed an accounting of the rents and profits received, and that the court would issue an injunction restraining the defendant from committing waste, and appoint a receiver to take possession of the said lots. On the 18th of January, 1889, this bill was filed, and upon a hearing, April 15th, it was dismissed, from which decree of dismissal an appeal has been taken, appellant assigning as error: The dismissing the bill, (1) inasmuch as no rights had been lost by the laches of complainant; (2) that the defendant had never obtained any title to the property in question under the judicial sale made on the 18th of January, 1882, and that no title passed under such sale, nor were such properties sold thereby,—and because complainant alleged a case entitling him to the relief prayed for, and that defendants did not establish any title to the properties in question.

H. Bisbee, for appellant.

W. W. Howe, S. S. Prentiss, and John A. Henderson, for appellees.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

LOCKE, District Judge (after stating the facts). The contention of the complainant in this suit is that the lots in question did not appertain to the railroad at the time of the sale of the railroad property on the 6th of January, 1882, and therefore did not pass to the purchaser, but remained the property of the Florida Central Railroad Company and its stockholders. The grounds of the defense are: First, that the complainant has no standing in a court of equity, but that he should have brought an action of ejectment to try title at law; second, that the property in question, the lots in Jacksonville, did appertain to the railroad, and passed by the sale under the deed of foreclosure; and, third, that complainant is estopped from setting up title. Although it was strongly contended by the defendant that the complainant was not entitled to the remedy prayed for in a court of equity, but that he should resort to an action of ejectment in a court of law, we fail to find the point discussed at length in the able brief of the complainant, and it was but lightly touched upon in the oral argument. The two grounds upon which it is presumed that the suit has been brought in equity rather than law are: First, that the complainant alleges that he was acting as trustee, with but an equitable title in part of the stock upon which he was suing; and, second, that he was attempting to recover property of a dissolved cor-

poration. The allegations of the bill would appear to give to the alleged trustee some equitable right in 4,400 shares of the stock, which might justify an appeal to a court of equity, but we fail to find any evidence of the substitution of the 5,100 shares of stock to replace the pledge of the \$138,000 of bonds, or any promise or agreement to make such substitution. The right of substitution was reserved by the borrowers, Reed, Willard, and Rody, and no equitable or other interest was conveyed to Donnel, Lawson, and Simpson in the stock of the Florida Central Railroad Company until such substitution was made. The possession of 700 shares, and no more, creates rather a presumption that the substitution was never made, and particularly when taken in connection with the fact that the 138 bonds pledged were still in possession of Donnell, Lawson & Simpson as late as July, 1882, after the sale of the road, and the apparent utter worthlessness of the stock, and when the bonds may have been presumed to have some value, as the Transit road was still a running road. But if any pledge had been made, and an assignment to complainant of the shares so pledged, Mr. Lawson, the assignor, says it was an absolute assignment, with no equities reserved. This was also the nature of the assignment from Reed, and the character of complainant as equitable trustee disappears, and he stands as legal assignee, with no equities intervening. It is not that a trust may be indirectly, or in some way, connected with the suit, or that complainant or defendant may call himself a trustee for some third party, that gives to a court of equity jurisdiction. It is only where a trust or trust estate is the subject-matter of the suit, as such trust estate, that a trustee can resort to equity. In this case, until the property in question should come into the control or possession of the trustee, it could in no way be considered a trust estate. No relation of trustee and cestui que trust exists between complainant and defendant herein. The relation of trustee, alleged to be existing between complainant and his assignors of the stock in whose behalf he is suing, does not so make him a trustee, in regard to this property, as to enable him to resort to a court of equity. In *Knox v. Smith*, 4 How. 315, the complainant sought to protect himself against what he held to be a fraudulent trust deed, but the court failed to find anything which authorized a court of equity to take jurisdiction of the case. In *Fussell v. Gregg*, 113 U. S. 550, 5 Sup. Ct. 631, complainant alleged equitable title, but desired possession. The court held that a court of equity could not give that redress. In *Killian v. Ebbinghaus*, 110 U. S. 568, 4 Sup. Ct. 232, complainant alleged himself to be a trustee, and brought suit for possession of property, and an account of rents and profits, but the supreme court decided that, he claiming the legal title, and the defendant being in possession, the issue could only be tried in an action at law. In *Hipp v. Babin*, 19 How. 271, although the complainants were suing for the use of others as well as themselves, or, in other words, were acting in the capacity of trustees to obtain possession of the property sued for, the court held that the suit, being for the possession of land which they claimed by legal title, as against

others in possession also claiming by legal title, was properly for a law court, and a court of equity had no jurisdiction in the matter. This suit is virtually one to determine the legal title to land in the possession of defendant, and cannot, therefore, on account of the character of complainant or cause of action, be considered in a court of equity.

The second ground upon which it may be considered that a court of equity might entertain jurisdiction of the case is that the complainant was seeking to recover the property of a dissolved corporation. The principle upon which courts of equity take jurisdiction of causes in which it is sought to follow the property of dissolved corporations, in behalf of creditors of that corporation, is that such property, where held by a legal title, is charged with an implied trust to pay such indebtedness. But it cannot be claimed that this property is so charged. The complainant, as assignee of a pledgee of such stock, can have no greater rights in bringing suit than could his assignor or the pledgee, and certainly such pledgee can have no greater rights than his pledgor, as no party can convey to others greater rights than he has himself. *Trask v. Railroad Co.*, 124 U. S. 515, 8 Sup. Ct. 574. Nor can the stockholders of a company, as such, have greater rights in obtaining possession of corporation property than the corporation might have, if in existence. When it appears that the interest which the complainant has in the shares of stock, instead of being equitable, as alleged in the bill, has become legal by a conveyance and assignment, as shown by the evidence, every equitable feature disappears from the suit, and, whatever equities might be urged as between the complainant and his cestuis qui trustent, as between him and the defendant there is but the enforcement of a legal title. *Hayward v. Andrews*, 106 U. S. 672, 1 Sup. Ct. 544. In the case of *Howe v. Robinson*, 20 Fla. 352, cited by complainant in the support of his right, it was the lien of a prior judgment that was sought to be enforced, and not a legal right. But in this case we fail to find any equitable title whatever. We consider, therefore, that it would be beyond the jurisdiction of a court of equity to grant the relief prayed, although it might be competent to appoint a receiver for the purpose of bringing an action at law to determine the legal title. Whether this court should reverse the judgment below dismissing the bill, and direct such appointment, and that the case be permitted to proceed, depends upon the other questions involved.

It has been considered by both parties that the question as to whether these lots in question appertained to the railroad, and therefore passed by the sale, is the important one in the case. Our views do not coincide with those of the complainant, that the burden of proof upon this point is upon the defendant to show that the property passed by the sale, but, the sale being proven and being general, purporting to convey all the property, rights, and franchises of the railroad, and the possession having passed with the sale, and the property being now, and having been for years, in the control of the defendants, and a great part of each lot occupied for railroad purposes, we consider the burden to be upon the

complainant to show that it came within some exception, and did not pass. It is contended by the complainant that the language of the fifth section of the decree ordering the sale only mentioned the railroad, and ordered that that alone be sold. But all parts of the decree must be considered together, and, in the third section, it declared that the complainants in that case had a first lien upon "the railroad, and all property, rights, and franchises thereto appertaining," and it cannot be accepted that, after declaring such a lien, the order to sell was intended to cover less than had been specified as being contained in it. The term "railroad," with no further specifications or modifications, we consider may well be taken as covering the entire property of the company connected with the use and purpose of the road. And particularly do we consider it should be so understood in this case, and extend, certainly, as far as the lien has been declared. It is also claimed by the complainant that the language of Mr. Justice Bradley, in his opinion in the *Schutte Case*,¹ in which the decree of foreclosure and sale was rendered, recognized as valid the exception found in the resolution of the board of directors in authorizing such bonds, excepting from the lien "the lots in the city of Jacksonville not used for depot purposes." We cannot accept this view of the case, nor do we consider that in quoting the language of the resolution he had any intention of giving force to that portion of it. The language of the statute was that the bonds should be a statutory lien on the part of the road for which the state bonds were delivered, and on all property of the company, real and personal, appertaining to that part of the line. No resolution of the board of directors limiting the character or extent of the lien was embodied in the bonds, nor could it affect the lien given by this statute, if they saw fit to issue them. Mr. Justice Bradley expressly states that the lien was created by the statute, and in no way, do we consider, intimates that the action of the board of directors influenced that lien. He said: "Of course, it would be for the Florida Central Railroad Company to prescribe the conditions or considerations on or for which it would issue such bonds. It had the power to do it." Then adds: "If done, and the exchange should be made, * * * this would not relieve the Florida Central Railroad Company from its obligations arising upon its bond." The conditions and considerations might be considered in issuing them; that is, there was no power to compel them to issue them, and they might dictate their disposition, but when once issued, and exchanged for state bonds, no condition could relieve them from the lien of the statute under which they were exchanged. Nothing said by him can, in our opinion, be construed into an intimation whether those lots were or were not property appertaining to the railroad, and such view would be utterly inconsistent with the language of the decree, which should have excepted them from sale if that was his view of the law. The question, then, is, did these lots appertain to the railroad?

¹ Fed. Cas. No. 12,492a.

In considering this question, there is nothing that can appeal to a court of equity as a reason why they should not be considered as so appertaining to said railroad, and be reserved from the sale. The proceeds of sale of the bonds for which the lien was declared had come into the hands of holders of the stock of the Central Railroad. The party moving the resolution in which the exception was made, M. S. Littlefield, representing 3,350 shares of the stock at that meeting, and Edward Houston, representing 1,310 shares of the stock, received the bonds, and disposed of them in accordance with an agreement between themselves, and used the proceeds. These lots were partly paid for with funds thus procured. Even in the absence of a positive lien, a court of equity might well hold them subject to an equitable lien in favor of the holder of the bonds whose money could be traced to them. When the road was sold it was hopelessly bankrupt, and its stock, particularly that represented by the complainant, was in the hands of those who had purchased it subsequent to the decree of foreclosure, and with full knowledge of all the facts. There were a large number of debts outstanding against the company, even after the sale of its property, and there are no equitable grounds why there should be anything left for the stockholders. This, though, cannot affect the validity or invalidity of the sale. In the various cases which have arisen where the question was whether or not certain property was appurtenant to the railroad, it has come up in different ways. In some it has been a question of exemption from taxation, and then it has been claimed that it required a strict construction. In others it has been a question between mortgagees and unsecured creditors, in others between purchasers and lienholders, and in such cases a liberal construction has been given. But, in each of these cases, whether or not the property was appurtenant to the railroad has been held to be a question of fact, and, where the trial was at law, to be submitted to the jury. *Railroad Co. v. Livermore*, 47 Pa. St. 465. The general term of a "railroad," as ordinarily used, includes many kinds of property, both real and personal, and cannot, with any degree of propriety, be confined to the track, or the land, simply, necessary to lay the track upon. It is not necessary to consider whether the land can pass as appurtenant to land, for it is unquestionable that land may pass as appurtenant to a railroad. It is claimed that nothing can be appurtenant to the railroad unless it is necessary for its operation. Here the term "necessary" may be used with several significations and limitations, and we do not consider that its most restricted and confined use should be accepted in this connection. It can at no time be claimed that a strip of land 100 feet wide, or 200, as is frequently granted by charter, is absolutely necessary for the laying of a track and the operation of a railroad; and yet it is considered that it is reasonably necessary and appurtenant to the road and all passes with it. A careful examination of the numerous authorities cited satisfies us that any piece of land that may be considered reasonably necessary for the present operations of the road, or contemplated and prospective extensions or improvements, and held for that purpose, may, within the scope of the

decisions, be held to appertain to a railroad. We find no case to which such principle may not be applied without conflict. In *Railroad Co. v. Livermore*, supra, the lots of land, across the mere edge of some of which the track was laid, but which were not in any other way used for railroad purposes, but which had been held for many years, and the original intention of occupancy abandoned, were held by a jury not to be appurtenant to the railroad, and that finding approved.

In that case the conduct of those interested, from the time of the mortgage and the sale up to the time of the suit, was reviewed, and, in closing, the court says: "These remarks are not to show a ratification of a void sale, but, by the united conduct and understanding of all the parties, that no actual appropriation of the lots has ever been made, and that the sale was valid." The same examination in this case would, we think, show, by the united conduct and understanding of all parties, that there was an actual appropriation of the lots to railroad purposes, and, although not all were required for immediate use, such appropriation has never been abandoned, or the idea entertained that any portion of the property had been or would be separated from the railroad, as held for actual use, and not for speculative purposes. We cannot accept the view that nothing passed by the mortgage sale except that property which was the property of the road at the time of the enactment of the statute. The railroad was a continuing property, and after-acquired property and rights which became merged into it, and appropriated for its purposes, became subject to its lien. The lots were purchased for the purpose of furnishing terminal facilities where a contemplated extensive system of roads was intended to reach the deep water of an Atlantic port. Although stretching along one street something over 1,200 feet, the depth of these 12 lots, or distance back from the street to the water, varied, as appears by the maps filed in the case, from about 125 feet to about 200 feet; and, had the road laid its tracks on the dry land of the lots, they would have been occupied for the entire surface, but, being water lots, the railroad was built out, by wharves and piers and by taking earth from some of the lots and filling in, until much of the railroad business is transacted on the extension of these lots. The map shows 11 lines of tracks running over and across these lots or their extensions, with passenger station, freight houses, platforms, etc. Has the railroad company, by thus extending and enlarging these lots, and using more generally the extension than the original land, abandoned the original appropriation, and lost the right to have them considered and treated as railroad appurtenances? We consider not. The riparian rights went with them, and have not been separated from them. The very occupying and extending them for railroad purposes was, we consider, an appropriation. It is true that certain parts of them might be detached and sold without the railroad's suffering any immediate inconvenience, and the same is probably true of a strip of land 25 feet wide on each side of the track for the entire length of the railroad, but that would not show that it did not appertain to it. The testimony

shows that it has never been the intention to abandon the appropriation, but that there has always been in view the time when the entire property will be required, as not only convenient, but absolutely necessary, for the purposes of the railroad. It has been treated, held, received, and used and occupied, by all having anything to do with it, as appurtenant to the railroad, and we fail to find by the evidence that it, or any portion of it, should be excepted from the lien of the mortgage or foreclosure and sale.

But the remaining ground of defense against this suit we consider more positive than that the lots were appurtenant to the railroad. Subsequent to the decree of foreclosure of the mortgage under which the sale of 1882 took place, Sir Edward J. Reed purchased, and was, at the time of sale of the road, owner of, 5,110 shares of the stock of the railroad, out of a total of 5,500 shares, and was president of the company. At the sale he purchased the property as sold, and in the organization of the new company, on the 8th day of February, 1882, in the articles of association he recited that he, and those associated with him, had purchased all the franchises, rights, privileges, and property of every description whatever belonging to the Florida Central Railroad Company. This was a positive recital, made in a public document, to be placed on file as the foundation of the incorporation of a new company, to which Reed conveyed by deed all the property thus purchased, and upon the strength of which bonds to the amount of upwards of \$2,000,000 were issued and sold. We do not find in the record a copy of the deed from Reed to the newly-organized company, the Central & Western, but in the minutes of the board of directors at which it was presented and entered we find that it is stated as having granted all the rights, privileges, franchises, and property of every description belonging to the aforesaid railroads, one of which was the Florida Central. Reed was at this time the sole owner of the shares of stock in whose behalf this suit is brought. There had, at that time, been no pledge or substitution of any of these shares of stock for the bonds of the Transit Railroad Company, as these bonds were in the hands of the creditors, Donnell, Lawson & Simpson, as late as the 8th July, that year, and by such recital in the articles of the association and the deed of conveyance, and his acquiescence in the possession and control for seven years of said lots, and the numerous transfers of the property, in one of which they are distinctly described as "all the terminal property of said railroad at Jacksonville," until large amounts of bonds have been issued and sold, into the security of which these lots have apparently entered as being railroad property, and so held and occupied, and other interests have intervened, we consider that Reed, or any one claiming by, through, or under him, is estopped from now saying that he only purchased at that sale a part of the property of said railroad, and that a very valuable portion of it yet remains the property of its stockholders, he holding all but one-thirteenth of it. No one taking from him any interest in these shares subsequent to these recitals can take any greater right than he had. *Trask v. Railroad Co.*, 124 U. S. 515, 8 Sup. Ct. 574.

Our conclusion is that upon the first point complainant is not

entitled to the remedy sought, nor should he have a decree upon either of the other points, and the decree of the circuit court is affirmed. But it appearing that the record contains much unnecessary, immaterial, and irrelevant matter, a portion of which, at least, is directly chargeable to the appellee, the costs of the record, and printing the same, may be equally divided between the parties to this suit; and it is so ordered.

PRENTISS TOOL & SUPPLY CO. et al. v. GODCHAUX.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1895.)

No. 241.

1. CORPORATIONS—EFFECT OF CERTIFICATE UNDER SEAL.

It seems that, where a corporation is not required by law or by its by-laws to keep official minutes of the proceedings of the board of directors, neither such corporation, nor any one claiming under it, can go behind a resolution, certified by the secretary under the seal of the corporation, and show that such resolution was not, in fact, passed.

2. SAME—RATIFICATION OF MORTGAGE—LOUISIANA STATUTE.

In Louisiana, the property of a corporation can be mortgaged only in the form provided by law, and the power to incumber must be express and special. The board of directors of a Louisiana corporation, on March 16, 1892, passed a resolution authorizing the president and secretary to execute a mortgage on the company's property, to secure an issue of bonds. On May 2d the president and secretary executed a mortgage to secure bonds, which varied, in some respects, from those authorized by the resolution of March 16th; attaching to such mortgage a certified copy of a resolution purporting to have been passed April 27th, authorizing the bonds in the form adopted. On May 6th, the board of directors approved the changes in the form of the bonds, and, by resolution, amended the resolution of March 16th, so as to conform its terms to those of the resolution attached to the mortgage. *Held*, that the bonds were fully ratified by the corporation.

3. SAME—RATIFICATION OF PLEDGE.

The president of the corporation, acting for it, pledged some of the bonds to one G., to secure a loan of \$10,000 on notes of the corporation. A creditor of the corporation afterwards claimed that the pledge was without authority. It appeared that the corporation had received the loan secured by the pledge, and that certain payments had been made on the notes, which were not shown to be without the authority of the corporation. *Held*, that the pledge was ratified by the corporation.

4. EQUITY PLEADING—RESPONSIVENESS OF ANSWER.

A cross bill alleged that a certain corporation did not execute an act of pledge to the defendant in the cross bill, that no one was authorized by the corporation to execute such pledge, and that the defendant illegally obtained possession of the property claimed to be pledged. The answer to the cross bill alleged that the pledge was executed in good faith for the purposes of the corporation which received and used the proceeds thereof. *Held*, that the answer was responsive to the bill.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This was a suit by Leon Godchaux against the Prentiss Tool & Supply Company and others to enforce a lien upon certain bonds of the Taylor Bros. Iron-Works Company, Limited, and was heard

upon the cross bill of the Prentiss Tool & Supply Company, the answer thereto, and proofs.

W. S. Parkerson, for appellants.

J. D. Rouse and William Grant, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. On the 16th of March, 1892, the Taylor Bros. Iron-Works Company, Limited, a business corporation under the laws of the state of Louisiana, by a resolution, passed by its board of directors, authorized and instructed its president and secretary to cause to be passed and executed an act of mortgage on the real property of the corporation to secure an issue of bonds of the corporation to the amount of \$50,000, being a series of bonds from 1 to 50, of \$1,000 each, bearing interest at the rate of 6 per cent. per annum, and due at different periods, as in said resolution provided. The said act of mortgage was to contain the usual clauses of such acts in the state of Louisiana. On the 2d day of May, 1892, the president and secretary of the Taylor Bros. Iron-Works Company, Limited, passed and executed an act of mortgage before Taylor, notary, to secure an issue of bonds of the Taylor Bros. Iron-Works Company, Limited, to the amount of \$50,000, falling due at different periods, and bearing 7 per cent. interest per annum. Attached to the act of mortgage was a certified copy, under the seal of the corporation, of a resolution purporting to have been adopted by the board of directors of the Taylor Bros. Iron-Works Company, Limited, on the 27th day of April, 1892, in all respects conforming to the act of mortgage passed. On the 6th of May, 1892, the board of directors of the Taylor Bros. Iron-Works Company, Limited, at a meeting at which all the directors were present, approved the action of the president and secretary in changing the form of the bonds from the denominations of \$1,000 to that of \$5,000, and interest rate from 6 to 7 per cent.; and at the same meeting the resolutions of March 16th, authorizing the issue of bonds and the mortgage to secure the same, were so amended as to correspond in every particular with the resolutions purporting to have been passed on April 27, 1892, a copy of which was attached to the act of mortgage. On the 18th day of May, 1892, the president of the corporation, acting for the corporation, pledged four bonds to Leon Godchaux, to secure a loan of \$10,000, represented by certain notes of the Taylor Bros. Iron-Works Company, Limited, and bearing date May 18th, and respectively due at 60 days, 90 days, and 4 months. The indorsements on the notes in evidence show payments by the corporation, from time to time, amounting to the sum of \$3,250.

This case was tried in the circuit court on the cross bill of the Prentiss Tool & Supply Company, appellant in this court, and the sworn answer of Leon Godchaux, with the usual replication. The cross bill charged, among other things, that the Taylor Bros. Iron-Works Company, Limited, did not execute an act of pledge on the

18th day of May, 1892, or at any other time, to Leon Godchaux, and that no one was ever authorized by the said company to execute any such pledge; and, further, that the said Leon Godchaux, combining and confederating with W. R. Taylor, W. A. Taylor, and divers others, illegally obtained possession of the bonds in question, and now pretends to hold a pledge of said property, good against the creditors of the Taylor Bros. Iron-Works Company, Limited. The cross bill not waiving the same, Leon Godchaux answered under oath, and, among other things, averred as follows:

"That said act of mortgage, and the pledge of the four (4) bonds held by him, were executed long since, in perfect good faith, for the purposes of said corporation, which received and used the proceeds thereof in its business; that said corporation has not repudiated the same, and does not now repudiate them, and cannot, in equity and good conscience, after this lapse of time."

The questions presented in this court are whether the mortgage was and is invalid for want of authority on the part of the president and secretary to execute it, and whether the pledge to Godchaux was a valid pledge, and binding on the corporation.

Considering that the Taylor Bros. Iron-Works Company, Limited, was a private manufacturing and trading corporation, not required by law, nor, so far as shown, by any by-law of the corporation, to keep official minute books of the proceedings of the board of directors, we are not prepared to say, in the present case, that the Taylor Bros. Iron-Works Company, Limited, or any one claiming through or under such corporation, can go behind the resolution, certified by the secretary under the seal of the corporation, which was attached to the notarial act of mortgage, and show that such a resolution was not in fact passed. Authority entitled to great respect is not wanting to maintain an estoppel in such case. *Whiting v. Wellington*, 10 Fed. 810, and cases there cited. See, also, *Railroad Co. v. Schuyler*, 34 N. Y. 30. The appellant offered in evidence in the circuit court a book purporting to be the minute book of the Taylor Bros. Iron-Works Company, Limited, and counsel, having brought said minute book to this court, contends that, as this book contains no record of any meeting of the board of directors on April 27, 1892, the proof is conclusive that no such meeting was held, and, if no such meeting was held, the certified resolution attached to the notarial act is false and untrue, if not forged. The appellant's case requires this, because article 2236 of the Revised Civil Code of Louisiana provides that "the authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved a forgery." The view we take of the case does not require that we go further into this interesting inquiry, and we pass it, merely noticing that the book offered in evidence is not shown to be the only minute book of the corporation, nor to contain the minutes of all the meetings held by the board of directors.

In Louisiana, the property of a corporation cannot be mortgaged by contract in any other form or manner than that directed by law. Rev. Civ. Code La. art. 3302. The power to incumber or hypothecate must be express and special. *Id.* art. 2997. Corporations neces-

sarily act by and through agents. The corporate powers of the Taylor Bros. Iron-Works Company, Limited, were vested by the charter in a board of directors. It is admitted that this board, on the 16th day of March, 1892, by a resolution reduced to writing, authorized the president and secretary of the corporation to execute a mortgage on the corporation property to secure a series of bonds amounting to \$50,000, and that on the 2d day of May, 1892, the president and secretary of the corporation, by notarial act, executed a mortgage of the corporation property to secure a series of bonds amounting to \$50,000, but varying from the power granted March 16th in the matter of interest, in the number and amount of the bonds, and in the time in which the bonds should respectively mature. On the 6th day of May, 1892, the board of directors approved the changes made by the president in the number and amount of the bonds and in the rate of interest, and by resolution reduced to writing amended the resolution of March 16th so as to specifically authorize the president and secretary to execute for the corporation exactly such a mortgage as was executed by them on May 2d. The resolution, as amended, uses words referring entirely to the future, but it is to be noticed that the board was dealing with the resolution of March 16th, and endeavoring to make that resolution read as, in their opinion, it ought to have been passed on that day; and that the approval at the same time of the changes made by the president in the bonds shows clearly that the board then knew that the act of mortgage had been passed. We are of opinion that the resolution of May 6th was intended to be, and was, a full and complete ratification of the act of mortgage granted on May 2d; and we further consider that, the question involved being one of power, the date of April 27th, given by the secretary in the certified resolution appended to the act of mortgage as the date when the authority was given by the board of directors, becomes immaterial.

The validity of the pledge of four of the bonds to the appellee, Godchaux, we think should also be maintained. The mandate to make the pledge must be special (Rev. Civ. Code La. art. 2997), but, as it concerns movables, it need not be in writing (Id. art. 3158; *Casey v. Schneider*, 96 U. S. 496). If the partial payments which appear by indorsement on two of the notes in evidence were made by authority of the corporation (and such authority, in the absence of proof, is in some cases presumed,—*Amis v. Insurance Co.*, 2 La. Ann. 594), then there was a ratification of the act of pledge. If the loan secured by the pledge was received by the corporation, or was usefully employed for its benefit, then the pledge was ratified. Rev. Civ. Code La. art. 3303. The sworn answer of Leon Godchaux to appellant's cross bill is to the effect that the proceeds of the loan secured by the pledge were received and used by the corporation. The appellant contends that this part of the answer of Leon Godchaux, although not impugned by any evidence in the record, cannot be considered as evidence in this case, because not responsive to any matter directly charged in the cross bill. As noticed above,

the cross bill charges that the Taylor Bros. Iron-Works Company, Limited, did not execute an act of pledge on the 18th day of May, 1892, or at any other time, to Leon Godchaux; that no one was ever authorized by said company to execute such pledge; and, further, that Godchaux illegally obtained possession of the bonds in question, and now pretends to hold the same in pledge. To these charges in the cross bill, the answer that the pledge was executed in perfect good faith for the purposes of the corporation, which received and used the proceeds thereof, seems to be responsive. See *Dravo v. Fabel*, 132 U. S. 487, 10 Sup. Ct. 170; *Beals v. Railroad Co.*, 133 U. S. 290, 10 Sup. Ct. 314. The issue was one necessarily tendered by the cross complaint in order to rebut the presumption of Godchaux's ownership arising from possession. See Rev. Civ. Code La. art. 3454. The silence of the corporation as to the rightfulness of the pledge,—which silence is sworn to by Godchaux, and is otherwise shown by the record,—in the light of the fact that the board of directors knew that the bonds were issued and were in the custody of the president to raise money for the necessities of the corporation, known to have been pressing, is significant. In *Merchants' Bank v. State Bank*, 10 Wall. 604-644, it is declared by the supreme court of the United States that:

"Where a party deals with a corporation in good faith, the transaction is not ultra vires, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."

And again, the same court, in *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192-194, in dealing with a case where there was no evidence showing that the president and secretary of a business corporation were authorized by special authority to overdraw its bank account, said:

"Touching that liability, we have to say that, since the mining company had power, under its charter, to raise money, in that mode, for use in its corporate business, and since an indebtedness thus created would, in the usual course of business, be evidenced by the checks of its president and secretary, the presumption should be indulged, not only that those officers, in making an overdraft, did not exceed their authority, but that the moneys thus obtained were paid over to or received by, the company. But that is a mere presumption, arising from the conduct of the parties, as well as from the general mode in which corporations organized for profit conduct their business. That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied, in the president and secretary of the mining company to make overdraft checks, and by proof that the company did not receive the money paid thereon by the bank. There is, however, no such proof in this case. The finding is entirely silent as to whether the company did not receive and use the money. And the finding that 'no resolution or special authority of the defendant was shown, authorizing its president and secretary, or either of them, to overdraw its account in bank,' fairly interpreted, means nothing more than that no proof was made either way on that point. It does not necessarily imply that a resolution to that effect was not, in fact, passed, nor that such special authority was not, in effect, given. The meager evidence upon which, according to the special finding, the case was tried below, is, we think,

insufficient to overturn the presumptions which should be indulged in favor as well of the bank as of the integrity and fidelity of the officers of the mining company."

In *Patterson v. Robinson*, 116 N. Y. 193-200, 22 N. E. 372, the court of appeals, in speaking of a contract made by the president of a business corporation in its name, and ostensibly for its benefit, said:

"There is no evidence that the financial transactions between the bank and mill, prior or subsequent to May 1, 1875, were unknown to or disapproved by the board of either corporation; and this court will not, for the purpose of reversing the judgment, presume that the transactions were unauthorized by the boards. The contract does not appear to have been entered into for the personal benefit of Vail or Robinson, but solely for the benefit of the then involved corporations; and there is no evidence that Vail or Robinson profited, or sought to profit, by the contract. The contract was one which the boards of the corporations had power to authorize, their presidents to make, or to ratify after it had been made; and the burden was on the plaintiff to show that the contract was not authorized or ratified by the boards. *Bank v. Warren*, 7 Hill, 91; *Gillett v. Campbell*, 1 Denio, 520; *Elwell v. Dodge*, 33 Barb. 336; *Bank v. Kohner*, 85 N. Y. 189, 193; *Smith v. Glass Co.*, 11 C. B. 897, 929; *Lee v. Mining Co.*, 56 How. Pr. 373, affirmed 75 N. Y. 601; *Mor. Priv. Corp.* (2d Ed.) 336, 538, 593. The plaintiff failed to rebut the presumption that the contract was entered into or ratified by the authority of the boards of the corporations, and it must be held to be binding on both."

The principles declared in these cases are not in conflict with the Louisiana cases cited by the learned counsel for appellant. In *Folger v. Peterkin*, 39 La. Ann. 815, 2 South. 579, the proof was that the defendant, Mrs. Peterkin, had never given the agent any authority to draw drafts in her name, and that she never knew of the existence of such drafts until long after their maturity, when she immediately repudiated them. In *Robertson v. Levy*, 19 La. Ann. 327, the main question decided was whether a mandate to administer a plantation carried with it the authority to sign promissory notes binding on the principal. *Nugent v. Hickey*, 2 La. Ann. 358, was a similar case. *Hills v. Upton*, 24 La. Ann. 427, decides that an agency to settle a debt does not authorize the agent to give the principal's note therefor. *Crossley v. Bank*, 38 La. Ann. 86, decided that "a claim to the ownership of securities pledged cannot be recognized when it is apparent that the pledgor did not transfer them, and the pretended conveyance was made by one who never had any title to the ownership thereof, to the knowledge of the pledgee." In none of the opinions of the supreme court of Louisiana in these cases do we find any language used which, fairly applied to the cases passed upon, in any wise affects injuriously the validity of the pledge in the case now before this court. The propositions of law taken from the text-books and marshaled with apparent force in appellant's brief are too general to be of assistance in reaching a correct conclusion under the state of the proof and the presumption therefrom legally arising. As we have found that the act of mortgage was fully ratified, and the pledge to appellee was valid, the decree appealed from must be affirmed, and it is so ordered.

CHURCH et al. v. PROCTOR.

(Circuit Court of Appeals, First Circuit. February 2, 1893.)

No. 102.

1. CONTRACTS—INTERPRETATION—VARIATION OF WRITING BY PAROL.

C. & Co. and P. entered into a written contract by which P. agreed to pay C. & Co. a stated price for "what menhaden they land" at a certain wharf, and C. & Co. agreed to furnish menhaden to P. at such wharf and price, "until he gets through slivering for the year 1888." *Held*, that such contract constituted a complete legal engagement to buy and sell such quantity of menhaden as might be reasonably required in P.'s business, and could not be varied by evidence of an oral agreement of the parties, at an earlier day, to deliver a specific quantity of menhaden daily.

2. SAME—PUBLIC POLICY—SELLING GOODS UNDER FALSE NAME.

In an action against C. & Co. for failure to deliver the menhaden, *held*, that it was competent to show that P.'s purpose in buying the menhaden was to sell them, under false labels, as mackerel, and thereby deceive the public, contrary to the policy of the law to prevent frauds upon the public, and in violation of a statute of Rhode Island, where the contract was made (Pub. St. R. I. c. 114), imposing a penalty for exporting or selling pickled fish in packages not branded by a sworn packer with its proper name; and that, if it appeared that it was P.'s purpose in buying the menhaden to commit such fraud, no right of action could arise in his favor for breach of the contract by C. & Co.

3. PUBLIC POLICY AS A DEFENSE—GROUNDS.

The defense of public policy does not proceed so much upon the idea of relief to the defendant as protection to the public, and it is immaterial that the illegal purpose was unknown to the defendant at the time of an alleged breach.

4. SAME.

It seems that the law will not afford a remedy to a wrongdoer in a scheme the purpose of which is to deceive and defraud the public, whether the party against whom the remedy is sought is himself innocent or guilty of participation in such fraud.

In Error to the Circuit Court of the United States for the District of Rhode Island.

This was an action by Joseph O. Proctor, Jr., against Daniel T. Church and others, to recover damages for breach of a contract. On the trial in the circuit court, the jury gave a verdict for the plaintiff. Defendants bring error.

William G. Roelker, for plaintiffs in error.

William A. Pew, Jr., Thomas A. Jenckes, and Charles A. Wilson, for defendant in error.

Before PUTNAM, Circuit Judge, and NELSON and ALDRICH, District Judges.

ALDRICH, District Judge. At the time the parties entered into the contract involved in this controversy, Proctor, the plaintiff below, was engaged in a general fishing business at Gloucester, in the state of Massachusetts, and in preparing and placing on the general market different kinds of fish, and especially in splitting and slivering a fish called "menhaden," and placing the same upon the market; and the defendants, at Tiverton, in the state of Rhode Island, were engaged in the business of catching and supplying

menhaden, and possessed superior facilities for so doing. On the 3d day of August, 1888, at Tiverton, the parties entered into an agreement in the words following:

"Tiverton, R. I., Aug. 3, 1888.

"We agree to pay Joseph Church & Co. for what menhaden they land at Still's Wharf, Tiverton, R. I., \$1.00 per barrel, cash on demand, and they to have, free of cost to them, the heads and guts landed at their dock in a boat that they furnish. Providing crews of steamers refuse to bail the fish, we agree to bail them at no extra charge to Joseph Church & Co.

"J. O. Proctor, Jr.

"Joseph Church & Co., Manufacturers of Menhaden Oil, Guano and Fertilizers.

"Tiverton, R. I., Aug. 3, 1888.

"We agree to furnish menhaden to J. O. Proctor, Jr., alongside Still's Wharf, Tiverton, R. I., at \$1.00 per barrel, from now until he gets through slivering for the year 1888.

Joseph Church & Co.

"It is understood that when fish in tubs, Joseph Church & Co. hoist them, and J. O. Proctor hauls them out, and dumps them.

"Joseph Church & Co."

At the trial below, Proctor, contending that the written agreements of August 3d did not contain the entire oral contract between the parties made on an earlier day, introduced oral evidence tending to show that, on a day prior to August 3d, he agreed to take, and Church & Co. agreed to deliver, at least 100 barrels of the menhaden fish on each day during the slivering season in the year 1888. To this evidence the defendants objected, and excepted on the ground that its effect was to change or add to the obligations of the parties as expressed in their written contract. We think the writings, taken together, constitute a complete legal engagement, and that evidence of an express oral agreement between the parties at an earlier day, to deliver a specific quantity of fish daily, was incompetent, for the reason that it reads into the written contract an element not necessarily a part thereof. It seems to us that the writings constitute one of those common agreements whereby one person agrees to supply for a stated price, and another person agrees to buy, all the articles in a certain line required for his family's use or for his business during a certain period. Such a contract is not indefinite, for the reason that the requirements of the family or business may be approximately known, and the quantities are to be determined by the reasonable demands of such family or business. By the terms of the contract expressed in writing, Church & Co. in effect agreed to deliver, and Proctor in effect agreed to receive, such quantities of menhaden as might be reasonably required by his business, to be delivered and received during the period and at the place and price designated in the contract. Proctor was not bound to receive, and Church & Co. were not bound to deliver, more than was reasonably required by the business to which the contract had reference. From the nature of the subject-matter to which the contract related, the quantity was necessarily uncertain. Proctor's requirements were subject to the fluctuations incident to the season and the demands of the market, and Church & Co.'s catch was subject to the weather and other elements of uncertainty incident to their enterprise. The

undertakings of the parties, therefore, like all contracts of this character, were subject to the contingencies which ordinarily affect catching and using fresh fish. Interpreting the writings, therefore, with reference to the subject-matter, and the understood situations of the parties, the contract was complete on its face, in the sense, of course, that it was as complete as contracts regulating undertakings of this character can well be made. The meaning was that one of the parties should receive such quantities as his business required, and the obligation of the other party was to answer such requirements, but in no event to exceed their catch, as their undertaking was subject to the contingencies ordinarily incident to an enterprise of the character of that in which Church & Co. were engaged. In such sense, the contract was a complete obligation, and evidence of a prior oral agreement to deliver daily a specific quantity of fish was inconsistent with its meaning, and therefore incompetent.

So much as to the face of the contract and its meaning as interpreted with reference to the subject-matter generally, but it is said by Church & Co. that, looking further to the subject-matter as disclosed by the record, the contract is altogether void, for the reason that it is against public policy. The ground of this objection, stated generally, is that Proctor, taking advantage of the scarcity of mackerel in 1888, conceived the idea of putting upon the markets generally the menhaden, as a food fish, split and salted, packed in barrels, tubs, pails, and other packages, and variously branded with misleading and deceptive marks and characters, as, for instance, "Alaska Mackerel, for Family Use." Proceeding upon the theory that the facts, if shown, would disclose a contract which would not be upheld, Church & Co. offered evidence to show the character of the marks and brands placed upon the casks and barrels containing the fish, and upon Proctor's objection this evidence was excluded, subject to exception. At the conclusion of all the evidence in the case, the defendants moved for a verdict "on the ground that it appeared from the plaintiff's testimony that the purpose for which he intended to use and did use the fish which were the subject-matter of the contract sued upon was illegal, and against public policy, as being a fraud and an imposition on the public, and * * * illegal, in being in violation of chapter 114 of the Public Statutes of Rhode Island." The court below refused to direct the verdict, and the defendants excepted.

The record does not clearly show that Proctor's deceptive and unwarrantable purpose existed during the entire period covered by the contract, and for this reason the court below could not have properly directed a verdict upon the ground stated in the motion. We think, however, that Church & Co., under the line of defense disclosed, were entitled to show fully the purpose of Proctor at the time of the contract, the use which he made of the fish furnished, and the manner in which they were placed upon the market, and that the court erred in excluding evidence as to the marks and brands upon the casks and barrels. The evidence excluded was competent and material upon the issue raised by the de-

fense, and would tend to show that the public was being deceived and cheated through false and misleading brands and characters used for the purpose of advancing the sale of a product beyond that which would result from its true merit. The point is made that the Rhode Island statute does not apply, for the reason that the evidence shows that the fish in question were designated as "salted fish," while the statute has reference to "pickled fish." This is a distinction which the trade might make, but which, perhaps, the jury would not be required to make, or which, if made, might have been overcome by the jury in view of evidence that the fish were put up for the trade in barrels and casks and in closed packages of various forms. All pickled fish in the ordinary fish business are salted, although all salted fish are not pickled. In view of all the evidence, we cannot say that the jury would not have been warranted in finding that the witnesses in using the term "salted fish" intended to describe the fish in question as pickled. The purpose of the evidence, as to the manner of placing the fish upon the market, was a double one, first, to show that statute of Rhode Island was violated, and, second, to show a scheme which involved a fraud on the consumers of fish as an article of food. As bearing upon the general question whether Proctor's purpose and manner of doing business was such as to render the contract void as against public policy, we think the Rhode Island statute might properly be urged, and that it was material to know whether Proctor's manner of doing business conformed to the statute, or whether it was in plain violation of a statute intended to protect the public generally against fraud and imposition. Chapter 114 of the Public Statutes of Rhode Island, which was in force in 1888, provides, among other things, that "casks for menhaden and herrings shall be of the capacity to hold twenty-eight gallons," and "every cask before being packed or repacked for exportation shall be first searched, examined and approved by a packer, and shall, when so packed or repacked for exportation, be branded legibly on one head with the kind of fish it contains and the weight thereof, or the capacity of the cask with the first letter of the Christian and the whole of the surname of the packer, the name of the town, and the words Rhode Island, in letters not less than three-fourths of an inch long, to denote that the same is merchantable and in good order for exportation." It is further provided, through section 8 of the same statute, that "every person who shall offer for sale in or attempt to export from the state any pickled fish which have not been approved by a sworn packer, or in casks which are not branded as aforesaid, shall forfeit fifty dollars for each offense." It is manifest that this statute regulating the packing of fish in Rhode Island was intended for the protection of the public generally, not Rhode Island consumers alone, but consumers generally. It was to prevent fraud upon the public, and public policy requires that no action shall be successfully maintained in favor of those who pack and ship food fish in open violation of the wholesome provisions of this statute. It is conceded that the plaintiff below not only did not conform to

the statute, but that the packages were falsely marked. The maxim, "*Ex dolo malo non oritur actio*," fairly and forcibly applies to such a situation. If, upon a jury trial, the fact should be established that the packages prepared and shipped by Proctor were pickled fish, within the meaning of the Rhode Island statute, then for such time as he was actually engaged, or had the purpose to engage, in packing and shipping pickled fish, without conforming to the provisions of the statute, he would not be entitled to maintain his action for damages resulting from nondelivery of the subject-matter intended to be used in violation of the statute law. *Bank v. Owens*, 2 Pet. 527, 539; *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884; *Forster v. Taylor*, 5 Barn. & Adol. 887; *Eaton v. Keegan*, 114 Mass. 434; *Pol. Cont.* 322; *Curtis v. Leavitt*, 15 N. Y. 9; *Benj. Sales*, § 654.

Looking at the transaction aside from the local statute, and independent of the question whether the packages contained pickled or salted fish, the authorities conform to a wholesome and sound rule of public policy that no cause of action shall arise in behalf of a person engaged in a business which is illegal, or which is a fraud and imposition upon the public, and the law will not uphold or enforce a contract, or aid a party, where the purpose is to cheat and deceive the public generally. We feel bound to recognize the modern public policy indicated by the various statutes, as sustained by judicial authority, designed for the protection of the public, and which, in the interest of health and fair dealing, undertake to regulate traffic in food products. The point is taken that the purpose of Proctor to place this product (innocent of itself) upon the market in an improper manner was not known to Church & Co. at the time of the alleged breach, and that, therefore, the objection is not open to the defense. This is not an answer. The defense of public policy does not proceed so much upon the idea of relief to the defendant as protection to the public, by withholding legal remedy from a party contemplating or practicing imposition. It would be a strange rule of law which would extend relief to a particeps criminis, and withhold relief from an innocent party, who seeks to avail himself of its protection when the imposition is discovered. *Cowan v. Milbourn*, L. R. 2 Exch. 230; *Spotswood v. Barrow*, 5 Exch. 110; *Holman v. Johnson*, Cowp. 341. The wholesome and salutary maxim, "*Ex turpi causa non oritur actio*," has been so far enlarged that it may now be said that the law will not afford a remedy to a wrongdoer in a scheme to deceive and defraud the public, and this modern doctrine does not depend upon the consideration, or the innocence, or lack of innocence, of the party who seeks to interpose the objection. It becomes a defense, and may be interposed whenever the fraud is discovered. It must be observed, however, that it would not always be enough to avoid a contract for a sale of articles innocent of themselves that the party who acquired them, or sought to acquire them, occasionally used them unlawfully. In order that this doctrine should operate in avoidance of a contract, except where the illegality involves life, or offenses of the higher grade, it must appear that the party acquir-

ing the product intended to use it unlawfully when the contract was made, or when possession was sought, or that he was engaged in a general scheme involving illegality, or the general purpose was to use the product in a deceptive and fraudulent manner. The record shows that the "plaintiff testified that under the arrangement contemplated by him, and the contract made with the defendants, the fish were to be landed at Still's Wharf, at Tiverton, in the state of Rhode Island, and immediately there split and salted, and packed up in barrels, tubs, pails, and other packages, and marked and branded and shipped to fill these orders to various parts of the country, and that all the fish that were actually received by him under this contract with the defendants, and otherwise during the season of 1888, at Tiverton, R. I., were so packed and marked there on the spot," and shipped from that point. It also shows that the barrels, casks, and packages were variously branded "Alaska Mackerel," "Russian Mackerel," "California Mackerel," "Family White Fish," and "Fat Family Silversides." It is obvious that the real object of marking the packages thus was to make the product "appear to be what it was not, and thus induce unwary purchasers,"—*Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154,—who could not scrutinize the contents, to buy it as mackerel.

Humanity is entitled to know what it buys and consumes. Government is instituted and maintained, and law is administered, for the protection of the people; and justice influenced by enlightened public policy, and controlled by legal principles, requires that contracts shall not be upheld and enforced for the benefit of a wrongdoer, where the subject-matter thereof is designed to be used in furtherance of a business enterprise which contemplates imposition upon the general public through false, misleading, and deceptive brands and labels, placed upon sealed packages of food products in a manner calculated to deceive, and forward the sale of such articles for what they are not. Looking at the record as a whole, however, it does not clearly and distinctly appear when the plaintiff below entered upon such scheme or business, and for this reason we cannot say there was error in the refusal of the court to direct a verdict for the defendants. If upon any subsequent trial this issue should be raised, and evidence adduced in support thereof, we think the jury should be instructed that no damages can be recovered, and no action maintained, covering any period in which the plaintiff below contemplated, or was actually engaged, in placing upon the market the fish described in the contract, under false, deceptive, and misleading brands, designed to attract and induce trade. During the time he entertained such purpose (*Cowan v. Milbourn*, L. R. 2 Exch. 230, 236; *Materne v. Horwitz*, 101 N. Y. 469, 5 N. E. 331), or was actually engaged in such business, the law will not help him. The verdict should be set aside for the reasons stated, and it becomes unnecessary to consider the other questions raised by the plaintiffs in error. Judgment of the circuit court reversed; new trial ordered.

CITY OF LAREDO v. INTERNATIONAL BRIDGE & TRAMWAY CO.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1895.)

No. 250.

1. MONOPOLIES—FERRY FRANCHISE AND BRIDGE PRIVILEGES.

The city of Laredo, Tex., owning a ferry franchise over the Rio Grande river, granted to it at an early day by the Spanish government, contracted, by ordinance, with a bridge company to permit the erection of the north end of a bridge in certain of its streets, and agreed not to exercise its ferry franchise for a period of 25 years, in return for which it was to receive \$5,000 per year for the same period. *Held*, that this ordinance did not create a monopoly, within the meaning of the Texas constitution (article 1, § 26), which declares that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."

2. MUNICIPAL CORPORATIONS — POWER OF COUNCIL — ALIENATION OF FERRY FRANCHISE.

In thus converting its ferry privilege into an equivalent or more beneficial bridge privilege, for a limited period, the city was not exercising a discretion so clearly beyond the purposes of the franchise as to make the contract void, and the ordinance was within the lawful power of the council to enact.

In Error to the Circuit Court of the United States for the Western District of Texas.

This was an action by the city of Laredo, Tex., against the International Bridge & Tramway Company, to recover money alleged to be due under a contract. The circuit court sustained a demurrer to the petition, and, plaintiff having declined to amend, rendered judgment dismissing the action. Plaintiff brings error.

William Aubrey, for plaintiff in error.

J. H. McLeary, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

McCORMICK, Circuit Judge. The plaintiff in error, the city of Laredo, Tex., brought its action in the state court for Webb county, Tex., against the defendant in error, the International Bridge & Tramway Company, a private corporation, incorporated under the laws of the state of Texas. The plaintiff alleged:

That it is the owner of a large tract of land, embracing the city of Laredo, which was granted to it by the crown of Spain in A. D. 1767. That in the same grant was embraced the exclusive right and privilege in and to the plaintiff to establish and maintain a ferry privilege across the Rio Grande, which stream bounds the grant and the city of Laredo on the south. That the grant from the Spanish crown was in all respects confirmed by the legislature of the state of Texas on the 4th of September, A. D. 1850, and for which that state issued its patent to plaintiff in July, 1884. That by an act of the legislature dated 29th January, 1848, incorporating the city of Laredo, the plaintiff's authority and privilege to establish ferries across and landings on the Rio Grande, and to fix the rates and rents of the same, was recognized, and was again recognized in an amendment to its charter granted by the legislature in February, A. D. 1850. That plaintiff had exercised the exclusive right of its ferry franchise from the date of its grant continuously up to the 7th April, 1889. That on the 1st September, 1887, the de-

defendant made application to plaintiff, through its council, by which it asked authority to erect and construct within the corporate limits of the city of Laredo, in such street as should thereafter be mutually determined, the north end of a bridge which it desired to construct across the Rio Grande, and proposed to pay the sum of \$3,000 annually for the first five years from the date of the opening of the bridge for travel, and to pay annually for the second five years \$5,000, and from the expiration of ten years to pay annually \$6,000 for the privilege it asked. That, at and for a number of years prior to the time of the negotiations set in motion by this application, the plaintiff was receiving and had received annually for its ferry franchise the sum of \$5,000, which was paid quarterly by the lessees thereof. That the negotiations between the plaintiff and the defendant resulted in the passage of an ordinance by the plaintiff's council authorizing the defendant to enter upon, with the north end of its bridge, certain streets and lands of the plaintiff, to use the same in constructing, opening, and maintaining its bridge, and agreeing that for the period of 25 years the plaintiff would not exercise its ferry privilege, nor permit others to do so, and would by proper ordinance enforce the collection of reasonable tolls, requiring bond of the defendant for the proper discharge of its duties in the premises, and allowing 18 months for the completion and opening of the bridge, the dimensions and quality of which were specified. The terms of this ordinance were duly accepted by the defendant, and bond given as required. That, pending the period of 18 months allowed for opening the bridge, the plaintiff withdrew the lease of its ferry franchise, and has not exercised the same, or permitted it to be exercised by any person or corporation other than the defendant, since the opening of the defendant's bridge for business, which was 7th April, 1889. That, in consideration of the acts and engagements of the plaintiff above substantially stated, the defendant, besides other covenants not in issue, contracted to pay the plaintiff the sum of \$5,000 a year for the period of 25 years from 7th April, 1889, in quarterly installments. That these quarterly installments, as each matured, were regularly paid from 7th April, 1889, to the quarter ending 8th January, 1892, except the sum of \$650. That since the time last mentioned the defendant has failed and refused to pay the installments that have matured to the amount, at the filing of the suit, of the sum stated. That the plaintiff has fully kept and performed its engagements, and the defendant has enjoyed the use and fruits of the rights, privilege, and aid granted it by the plaintiff.

The prayer is for judgment for the amount of the installments matured and unpaid, and for interest thereon, and for costs, and for such other general relief as the court may deem just.

The defendant demurred to the plaintiff's petition, urging: (1) It shows no cause of action; (2) the contract sued on was made in pursuance of an attempt to regulate foreign commerce; (3) the contract sued on created a monopoly; (4) it appears from the petition that the city had no authority to enact the ordinance under which the recovery is sought; (5) the city undertook by the ordinance to barter away its ferry privilege without authority of law.

At the hearing the circuit court, to which the case had been removed, sustained the demurrer on the first, third, fourth, and fifth of the grounds just stated, and, the plaintiff declining to amend, judgment was passed dismissing the action.

The constitution of Texas declares: "Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." Const. 1876, art. 1, § 26. In the whole period of that historic struggle, in the forum and on the field, which marked the birth, growth, and full maturity of the genius of English free government, the denunciation against monopolies was never leveled at any claim of right to exclusive privilege held under an act of parlia-

ment. In the *Slaughterhouse Cases*, 16 Wall. 36, it was said by Mr. Justice Miller in delivering the opinion of the court:

"We think it may be safely affirmed that the parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day continued to grant to persons and to corporations exclusive privileges,—privileges denied to other citizens, privileges which come within any just definition of the word 'monopoly' as much, as those now under consideration,—and that the power to do this has never been questioned. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good have been made successful by means of these exclusive rights, and could only have been conducted to success in that way."

There are classes of exclusive privileges which certainly do not amount to "monopolies," within the meaning of the common law or of the Texas constitution. Courts of last resort have generally refrained from propounding an authoritative affirmative definition of the "monopoly" so odious to the common law and to the genius of a free government. It would try the power of expression of most judges, if not of human speech, to frame such a definition, outside of which a grant or contract must wholly and clearly rest to escape the stroke of nullity. It has therefore generally been deemed wise and safe to use rather the process of exclusion, and determine what is not a monopoly, so far as the case in hand required. From the time of the separation of Texas from Mexico the provision above quoted has had place in her constitution. From its first adoption, now nearly 60 years ago, it has been the constant practice to grant exclusive ferry privileges to individuals and to corporations. These grants have been made sometimes directly by the legislature, but commonly by the subordinate municipal bodies. It has also been the practice in that state to grant to individuals and to corporations authority to erect and maintain toll bridges over the larger streams. At one time a general law authorized the securing of such a privilege to be exclusive for a period of not exceeding 10 years, on the terms and in the manner prescribed in that statute. Special charters have been passed granting such privileges to individuals and corporations for longer periods than 10 years; and the power of the legislature to make such grants has been held to be undoubted by the supreme court of Texas. *Hudson v. Emigration Co.*, 47 Tex. 56. It may be safely affirmed that many of these enterprises thus authorized and fostered have been as useful and beneficial to the public, as promotive of the general good, as they have proved profitable to the holders of the privilege; that they have been made successful by means of the enjoyment of the exclusive right; and that, at the time and place when and where these bridges were erected, they could have been constructed, maintained, and conducted to success only in that way. It is not suggested that the defendant's bridge is not promotive of the general good, or useful and beneficial to the inhabitants of the city of Laredo, or that it is not as useful and beneficial as the ferry which the city had maintained for more than a century under its grants from the Spanish crown and from the state of Texas. It is not shown by the plaintiff's pleading, nor

can it be fairly inferred therefrom, that the ferry privilege so early granted, so often recognized by the legislature, and so long enjoyed, was held by the city of Laredo for strictly municipal purposes, rather than bestowed as a source of revenue, to be administered as such for the best interest of the city, in the sound discretion of its constituted authorities, acting in good faith. On the contrary, if the petition does not expressly so aver, it is fairly and clearly to be implied from its allegations that the privilege was originally extended as an endowment for the purpose of providing revenue for the infant town, to be reared in a remote province existing in the state of nature, inhabited chiefly by savage Indians. It is only in its quality as property that the contract declared on deals with this ferry privilege. The defendant had organized as a corporation under the state laws for the purpose of erecting a bridge across the stream. It had procured the consent and authority of congress to erect and maintain its bridge. It represented that it had procured the proper concession from the authorities on the Mexican side of the river. But it could not enter the city of Laredo, or erect any part of its bridge on the streets or grounds of the city, without its consent, either voluntarily given, or secured by the process of expropriation, if the defendant had that power. If it was authorized to put in operation the police power of expropriation, it must do it, if at all, in the manner and on the terms prescribed by law. The opening of a sufficient bridge at that point, or from any point in the city, across the stream to the Mexican city on the other shore, would injure or destroy the value of the ferry privilege, then yielding the city an annual revenue of \$5,000, payable and being regularly paid quarterly into its treasury. The abutments and approaches to the bridge would necessarily, to some extent, obstruct the street on which it entered, and the streets crossing it at or near the river front. It was or might become necessary or desirable to use other ground belonging to the city not in use as a public street. All of these matters would be considered in the expropriation proceeding, or, at least, would certainly be insisted on by the city. In full view of all the conditions of the respective parties, with perfect actual knowledge of all the facts, and charged with equal knowledge of the constitution and general laws of Texas, the defendant chose to negotiate for, and proposed to contract for, the voluntary grant of the right and privilege it needed or desired from the city. It can hardly be seriously contended that the petition does not show that the city had some interest and rights in the subject-matter of this contract about which the city council had power to contract in some manner or to some extent. *Laredo v. Martin*, 52 Tex. 548; *Indianola v. Gulf, W. T. & P. R. Co.*, 56 Tex. 594; *Waterbury v. Laredo*, 60 Tex. 519. Not only has it power to make some provision for the proper disposition and use of these valuable interests of the city, but an exigency has arisen when it is imperatively called to decide whether it will make a voluntary contract disposing of these interests, so as to save the city the present value and secure full compensating equivalents, or submit to proceedings for expropriation that would substantially devour these

rights on such terms as another tribunal might impose. The council decided to contract as in the ordinance specified and sufficiently set out in the opening of this opinion. So far as the defendant, in the erection and operation of the bridge, may or should be subject to municipal regulation and control by the city, county, or state, as respects the due regard for safety, the sufficiency of the service, and the reasonableness of tolls, it is not affected by this contract. The defendant did not ask the city council to grant it a franchise to erect and maintain a toll bridge across the Rio Grande. It represented that it already had and held from the Mexican authority, and from the congress of the United States, the exclusive right to construct, maintain, and operate such a bridge, and to collect tolls, the government of the United States reserving the right to regulate the tolls. The plain, practical construction put on the constitution of Texas by every department of her state government clearly shows that the exclusive privilege held and exercised by the defendant does not constitute a monopoly, within the meaning of section 26, art. 1, of that instrument. The allegation is ample that the defendant is exercising all the rights and enjoying all the exclusive privileges that the contract sued on contemplated. It therefore follows that the contract is not one creating a monopoly forbidden by the constitution of Texas. The defendant preferred to incur an annual charge running from the opening of its bridge, then 18 months in the future, and to promise to pay from that future date quarterly installments of a specified amount for a period approximating the ordinary lifetime of the bridge structure it was to erect, rather than pay in advance a lump sum in full of the consideration it received. We do not have to seek far or to look sharp to find good reason for this choice. The sense of justice rejects the thought that any lawful being, though without a soul, could have made this choice with a view to the defense here urged. Considering the grant of the ferry franchise as an endowment for the purpose of producing revenues, and conceding that this franchise, though not alluded to in the defendant's proposition, was a material, if not the chief, subject of the contract between the parties, the administration and disposition of it by the ordinance which embodies their contract does not appear to have been or to be reckless or improvident. The discretion to convert the ferry privilege into an equivalent or more beneficial bridge privilege, without loss of revenue to the city, does not appear to us to be a dangerous discretion, so clearly beyond the purposes of the franchise as to make the agreement to do so void. In the nature of the case, such a disposition, if made at all, must extend over a period approximating the ordinary lifetime of the bridge structure. The stream is a large one,—as its name imports, it is a navigable water, the dividing line between two great nations, under whose authority the bridge was to be built and operated. The defendant relies on *City of Brenham v. Water Co.*, 67 Tex. 542, 4 S. W. 143; *Waterbury v. City of Laredo*, 68 Tex. 575, 5 S. W. 81; and *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478. We have carefully examined all of the Texas cases cited on the briefs

of the counsel for each of the parties. The doctrines announced by Mr. Justice Gray in the case last referred to, and the doctrine of the various previous cases in that court, reviewed by him and so clearly summarized in that opinion, have become familiar law. But neither in those opinions of the supreme court, nor in the authority of the Texas cases, as we read them, do we find support for the contention of the defendant in error. The Texas cases, taken all together, it seems to us, oppose, rather than sustain, the defendant's contention. The opinions of the supreme court, so far as they apply, have the same effect. It seems clear to us that the contract in question is within the powers of the council to contract. We conclude, therefore, that the demurrer should have been overruled. Ordered that the judgment of the circuit court is reversed, and the cause remanded to that court, with direction to award the plaintiff a new trial!

UNITED STATES v. MERCK et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

CUSTOMS DUTIES—CLASSIFICATION—ELATERIUM.

Elaterium in cakes, prepared from the juice of the fruit of "echallium elaterium" by evaporation and drying, and containing a medicinal drug known as "elaterine," which, however, is extracted from the cakes before it is used by the physician, is exempt from duty under Act Oct. 1, 1890, par 560, as a drug "in a crude state," and cannot be classified as a "medicinal preparation," within paragraph 75, nor as a "drug which has been advanced in value or condition, by refining or grinding or by some process of manufacture," within paragraph 560.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by Merck & Co., importers of certain merchandise known as "elaterium," for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise. The circuit court reversed the decision of the board. The United States appealed.

Henry C. Platt, Asst. U. S. Atty.

Comstock & Brown, for importers.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The appellees, Merck & Co., imported, in the year 1892, into the port of New York, sundry boxes containing a drug known as "elaterium," which was returned by the appraisers as a "medicinal preparation," and duty was assessed thereon by the collector at 25 per cent. ad valorem, under the provision of paragraph 75 of the tariff act of October 1, 1890, which is as follows:

"All medicinal preparations, including medicinal proprietary preparations of which alcohol is not a component part, and not specially provided for in this act, 25 per cent. ad valorem; calomel and other mercurial medicinal preparations, 35 per cent. ad valorem."

The importers protested, claiming that the merchandise was exempt from duty because contained in the free list. They principally relied on the alleged fact that it was a crude drug, and was exempt under paragraph 560 of the same act, which is as follows:

"Drugs, such as barks, beans, berries, balsams, buds, bulbs, and bulbous roots, excrescences such as nut galls, fruits, flowers, dried fibers and dried insects, grains, gums and gum resin, herbs, leaves, lichens, mosses, nuts, roots and stems, spices, vegetables, seeds aromatic, and seeds of morbid growth, weeds and woods used expressly for dyeing; any of the foregoing which are not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially provided for in this act."

The collector's decision was sustained by the board of general appraisers, whose decision was reversed by the circuit court. The United States thereupon appealed to this court. Elaterium is the residue deposited by the juice of the fruit of *echallium elaterium*, which is a little fruit resembling somewhat the cucumber, with a hollow interior filled with juice. The fruit is gathered just before it is ripe, because when ripe it breaks in handling. It is cut in two, when the juice flows out, which is allowed to stand until the sediment is deposited at the bottom. The juice is poured off, and the sediment is dried as quickly as possible, to avoid fermentation. The British Pharmacopoeia contains the following formula for the preparation of the drug as imported:

"Cut the fruit lengthwise, and lightly press out the juice. Strain it through a hair sieve, and set aside to deposit. Carefully pour off the supernatant liquor, pour the sediment on a linen filter, and dry it on porous tiles, in a warm place."

It is imported in little cakes, and varies much in quality. It is not used in this form by the physician. The manufacturer extracts from the cakes their vital principle, which is known as "elaterine." The imported article is not a medicinal preparation. It is an article from which a medicinal preparation can be made. It is a deposit from the juice or is the evaporated juice of the fruit, and from it its active principle is subsequently extracted. The contention of the United States, that, if not a medicinal preparation, it is, under paragraph 560 of the act of October, 1890, a drug which has been advanced in value or condition by refining or grinding, or by some process of manufacture, cannot be sustained. It is not only a drug, but a crude drug, and is the crudest form in which elaterium is known. It is not reasonable to call the simple process of evaporation and of drying, by which it has been brought into the condition of a drug, a process of manufacture which has advanced the article beyond the condition of a crude drug. The juice has become, by evaporation and drying, a crude drug, but nothing more. The decision of the circuit court is affirmed.

PENROSE v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA.

(Circuit Court, D. Montana. November 19, 1894.)

No. 251.

1. PLEADING—EXHIBIT ANNEXED TO COMPLAINT.

Annexing to a complaint, as an exhibit, a copy of a contract sued upon, and referring to the same in the complaint, does not take the place of positive allegations of the terms of such contract, according to their legal effect or in haec verba.

2. SAME.

P. sued an insurance company upon a policy of insurance, alleging that said company had agreed to pay to plaintiff \$5,000 in case of the death of her husband from "violent injuries," and that her said husband had died in consequence of "violent injuries." A copy of the policy was annexed to the complaint, as an exhibit, by which it appeared that the insurance was against "violent and accidental injuries." *Held*, that the exhibit could not be taken as, adding allegations to the complaint, and since, excluding the exhibit, the complaint stated a complete cause of action, it was not demurrable.

This was an action by E. A. Penrose against the Pacific Mutual Life Insurance Company of California upon a policy of insurance. Defendant demurred to the complaint.

George Haldorn, for plaintiff.

Thos. C. Bach, for defendant.

KNOWLES, District Judge. This is an action on what is termed an "accident policy." The complaint contained this allegation:

"That, under the terms of said policy of insurance, defendant agreed that in case W. J. Penrose did, during the continuance of said policy, sustain such violent injuries, which alone should cause his death within ninety days from the time of the happening of such accident, then the said defendant should pay to the plaintiff, if surviving, the sum of five thousand dollars; that the said W. J. Penrose did during the continuance of said policy sustain such violent injury, which caused his death within ninety days from the happening thereof; and that defendant had due notice and proof thereof, as required by the terms of said policy."

Plaintiff made the policy of insurance an exhibit and part of the complaint.

In looking at the policy of insurance, I find therein, after stating the amount for which said W. J. Penrose was insured, this:

"The said sum to be paid to Mrs. E. A. Penrose, wife, if surviving (if dead, to the legal representatives of the insured), after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which alone shall have caused his death within ninety days from the happening of such accident."

Defendant demurred to the complaint, for the reason that the same did not state facts sufficient to constitute a cause of action. If the policy was as stated in the allegations of the complaint, I do not see but it states a cause of action. The trouble is, not that it does not state a cause of action, but that plaintiff in her complaint has not stated the contract of insurance correctly. It is not the same contract set forth in the exhibit.

Whether or not the plaintiff should have stated that under the terms of the policy of insurance defendant agreed that in case W. J. Penrose did during the continuance of said policy sustain such violent and accidental injury, is a question that does not arise in such a demurrer as is presented in this case. It might arise on a plea of non est factum. Whether or not the plaintiff should have alleged that W. J. Penrose "did sustain such violent and accidental injury" as occasioned his death, might arise under the demurrer if plaintiff had set forth the contract in the alleging part of the bill. As a rule, an exhibit is not considered as an allegation of the facts it contains. *Fitch v. Cornell*, 1 Sawy. 156, Fed. Cas. No. 4,834; *Oh Chow v. Hallett*, 2 Sawy. 259, Fed. Cas. No. 10,469. Under what is termed "code pleading," the facts constituting the cause of action should be stated. A contract may be stated according to its legal effect or in *haec verba*. In setting forth a contract in *haec verba*, the language of the contract is used in stating the same in the pleading. This view of code pleading is supported by *Pom. Rem. & Rem. Rights*, § 526. In declaring upon a contract at common law, the setting forth the contract according to the legal effect, or in *haec verba*, was the rule of pleading. Then the allegations were that the parties entered into a contract, using the words thereof, if declared upon in *haec verba*. 1 Chit. Pl. 313, 314.

The rule in regard to the profert of a written instrument shows that the stating of a contract in *haec verba* was not considered as setting forth a copy of a contract. Oyer of a contract could still be demanded. *Id.* 378-446; *Shipman*, Com. Law Pl. 105. I do not think that in using the language that a contract should be stated according to its legal effect, or in *haec verba*, any different rule is sought to be established in this regard from what prevailed at common law. There are some decisions of the supreme court of California which seem to be to some extent in conflict with the views here expressed. *Stoddard v. Treadwell*, 26 Cal. 294; *Murdock v. Brooks*, 38 Cal. 596. A reference to an exhibit, however, to supply a deficiency in the allegations of a complaint, has been held by the same court not to be sufficient. *City of Los Angeles v. Signoret*, 50 Cal. 298. In the case of *Blasingame v. Insurance Co.*, 75 Cal. 633, 17 Pac. 925, it was held that a variance between the allegations of a complaint and the facts appearing in a copy of a policy, attached to and made a part of the complaint, could not be raised by a general demurrer that the complaint did not state facts sufficient to constitute a cause of action. To the same effect is the case of *Mendocino Co. v. Morris*, 32 Cal. 145. Taking these cases altogether, and I think it is evident that it cannot be considered settled that the citing of an exhibit as part of a pleading can be considered as taking the place of the positive allegations of the terms of a contract in a complaint, according to their legal effect or in the very terms of the contract.

The allegation in the complaint is that defendant made and issued to said W. J. Penrose a certain policy of insurance, a copy of which is thereto annexed, marked "Exhibit A," and made a part of the complaint. Under this allegation there might be an issue joined

as to whether or not the exhibit was a copy of the contract sued on, if it was material. I think that the attaching of an exhibit to a complaint is proper enough, as taking the place of proffert and oyer at common law. Excluding the exhibit from the complaint, and it would appear that the complaint stated a cause of action. The breach of the contract, as alleged, is sufficient. If the copy of the contract could take the place of the allegations as to the same, the breach assigned would not be sufficient, it is evident. For the reasons assigned, the demurrer is overruled.

McDONALD v. UNITED STATES.

(Circuit Court, D. Montana. November, 19, 1894.)

No. 280.

1. SUITS AGAINST THE UNITED STATES—DUTY OF COURT TO EXAMINE EVIDENCE.

It seems that, under the act to provide for bringing suits against the United States (Supp. Rev. St. p. 559), it is the duty of a court before which such a suit is brought to examine into the evidence to sustain the claim, even if the pleading interposed by the district attorney on behalf of the government presents no defense.

2. SAME.

Upon consideration of the evidence presented in support of a claim against the United States for salary as a clerk in the office of a district attorney from March 12, 1891, to December 31, 1892, *held*, that the claimant was not employed after December 31, 1891.

George F. Shelton and J. A. Carter, for plaintiff.
Preston H. Leslie, for the United States.

KNOWLES, District Judge. This is an action on the part of the petitioner, against the United States, to recover the sum of \$2,737.50. In an act entitled "An act to provide for the bringing of suits against the government of the United States" (Supp. Rev. St. U. S. p. 559), it is provided—

"That the court of claims shall have jurisdiction to hear and determine the following matters: First. All claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable."

Section 2 of said act provides—

"That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claims exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury."

In proceeding in the district and circuit courts under this act, they—

"Shall be governed by the law now in force in so far as the same is applicable and not inconsistent with the provisions of this act, and the course of procedure shall be in accordance with the established rules of said respective courts and of such additions and modifications thereof as said courts may adopt."

In his petition the plaintiff sets forth—

"That his claim is for clerical services in the office of the United States attorney for the district of Montana, all in the years 1891 and 1892; that, pursuant to authority from the attorney general of the United States therefor, plaintiff began said services on or about the 12th day of March, 1891, under an appointment by the said United States district attorney, at an annual salary of fifteen hundred dollars, and continued said services, under said appointment, and at the request of said attorney general and the said United States, up to and including the 31st day of December, 1891."

In the answer of the United States, filed by United States District Attorney Weed, the United States admits that, by authority of the attorney general of the United States, plaintiff performed certain clerical services in the office of the United States district attorney for said district, commencing on or about the 12th day of March, A. D. 1891, at an annual salary of \$1,500, and continuing said services up to the 1st day of December, A. D. 1891, and not longer.

There would not appear, considering the ordinary rules of pleading, that there was any issue of fact to be tried upon the issue here presented.

The ground for the second claim is thus set forth in the petition:

"That, pursuant to authority from the said attorney general therefor, plaintiff continued in said services from January 1, 1892, to December 31, 1892, both dates inclusive, under an appointment by the said attorney general and the said United States district attorney, and at an annual salary of fifteen hundred dollars, for services as a clerk in the office of the said United States district attorney, no part of which has been paid."

Instead of meeting this allegation by a direct denial, the United States attorney sets forth this affirmative matter:

"Defendant, by its said attorney for the district aforesaid, who appears for and on behalf of the defendant in this action, alleges that on said 1st day of December, A. D. 1891, the said plaintiff, John M. McDonald, was duly appointed by the attorney general of the United States as assistant United States district attorney for said district, at a salary of twelve hundred (\$1,200) dollars per annum, and alleges that said appointment at the annual salary of twelve hundred (\$1,200) dollars continued from said 1st day of December, A. D. 1891, up to the 1st day of January, A. D. 1893, when said appointment and term of service as said assistant United States district attorney for the district of Montana, at the compensation aforesaid, was terminated by direction of the attorney general of the United States."

While these allegations in the answer do not meet the issue presented in the petition directly, I think they were intended to do so indirectly. That is, it was sought to allege matter which would be inconsistent with the allegations in the petition. As a matter of fact, however, there is not any incompatibility in plaintiff holding both the position of clerk in the office of the United States district attorney and that of assistant to the said attorney. Neither office

has a salary of \$2,500 per annum attached thereto. Section 6 of the aforesaid act, giving jurisdiction in such cases as this to the circuit court (Supp. Rev. St. U. S. p. 561), contains this provision:

"Provided, that, should the district attorney neglect or refuse to file the plea, answer, demurrer or defense as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises, but the plaintiff shall not have judgment or decree for his claim or any part thereof unless he shall establish the same by proof satisfactory to the court."

Perhaps, under the provisions of this statute, the court is called upon to examine into the evidence presented in the case. The matter under consideration is the second claim, and, if the United States had a defense to the same, the answer does not present it. Certain letters from the departments of the general government are presented in evidence, for the consideration of the court, as bearing upon the issues presented. On the 10th of February, 1891, the United States attorney general wrote to District Attorney Weed:

"On the 26th ultimo you ask for the appointment of an assistant attorney at a compensation to be allowed from the emoluments of your office in excess of your maximum. Whenever an appointment is made in the manner mentioned, it is a difficult matter to get a settlement through the accounting officers of the treasury. The better way seems to be that you appoint a person for the discharging of clerical services in your office at a compensation not exceeding \$1,500; such person to be an attorney at law, who can assist you in the court. If you are willing to appoint Mr. McDonald, his appointment as an assistant is authorized upon the further condition that he is to understand that he can have no account against the United States for services, but is to look exclusively to you for compensation."

This letter seems to have been the one acted upon, and under which plaintiff was appointed a clerk for Mr. Weed on the 12th day of March, 1891. Under this appointment, from the allegations in the petition, it appears petitioner served as clerk up to the 31st day of December, 1891. It was suggested when this case was presented to the court that this letter shows that the services plaintiff rendered as clerk was to be paid by District Attorney Weed. I do not think that is a proper construction of that letter. There is a difference between an assistant to a district attorney and one performing clerical work for such an attorney. From the language used in section 363, Rev. St., it would appear that, when an additional attorney for the United States is employed, he should be termed an "assistant to the district attorney," or an "assistant district attorney." If the attorney general understood when he suggested that the district attorney should employ some one to do clerical services that he should be his assistant attorney, he would not have suggested that he pay him \$1,500 a year, and take it out of his own salary. If the district attorney was to engage an assistant, and pay him out of his own salary, the attorney general would have left the salary for this assistant to be fixed by the district attorney himself. I have presented this view of the said letter of the attorney general because I may wish to refer to it hereafter.

In regard to the appointment of plaintiff for the year 1892 as a clerk, there is no evidence that Mr. Weed gave him this appointment. It is alleged that he was appointed both by the attorney general

and Mr. Weed. On March 30, 1892, plaintiff was appointed an assistant to the district attorney, district of Montana. In the letter making this appointment, the attorney general says:

"This appointment is in lieu of the one dated December 1st, 1891, which is hereby revoked, as are also all other appointments, and letters authorizing the payment to you of extra compensation."

The letter appointing plaintiff on December 1, 1891, is not in the record. Whatever authority District Attorney Weed had to appoint plaintiff to a clerical position by virtue of the letter of March 30, 1891, was hereby revoked. That this was the understanding, I think, fully appears from a letter from the attorney general dated May 5, 1892. In this he says:

"In answer to your application of April 22, 1892, you will place this letter in the hands of the United States attorney, E. D. Weed, as his authority for allowing you compensation per annum of \$800, beginning with January 1, 1892, for services rendered to him as a clerk in his office, payable from the emoluments of the district attorney."

Whether or not District Attorney Weed made him this allowance does not appear in the petition, and it does not appear from any accounts in evidence presented to the auditor's department of the general government. The claim seems to have been made for \$1,500 for clerk hire for plaintiff in District Attorney Weed's accounts for 1892. But there was evidently no authority shown for appointing plaintiff clerk for that year at that salary, received from the attorney general.

It appears from the reports from the treasury department (comptroller's office) that plaintiff presented claims for allowance in the United States district attorney's office for both the years 1891 and 1892. It would appear from a letter from the first comptroller that the vouchers furnished by the said District Attorney Weed for these years from plaintiff was for an assistant to the said district attorney. It is evident from this letter that plaintiff and District Attorney Weed considered this a mistake. Considering the first claim for \$1,237, there is an implied authority in the letter of March 30, 1891, given to Mr. Weed, as United States district attorney, to appoint plaintiff his clerk at a salary of \$1,500 per year. Whether that letter, however, gives this authority or not, it is admitted in the pleadings, by the answer of the United States, that he was appointed under such authority, and served under that appointment up to December 31, 1891. In the case of *U. S. v. McDaniel*, 7 Pet. 1, the supreme court said:

"It is insisted that, as there was no law which authorized the appointment of the defendant, his services can constitute no legal claim for compensation, though it might authorize the equitable interposition of the legislature. That usage, without law or against law, can never lay the foundation of a legal claim, and none other can be set off against a demand by the government. A practical knowledge of the action of every one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise this discretion. He is limited in the exercise of its powers by the law, but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles."

It is evident from the views expressed throughout this decision that the attorney general had the right to authorize District Attorney Weed to employ plaintiff as a clerk, and that, he having done so under such authority, plaintiff is entitled to the compensation provided in the employment. It is admitted that had the said district attorney employed plaintiff as an assistant attorney, under the terms of said letter, plaintiff would have had to look to Mr. Weed for the payment for his services. If plaintiff had brought his second claim within the authority conveyed in the letter of May 5, 1892, then this court might be called upon to determine whether or not he was entitled to the same, considering the provisions of section 1765, Rev. St. In construing this very statute, Chief Justice Taney, in the case of *Converse v. U. S.*, 21 How. 463, said (referring to the acts of congress which are embodied in said section 1765):

"But they can, by no fair interpretation, be held to embrace an employment which has no affinity or connection, either in its character, or by law or usage, with the line of its official duty, and where the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law."

This language was referred to in the case of *U. S. v. King*, 147 U. S. 680, 13 Sup. Ct. 439, and recognized as the position of the supreme court on this point.

If this matter had been properly presented to the court, it would have had to determine whether or not the duties of a clerk in a United States district attorney's office had any affinity or connection, either in its character, or by law or usage, with that of an assistant to a United States district attorney. It is a question not free from difficulty. There are some duties, undoubtedly, expected of and demanded of a clerk in a lawyer's office that it would not be expected a mere assistant attorney would undertake. It is apparent, however, from the letter of the attorney general, which seems to have been the authority under which it is claimed plaintiff was appointed clerk for the said district attorney, that it was expected that plaintiff would, to some extent, perform the services of an assistant to District Attorney Weed. There seems to be a claim that, for whatever plaintiff is entitled to, he can be paid only out of the emoluments of District Attorney Weed's office, and, there not being emoluments to pay him, after paying District Attorney Weed his maximum allowance and other items charged in his account, owing to the disallowance of certain items in said district attorney's accounts, he cannot recover. This does not appear to have been the contract with plaintiff. Neither the petition nor answer set up any such contract. If there was any such contract, the claim of plaintiff for services should not have been disallowed, without any conditions. There was some \$2,010 of suspended items in the account of District Attorney Weed, which might in time be allowed. Some of the suspended or disallowed charges, as a matter of law, Mr. Weed might be entitled to. What he claimed as gross emoluments was \$9,687.80 for the year 1891. This more than covered all charges he made for expenses. For the year 1892, plaintiff was paid a salary of \$1,200 per annum as assistant to the district attorney.

The court finds as follows:

First. That from the 12th of March, 1891, to the 31st day of December, 1891, plaintiff performed services for the United States, as clerk in the office of the United States district attorney for the district of Montana; that he was employed to perform said services for the United States by E. D. Weed, the United States district attorney for the district of Montana, and his salary was fixed at \$1,500 per annum; that said Weed was duly authorized to so employ plaintiff at said salary.

Second. That plaintiff was not employed in said capacity as a clerk after December 31, 1891, by said Weed, under any authority from the attorney general of the United States.

As a conclusion of law, I find that plaintiff is entitled to a judgment against the United States for the sum of \$1,237.50.

WALLACE v. STANDARD OIL CO.

(Circuit Court, D. Indiana. March 6, 1895.)

No. 9,168.

1. NEGLIGENCE—DANGERS INCIDENT TO EMPLOYMENT.

One B., a boy of 17, was employed by the S. Co. in handling coal oil and other inflammable fluids in and about the premises of the S. Co. B. was ignorant and inexperienced, and unacquainted with the inflammable character of the oils he handled, and had been told by W., the agent of the S. Co. in charge of its premises, that there was no more danger in approaching a fire, when his clothes were saturated with such oils, than if they were wet with water. On a cold day, when B. had been handling oils out of doors, he was instructed by W. to go into the office, where there was a hot fire in a stove, to warm himself. The door of the office was fastened with a lock which was defective, and could sometimes not be opened from the inside, which fact was known to both B. and W., and W. had promised to repair the lock. B. went into the office, where his clothes caught fire from the stove, and, being unable to escape by the door, he leaped from a window, and, in consequence of the injuries sustained thereby, and of his burns, he died. *Held*, on demurrer to a complaint stating these facts, that the failure of the S. Co. and its agent, W., to instruct B. as to the dangers incident to his employment, in reference to the liability of his clothes to catch fire when saturated with oil, especially when instructing him to go to the stove to warm himself, was negligence rendering the S. Co. liable for damages.

2. SAME—PROXIMATE CAUSE.

Held, further, that the failure to repair the defective lock was not the proximate cause of the injury, and would not support an action.

This was an action by Hattie Wallace against the Standard Oil Company to recover damages for the death of her son, alleged to have been caused by defendant's negligence. Defendant demurs to the complaint.

Stansifer & Baker, for plaintiff.

Elmer E. Stevenson and Waltman & Brown, for defendant.

BAKER, District Judge. The complaint charges that the defendant was engaged at Columbus, Ind., in the business of handling,

transporting, and selling coal oil, turpentine, gasoline, and other inflammable oils, and occupied for that purpose a building of three rooms, two of which were above and one was below; that one of the upper rooms was 10 feet square, and was used as an office, and contained oil cans, small tanks, oily working clothes, a cot with rugs and quilts, an office desk and stove; that it had a window on the east side, and a door and a window on the north side; that the floor thereof was 10 feet above the ground on the east side, and 2 feet above the ground on the north side; that the door had a defective lock, and the north window was shut up and closed by a large and heavy office desk, which had been placed against it; that the plaintiff's son, George W. Barcus, aged 17 years, was employed by the defendant in handling the oils; that nearly all of such work was done on the outside of the building, and by him; that on the 30th day of March, 1894, which was a damp, cold, and chilly day, Barcus was so handling the oils under the direction of W. M. Wallace, who was the agent of the defendant in charge of its business at Columbus, Ind.; that the clothes of Barcus became saturated therewith, and, being cold and chilly, he was directed by Wallace to go into the office, and warm himself; that there was a hot fire in the office stove, which had been made by Wallace; that Barcus went into the office, and closed the door; that while in the office his clothing and other articles therein caught fire from the stove; that Barcus endeavored to escape through the door, but was unable to do so, on account of the defective lock, by means of which the door had become fastened and could not be opened from the inside; that he thereupon leaped through and from the east window to the ground below; that in doing so he was cut by the window glass, jarred and bruised, and that he died on the day following, as a result of his burned, bruised, and wounded condition. It is further averred that Barcus was ignorant and inexperienced, and wholly unacquainted with the inflammable character of the oils that he was engaged in handling for the defendant; that he had been told by Wallace that there was no more danger in going to the hot stove with his clothes saturated therewith than if his clothes were wet with water; that Barcus believed and relied on these statements; that the bad character of the lock was known to both Wallace and Barcus; that Wallace had promised Barcus to repair the same, and Barcus relied on the promise of Wallace to do so; and that Barcus was wholly without fault in the premises. The defendant demurs to the complaint because it does not state facts sufficient to constitute a cause of action against it.

The complaint is in a single paragraph, and charges negligence in failing to repair the defective lock, and also in failing to instruct the decedent in respect to the dangers incident to his employment. By reason of his youth and inexperience he is alleged to have been ignorant of the danger from fire by reason of his clothes becoming saturated with dangerous and inflammable oils and gases in the course of his service. The defective condition of the lock, and the failure to repair it, as promised, which caused the door to become fastened so that it could not be opened, were not the proximate

cause of the decedent's death. At most, it was a condition which gave opportunity for the fatal result which followed the accident. The condition of the decedent's clothes, which were saturated with dangerous and inflammable oils and gases, and his proximity to the overheated stove, were the immediate cause of his injury and death. So much of the complaint, therefore, as relates to the defective lock, and to the fastening of the door so that it could not be opened in consequence of it, does not state a separate cause of action. This part of the complaint would not support an action on the ground that the master had promised to repair the defective lock, and the servant had continued in the master's employ on the faith of such promise, because the injury complained of was not the result of such defect and breach of promise. The cases to which this rule applies are those in which the defective tools, machinery, and appliances which the master has promised to repair are the proximate cause of the injury, and are essential to the service which the servant was required and undertook to perform, and which were furnished to him for use in such employment. The utmost effect which can be attributed to this part of the complaint is to excuse the decedent from the charge of negligence in going into a room having a door liable to become fastened in consequence of the defective lock.

If the plaintiff has a cause of action, it is on account of the master exposing a young and inexperienced boy to the danger arising from the saturation of his clothes with dangerous and inflammable oils and gases in the course of his employment, and in failing to instruct him in regard to the hazards arising therefrom, and in assuring him that his clothes, when so saturated with such oils and gases, were no more liable to take fire than they would be if they were wet with water. It is the duty of the master to instruct an infant servant, who, by reason of his youth and inexperience, is ignorant of them, in regard to all the dangers incident to and growing out of the service in which he is employed. This duty is not discharged so as to exonerate the master from liability by mere general instructions, but they must be so full, plain, and specific as to bring to the knowledge and understanding of such infant the dangers incident to and growing out of his employment. This duty is the master's; and the agent, employé, or servant who may be delegated to perform it stands in the master's place, and his negligence is the master's negligence. In the performance of that duty, the servant, whatever his grade, is a vice principal, and speaks and acts for the master. The defendant owed the decedent the duty of instruction, so that he might fully understand and avoid the danger from fire arising from the nature of his employment, and, instead of performing that duty, he misled the decedent by the false assurance that there was no danger from fire. This was a plain breach of duty, and, if the injury complained of resulted from such breach of duty, the complaint must be held sufficient. If his clothes had taken fire from exposure to it while the decedent was actually engaged at work for the defendant, there could be no serious dispute concerning its liability under the circumstances. It is said that the accident was one which ought not to have been anticipated by the defendant, and

was not a probable result of the saturation of his clothes with oils and gases. It seems to me that this contention is unfounded. The danger of the ignition of clothes, when saturated with oils and gases as alleged, by exposure to fire, is obvious, and is one which the defendant was bound to take notice of. It is equally obvious that the decedent, in the cold days of winter and spring, would be likely to be about fires, and in dangerous proximity to them, while his clothes were impregnated with oils and gases, especially if he was told by his employer that there was no danger in so doing, and he believed what he was told. The decedent was guilty of no negligence in acting on the direction of the representative of the defendant in going dangerously near to the hot stove in question. He went where he had a lawful right to be. His danger in so acting arose from conditions incident to the service, which conditions continued to be present with him, and caused the burning of his clothes and subsequent death. This ignition of his clothes, and injury therefrom, were the direct result of the condition of his clothes incident to his employment. While the boy was sent to warm himself by his employer, he did not cease to be in its service, and he was, it seems to me, as much entitled, under the circumstances, to charge the defendant for its failure of duty to instruct, as though, at the time of the accident, he had been actually at work in the room. His clothes, saturated with the dangerous and inflammable substances mentioned, continued to be a source of danger, while unremoved, after, as well as during, his hours of actual service; and, in my opinion, it was actionable negligence to direct the decedent to go into the room containing the hot stove, even if the direction were only permissive, without instructing him in regard to the danger from a too near approach to it. The demurrer will be overruled.

CLARK v. EVANS et al.

(Circuit Court of Appeals, Eighth Circuit. January 2, 1895.)

No. 471.

NEGOTIABLE INSTRUMENTS—CONSTRUCTIVE KNOWLEDGE.

Knowledge of such facts as would put a prudent man on inquiry in reference to negotiable paper is, in the absence of bad faith, not sufficient knowledge to affect the rights of a purchaser for value and before maturity.

In Error to the United States Court in the Indian Territory.

This was an action by Mary T. Clark against R. A. Evans and N. P. Blackstone, as partners, under the name of R. A. Evans & Co., on a promissory note. Defendants had judgment, and plaintiff sues out this writ of error.

Francis M. Wolf, R. V. Bowden, and J. H. Koogler, filed brief for plaintiff in error.

William T. Hutchings, filed brief for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was commenced in the United States court in the Indian Territory by Mary T. Clark, the plaintiff in error, against R. A. Evans and N. P. Blackstone, as partners, under the name and style of R. A. Evans & Co., to recover the contents of a promissory note for the sum of \$416.67, dated May 1, 1891, made by R. A. Evans & Co., payable to the order of T. A. Kyle, 12 months after the date thereof, and by Kyle indorsed to the plaintiff. The defense was that the note was obtained from the makers by fraud, and was without consideration, and that the plaintiff had knowledge of these facts before she purchased the same. The plaintiff claimed to have purchased the note in good faith and for value before maturity. There was evidence tending to support the contention of each party. The defendants had the verdict and judgment, and the plaintiff sued out this writ of error.

In the course of its charge the court told the jury:

"But if you believe that this note had its inception in fraud,—that is, that a fraudulent representation was made to the makers of the note by which the note was acquired,—and if you further believe that the plaintiff knew that this note, at the time she purchased it, had been acquired through fraud, or had knowledge of such facts as would put a prudent man on inquiry, and that inquiry, if prosecuted, would have led to a knowledge of the fraud, then you will find for the defendants."

Exception was taken to this paragraph of the charge, and error has been assigned thereon. The charge was erroneous. "Knowledge of such facts as would put a prudent man on inquiry" would not affect the right of the plaintiff to recover if she was otherwise a bona fide holder for value. One who purchases a negotiable note for value before maturity does not owe the maker the duty of making active inquiry into the origin or consideration of the note, before purchasing the same. His right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper. "Knowledge of such facts as would put a prudent man on inquiry" will not suffice.

In *Murray v. Lardner*, 2 Wall. 110, 121, the court say:

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith."

And in *Hotchkiss v. Banks*, 21 Wall. 354, 359, the same court said:

"The law is well settled that a party who takes negotiable paper before due for valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance, and the burden of proof lies on the assailant of the title."

See, to same effect, *King v. Doane*, 139 U. S. 166, 11 Sup. Ct. 465; *Kneeland v. Lawrence*, 140 U. S. 209, 11 Sup. Ct. 786. The

rule announced by the supreme court in these cases is now the settled doctrine. The cases sustaining it are too numerous for citation. For cases in point, and for citations to the authorities generally, see *Hopkins v. Withrow*, 42 Ill. App. 584; *Wilson v. Denton*, 82 Tex. 531, 18 S. W. 622; *Bank v. Stanley*, 46 Mo. App. 440; *Richardson v. Monroe* (Iowa) 52 N. W. 340.

The judgment of the United States court in the Indian Territory is reversed, and the cause remanded, with directions to grant a new trial.

DEXTER HORTON & CO. v. SAYWARD.

(Circuit Court, D. Washington. June 7, 1894.)

1. CONTRACTS—INTERPRETATION.

In 1880 one M. owned a sawmill, a large quantity of timber land, and several vessels in which the lumber manufactured at the mill was shipped. This property was subject to numerous liens, by way of mortgage, judgment, and otherwise, some of which were in process of foreclosure or about to be foreclosed. M. sold the property to one S. Shortly after acquiring the property, S. went to C. & H., dealers in supplies, who had previously been furnishing supplies to the mill, and, after a conference with them and their attorney, gave them a written authority to furnish such supplies and money as were needed for the mill, and charge the same to the account of S. S. also appointed M. his agent, giving him general authority to protect his interests in the property. C. & H. furnished supplies to the mill, and also, from time to time, furnished money to pay off or buy up sundry liens upon the property, rendering monthly statements of account to M., as S.'s agent, showing such advances, which statements were entered in S.'s books at the mill, which were open to his inspection on frequent visits to the mill. This course of dealing continued for a long time. C. & H. assigned their claim to D., who brought an action against S. to recover the advances. It appeared that the written authority to S. had been lost, and its exact terms could not be proved. *Held*, that it was established by the evidence that such an authority to advance moneys needed for the mill had been given, and that, under the circumstances of the property at the time, such authority included advances for the purpose of paying off or avoiding foreclosure of liens.

2. PRINCIPAL AND SURETY—JUDGMENT AGAINST SURETY AS EVIDENCE.

A judgment against a surety is at least prima facie evidence against the principal, though he was not notified of the action.

This was an action by Dexter Horton & Co. against W. P. Sayward upon an alleged contract of guaranty. Heard on defendant's exceptions to the report of a referee.

E. C. Hughes and E. F. Blaine, for plaintiff.

Battle & Shipley, for defendant.

BELLINGER, District Judge. On the 7th day of February, 1880, George A. Meigs was the owner of a tract of land at Port Madison, Wash., and sawmill and plant, of a capacity of from one to two hundred thousand feet of lumber daily, situate thereon. Prior to that date, the Meigs Lumber & Shipbuilding Company, a corporation, was organized by Meigs and others, he being the owner of a great majority of the stock, and the president, general manager, and agent of the corporation. The corporation owned large tracts of

timber lands, amounting to about 16,000 acres, in different counties of Washington, and a fleet of vessels used in the lumber trade, and was engaged in operating the sawmills and conveying the lumber manufactured to market by means of the vessels. Both Meigs and the Meigs Lumber & Shipbuilding Company became indebted in large amounts, to secure a part of which indebtedness Meigs and the company executed mortgages upon the property mentioned to E. Bourne, trustee, Bartlett Doe, and others. These liens, with others then existing, amounted to about \$300,000. On February 7, 1880, suits were pending to foreclose certain of these mortgages, and an attachment had been levied upon the mill and plant and the Port Madison land at the suit of one Judson, upon a claim for about \$20,000 against the Meigs Lumber & Shipbuilding Company. Two of the vessels, the Northwest and Tidal Wave, were also in custody of the court under other process, and were being navigated under its direction. Including the Judson action, there were cases pending against Meigs and the company involving an aggregate of about \$250,000. Prior to this time, Dexter Horton & Co. had recovered a judgment against Meigs and the company, upon which there remained unpaid \$10,974.40. F. M. Guye had also recovered a judgment against such parties, upon which there remained unpaid \$1,905.29. Both of these judgments were liens upon the property of the judgment debtor. On February 7, 1880, Meigs, and the company, acting through Meigs, conveyed and assigned all the property of each of said parties to the defendant, Sayward, who was then, and has since continued to be, a resident of Victoria, British Columbia, but who was at the time at Port Madison, where he remained until about April 15, 1880. The consideration for the mill and plant and land at Port Madison was \$5,000, which Sayward paid by his check for that amount, which check was given to one Wallace by Meigs, in satisfaction of a debt due the latter from Meigs for services at the mill. Wallace subsequently received out of the earnings of the mill the amount of his debt, whereupon he returned the check to Meigs, by whom it was returned to Sayward, unused. The consideration expressed in the deeds to the other property was \$10. In addition to the check given and returned as just stated, Sayward paid, in consideration of these transfers to him, \$10,000, in discharge of claims and liens against the property, \$4,000 of which was in discharge of a salvage lien against one of the vessels of the fleet mentioned,—the Vidette. It is objected by the defendants that it does not appear that all this \$10,000 was applied as here stated, but this is not material. Meigs and Sayward were old acquaintances, and had formerly been partners in business in Florida and California, and their relation appears to have been one of unusual confidence. Prior to these transfers, the firm of Crawford & Harrington, wholesale and retail dealers in groceries, provisions, and other merchandise at Seattle, had had dealings, in the course of their business, with the lumber company under the name of the Port Madison Mills, and the mill company had on occasions consigned cargoes of lumber in the name of such firm as consignors to liquidate the indebtedness due the firm on account of such busi-

ness. These cargoes had been sold in San Francisco for account of such consignors, Crawford & Harrington, and the net proceeds of the sales credited to the account of the Port Madison Mills upon the firm books; the firm sending from time to time statements to Meigs showing the state of their account with the Port Madison Mills. Shortly after the transfer and conveyance to Sayward, Meigs came to Seattle, and informed Crawford & Harrington of the transfer, and presented an order from Sayward for supplies for the mill, stating that Sayward would come to Seattle in a few days, and make a further or permanent arrangement for supplies. As to this there is no dispute. Plaintiffs claim, and the referee finds, that Meigs at this time instructed Crawford & Harrington to charge all supplies furnished the mill from that date to Sayward, the defendant. This is denied by defendant. The question thus in dispute cuts no figure in the case either way. What took place at this time is only preliminary to what followed, in relation to which it has no special significance. Sayward subsequently did come to Seattle, accompanied by Meigs, and made an arrangement with Crawford & Harrington to furnish the mill with supplies and money, on the defendant's account. The plaintiffs claim and the referee finds that by this arrangement Crawford & Harrington were also authorized to advance such sums of money as should be required from time to time to pay off such indebtedness of Meigs and of the company as constituted liens on the property purchased by the defendant, and as threatened a sale of the property and the shutting down of the mill, which advances were to be charged to the defendant's account with other advances made; that a written order was given to Crawford & Harrington by the defendant which was intended to cover the advances that the firm was authorized to make on the defendant's account; and that this writing was destroyed in the Seattle fire of 1889. Defendant denies that such writing was ever executed, or that there was any authority from him for advances other than for current expenses. Crawford & Harrington made advances to pay current expenses of the mill and supplies therefor, and paid interest on certain judgments against the property, until November, 1880, when the firm was succeeded by Harrington & Smith, who continued to make advances of supplies furnished and moneys advanced to discharge lien debts of the property. Crawford & Harrington and their successors, Harrington & Smith, made advances of supplies and money for current expenses regularly, and also from time to time paid or purchased such judgments as were liens on the property, most of which were compromised at much less than their face, and forwarded to Meigs, who was defendant's agent in the conduct of the business at Port Madison, at the end of each month, itemized statements of all supplies and money so furnished and expended. There was a formal delegation of authority by the defendant to Meigs, under date April 7, 1880, as follows: "I appoint you agent, to protect my interests in lands, mill property, lumber, logs, rents, &c., and vessels, in my absence from Washington Territory." Meigs assumed the conduct of the business of the mills, and continued therein during all the time mentioned, as the agent of

the defendant. In these statements furnished to Meigs as stated, the defendant was debited with all supplies furnished and moneys advanced, and he was credited with all moneys received as the proceeds of cargoes consigned as aforesaid. The balance shown by each statement was carried forward, and became the first item in the next succeeding monthly statement. Three monthly statements so forwarded were each accompanied by a short letter explaining the respective statements, and expressing the wish that such statements would be found correct and would be satisfactory. When received, they were handed by Meigs to the bookkeeper of the defendant at Port Madison, who entered the substance of them in the defendant's books of account, kept in the name of Port Madison Mills. Whether the receipt of these statements or their entry in this way was known to the defendant is a disputed question. No objection was made by Meigs to any considerable item in these accounts, except as to the item of mill insurance. There was no objection to the charges made in the account for sums paid upon debts that were liens on the property. Crawford & Harrington and their successors, Harrington & Smith, took assignments of the judgments and liens in question. Plaintiffs explain this upon the theory that such assignments were merely to secure the moneys advanced on account of such liens, while defendant contends that the firm purchased such liens on their own account. The last monthly statement, which was rendered on September 30, 1891, showed a balance due to Harrington & Smith of \$227,768.86. Prior to the commencement of this action, Harrington & Smith assigned this account to plaintiffs, who bring this action upon such account as upon an account stated.

The questions for decision arise upon exceptions filed by the respective parties to the report of the referee herein. The principal question in the case is as to the liability of the defendant for moneys paid on account of liens upon the property referred to. The referee finds that the defendant authorized Crawford & Harrington to advance such sums as might be necessary to discharge liens upon the property, and thus prevent its sale and the shutting down of the mill, and charge the same to his account. The defendant contends that this finding is not supported by evidence, and this presents the principal point of controversy in the case. If Harrington & Smith had this authority from the defendant, it was contained in the writing claimed to have been given them, and destroyed in the Seattle fire. If there was a writing intended to authorize such advances, its terms are conclusive as to the defendant's agreement respecting them. The plaintiffs, having alleged such a writing, must establish an agreement in the form and of the character alleged. I am of the opinion that there was a written authority of some character. The parties present when this writing was delivered were Crawford and Harrington, of the firm of that name, the defendant, Sayward, Meigs, Frank Hanford, bookkeeper of Crawford & Harrington, and Struve, the attorney of the firm of Crawford & Harrington. The time of the occurrence, according to plaintiffs' witnesses, was in February or March, 1880.

Frank Hanford's testimony is to the effect that the object of the meeting and conversation of the parties was to enable the defendant "to make arrangements with Crawford & Harrington to protect them in carrying the mill, meeting payments, and making advances"; that Crawford & Harrington, having theretofore made advances on account of the mill, had decided to make no more advances, after the transfer to the defendant, without some guaranty on defendant's part; that, for the purpose of arranging for such advances, the defendant and Meigs came to Seattle, when the meeting referred to was had; that defendant handed to Mr. Crawford or to Mr. Harrington a letter authorizing them to make advances, and charge the same to his account; that the defendant inquired if it (the writing) was satisfactory, and was answered by Mr. Crawford that it was. Mr. Hanford continues his testimony as follows:

"Then the conversation did not go into all the details, but the substance of it was that the mills should be able to carry those payments that were spoken of. Q. What payments? A. Those payments that had to be made on judgments according to a certain stipulation,—the Bourne judgment, the Horton judgment, and the Fish judgment, and other judgments which had been —"

The witness was interrupted at this point by an objection, after which he continued as follows:

"And Mr. Crawford stated that those payments would be a large amount of money, and it was necessary to provide for them, and Mr. Sayward expressed full confidence that the mill would be able to take care of them as they became due, but in the meantime he became responsible for all these matters."

In his cross-examination the witness says the order was very brief; that "it was to the effect that the firm of Crawford & Harrington were authorized by that writing to advance whatever might be required to the Port Madison Mills, and charge that account to Sayward"; that it was a general authorization to make advances to the Port Madison Mills. The witness further said that he did not remember that any judgment was specifically referred to.

Mr. Harrington testifies as follows:

"Q. Now, will you state what was said between Mr. Sayward and yourself and Mr. Crawford at that time? A. Well, he wished us to go on furnishing the supplies and advancing the money for whatever amount Mr. Meigs needed to pay off the bills against the mills, such as judgments, etc., and he further sent a written order. But the order is now lost. I think it was lost during the fire. But it was a written order to Crawford & Harrington to supply them with what they required. Q. And how was it to be charged? A. To W. P. Sayward. The account was then and there charged to W. P. Sayward, and the bill sent every night, and at the end of the month a written statement was sent."

It was argued with much force that, where a party is to be charged for advances made solely on his agreement to repay the same, the testimony to establish such agreement should be direct and explicit; that the terms of the agreement should be proved with such directness that nothing is left to inference; that in this case the terms of the writing and the language used by the parties at the time, as testified to by Harrington and Hanford, are general, and are fully answered by advances for the ordinary expenses of the mill; that it cannot be gathered from this testimony that advances

to pay judgments were authorized, except as an inference drawn by these witnesses from the facts to which they testify. Assuming that the authority given to Crawford & Harrington was to advance whatever might be required to the Port Madison Mills, as testified to by Hanford and Struve, or that it was to advance the money for whatever amount Mr. Meigs needed to pay off the bills against the mills, as testified to by Harrington, this does not necessarily exclude advances to pay off judgments that were threatening the property. In other words, if the reference to judgments and liens in the testimony of these witnesses is treated as mere matters of opinion or inference on their part, and if it be accepted as the fact that the advances authorized were to be of whatever money or supplies were "required" or needed for the Port Madison Mills, there is no such fixed meaning in these words as excludes the advances in question. Of course, it does not follow that they were necessarily included. Thus considered, the language of the obligation leaves room for construction as to whether advances "required" or "needed" by the mill or by Meigs for the mill were intended to include those in dispute. "The situation of the parties at the time and of the property which is the subject-matter of the contract, and the intention and purpose of the parties in making the contract, will often be of great service in guiding the construction, because, as has been said, this intention will be carried into effect so far as the rules of language and the rules of law will permit." 2 Pars. Cont. 499.

At the time the arrangement in question was entered into between Crawford & Harrington and the defendant, the mill property was under mortgage to the aggregate amount of \$300,000, and foreclosure suits were pending for the aggregate amount of above \$200,000. There was also an attachment levied upon all the property in an action for \$20,000, and two of the vessels of the concern were being navigated under legal custody. It was in such a state of the property that the defendant made the arrangement in question for advances of whatever amount Mr. Meigs needed to pay off the bills against the mill,—of "whatever might be required by the Port Madison Mills." It is not, in the nature of things, possible that at such a juncture the meeting of parties testified to could have been had to provide for the requirements of the mills without, at least, considering these lien debts and proceedings. The business could not continue without providing for liens as well as current expenses. There was equal necessity for provision for both requirements, and there was therefore equal reason why the defendant should assume responsibility for both. He could not safely assume large obligations for operating expenses unless the continued operation of the mill could be guaranteed. On the other hand, Crawford & Harrington had as much reason to require a guaranty for advances of one kind as for another. True, they took assignments of such judgments as they provided for; but they also arranged for consignments to them of all product of the mills. If the security of the liens was sufficient to induce advances to discharge lien debts, the consignments provided for should have sufficed to secure advances for operating expenses. There was greater incentive to the owner

to guaranty advances to satisfy lien debts than there was for a third person to do so upon the security of such liens. Crawford & Harrington had only the consideration of keeping a customer for their merchandise. They were not lending for interest. That was not their business, and much of the money advanced by them to settle these judgments was obtained by paying discount, and was charged to the defendant, without anything being added for themselves. All interest charges were at current rates. It is in evidence that the defendant was of the opinion that the earnings of the mills would in a little time pay all debts; that this might be done in one good year. Crawford & Harrington had only the profits on sales of merchandise to the mill to compensate them for all these advances, while the defendant had the preservation of the property, which he thought capable of earning enough in one good year to pay all its debts. The advantage was enormously in his favor, as it appeared at the time. It is incredible that in such a situation there should have been a conference between the parties and a discussion of the means to provide for continuing the operation of the mills, ending in an agreement for such provision, without taking the foreclosure and attachment proceedings into consideration, or intending any provision for these and like demands. It is safe to conclude that the witness Hanford is not mistaken when he says: "I cannot say that any specific judgment was named that day; simply these lien claims. It was well understood, however, what they were." The object of the conversation was for Mr. Sayward to make arrangements with Crawford & Harrington to protect them in carrying the mill,—meeting payments and making advances. What was subsequently done in pursuance of this arrangement is conclusive as to how it was understood by the parties. The witness Hanford, following what is just quoted, says:

"It may be an inference, but, if you have a matter talked of in your presence and in your store for days and weeks at a time, it would make a strong impression. * * * It was a good while ago, and the impressions of the conversation are very distinct, while perhaps the language may not be. I remember very distinctly the circumstances, however, and the policy that was adopted by the house from that time in consequence of it."

It is not a valid objection to this testimony that the witness' recollection of what was agreed upon is re-enforced by what was done in pursuance of the agreement. The conduct of the parties in pursuance of an agreement, when good faith is conceded, may be safely relied upon in determining what is otherwise doubtful in the agreement. In this case the advances made on account of liens were charged in the monthly statements of account with other advances of money and merchandise. These accounts were entered in the books of the mill company. There was no objection from Meigs or from the defendant, except as to certain items not material to be considered in this connection. The balances from each month were carried into the succeeding statement. These advances began shortly after the arrangement in question, and more than 10 years before this suit was begun. The periodical statement of

account containing them furnished by the one party, and entered in the books of the other, and not objected to until this suit, more than 10 years later, may be regarded, from the nearness in their inception to the transaction in dispute, as in effect accompanying that transaction and explaining it. There is no escape from the effect of this account. It is argued that the defendant, being a resident in Victoria, was ignorant of the account. But, if so, he was ignorant under circumstances that attach to such ignorance the consequences of knowledge. He was at Port Madison Mills at different times during the continuance of this account. His home is distant only a half day's journey. He was presumably in daily communication by mail with the agent, who was invested by him with full authority to "protect" his "interest in lands, mill property, lumber, logs, rents and vessels," and who, in pursuance of such or other authority, was actively engaged in the conduct of the business of operating such mills in his name. His business thus conducted and his property, which his agent was authorized by him to protect, were in the enjoyment of immunity from foreclosure and execution purchased by the money of Crawford & Harrington, advanced on his personal credit, and the fact was daily entered in the books of his business. Some of the judgments (the Dexter Horton and the Fish judgments), when fully paid for and assignments taken, were entered in the bills receivable account. The idea in this seems to have been that, when an assignment was taken, so much of the advances as the assigned judgments were security for should go into the bills receivable account, and that the judgments were not such security for previous advances of interest. The reason for this is not clear or satisfactory, but the fact furnishes no ground of inference that Crawford & Harrington bought the judgments on their own account to hold other than as security for advances made on account of them. As stated, prior advances on these judgments were charged in the monthly statements. The final payment advanced was entered on the debit side of the bills receivable account in the name of the defendant. In each case it equally appears that the advances were made on the account of the defendant. These accounts are, in my opinion, conclusive of the defendant's liability. So, too, is the transaction which authorized the account. The testimony of Hanford, Harrington, and Struve as to the written order is sufficiently explicit to justify the finding that the judgments and lien claims against the mills property were considered at the meeting in question, and that it was the understanding of the parties at the time that the order was authority for such advances; that they were such advances as would be "needed" by the mills,—as Meigs might "require" to "protect" Sayward's property while conducting the business of the mills.

It is suggested in the argument that these advances were made solely upon Meigs' authority, and the testimony of Harrington is quoted to show that such advances were so made in the mistaken belief that Sayward had given Meigs full power to act for him in procuring the advances to be made. If such is the fact, it is of doubtful advantage to the defendant. If the defendant did not

authorize the advances directly, at least he permitted Meigs to assume authority to do so, and to exercise it for many years. He could not have been ignorant of what was taking place. The books of his business were full of written evidence that these advances were being made on his personal credit. The writing by which he appointed Meigs as his agent was in words of general authority. If he did not directly or through Meigs authorize these advances, there must have been a collusive understanding between the two to induce, or at least permit, Crawford & Harrington to act upon the belief that Meigs was authorized to procure them. He knew they were being made, and on his credit. He could not have escaped information of the fact unless he purposely went out of his way to do so, in which case knowledge is implied. Crawford & Harrington's belief that Meigs had the authority testified to by Harrington is consistent with the personal guaranty claimed to have been given by the defendant. There is no inference that Crawford & Harrington were to go about hunting up judgment and other lien claims, and making payments thereon. Their agreement with Sayward, as testified to by Harrington, was to advance money to whatever amount "Mr. Meigs needed" to pay off the bills against the mills; or, as testified to by Hanford and Struve, "to advance whatever might be required." The parties might properly assume—and I believe the fact to be—that Meigs was fully empowered to make requisitions for advances from time to time, to make adjustments and settlements of pressing claims. There was no reason for making a distinction between old debts and new ones. There was imperative necessity to provide for both. The property might have been as easily, and probably with less delay, sold upon an existing judgment as upon a new debt. The taking of assignments of these judgments by Crawford & Harrington is claimed by the defendant as evidence that the advances made on account of such judgments were an investment made upon their own motion; but the referee finds that this course was adopted as a result of a consultation among the attorneys of Meigs and the Meigs Lumber Company and the defendant, and that this was done "to preserve the lien of said judgments as a security for the persons making the payments." This finding is not challenged, except that the objection is made to it that Crawford & Harrington's attorney was also present at such consultation. Judge Lewis, a witness called in behalf of the defendant, gives an account of this consultation and of the circumstances attending it. He was defendant's attorney at the time. He says that in the early part of the litigation (the suits pending against the mills property) it became necessary for him to satisfy his own mind about something. What this was he does not remember. This was not later than 1881. He went over to Crawford & Harrington's, or perhaps to Harrington & Smith's (he does not know whether the firm had changed at this time), for the purpose of seeing a written authority or direction that Mr. Sayward had said he had given to them in relation to some business matters. The paper was found, and was in the

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shape of a letter. Lewis looked at it. It was short. He cannot say what was in it at all, but he satisfied himself as to what he wanted to know very quickly. He is able to fix March 9, 1881, as the date of this occurrence, by a praecipe which he filed in the consolidated case immediately after this, and which therefore appears to have some relation to the examination of the authority that Sayward told Lewis he had given Crawford & Harrington. In the same connection, Lewis says there was a consultation held by the attorneys of Meigs, the Meigs Lumber & Shipbuilding Company, Sayward, and Crawford & Harrington to determine, "if these judgments were paid by any one, whether they could hold the judgments as security in their name." The witness continues:

"And the conclusion was reached by us that we could do that, and thereupon I went up to the courthouse, and filed a praecipe, telling them simply to file or note the receipts on the appearance docket, and not to give them as a credit, so as not to cancel the judgment; and that is the reason for the memorandum here."

The relation which the "something" that it became necessary for Judge Lewis to satisfy his mind about seems to bear to the foreclosure suits and to the written authority or direction given by the defendant to Crawford & Harrington, according to defendant's own statement to Lewis, and which these bear to the consultation that followed and to the praecipe, is suggestive. There was no written authority or direction from defendant to Crawford & Harrington, according to defendant's contention, other than the order for supplies (until such time as permanent arrangements could be made, known as the "temporary order"); and this writing has no such importance as answers the requirements of an "authority" that defendant would be likely to inform his attorney about, and as that attorney would find it necessary to examine with reference to dealing with judgments against the mills. These statements by Judge Lewis point to such an authority as plaintiffs say was given by defendant to Crawford & Harrington to advance money to provide for liens against the property. Judge Lewis says he was the attorney of the mill company, Meigs, and the defendant in the matter of the consolidated suit. Presumably, the communication made to him by defendant as to a written authority given by him to Crawford & Harrington in some way related to such suit. Lewis seems to have referred to it in that connection. The consultation as to having the debts assigned so as to preserve the liens in favor of those advancing the money (Crawford & Harrington) followed the examination of the written authority mentioned. If not a consequence of that examination, it was an incident of an occurrence common to both. The fact that the witness fixes the date of his examination of the writing given by Sayward, the defendant, to Crawford & Harrington, by the date of the written directions he gave the clerk to file the receipts for money paid on the judgments, and not to cancel the judgments, shows pretty conclusively that the writing given by Sayward to Crawford & Harrington related to these judgments. All this goes to show that not only the assignment of judgments was intended as a security, but that there was

a writing given by the defendant authorizing advances to pay liens.

The defendant had an interest in preserving the liens of these judgments in friendly hands. Hanford explains as one of the considerations for what was done that by such assignments Crawford & Harrington could use the judgments, so that no one else could "obtain any judgment and come in and close out the property." The stipulation or agreement executed by Lewis as attorney for the defendant in January, 1883, by which the defendant promised and agreed to pay the Dexter Horton judgment of above \$10,000, shows that Crawford & Harrington were not undertaking to provide for the lien claims by purchasing them on their own account. So, too, of the Pemberton mortgage, executed by Sayward by his own hand, to provide some \$30,000 with which to pay such claims. By the provisions of this mortgage, the defendant expressly obligated himself to pay the debt secured.

In the Judson suit, brought by Harrington & Smith to compel an assignment to them of the judgment held by Judson, plaintiffs alleged their agreement with defendant in effect as these plaintiffs allege it now. They allege advances at different dates of money to pay off liens and incumbrances, and that such advances were at Sayward's special instance and request. Sayward was a party defendant therein. He made no answer. It is said, however, that in the Boyd-Stevens suit, brought by creditors of the mills to set aside the conveyances to the defendant, the defendant denied that he had assumed payment of the mill debts, or had become bound to pay them. It is not claimed that he assumed these debts. His arrangement with Crawford & Harrington for such advances of money as might be required to provide for liens bears no resemblance whatever to an assumption of an obligation to the creditors to pay such liens. Judge Lewis testified that he drew a check as attorney for defendant for \$766.86, to pay interest on judgments represented by McNaught (what he did was to indorse an order for such payment upon a check drawn by Meigs, which is in effect as he testifies); and, in explanation of the reasons for so doing, he testifies that there was a general understanding that in case of an emergency he was to call on Crawford & Harrington or Harrington & Smith for any money that might be required, and that, when he drew the check in question, there was a great emergency; that it was a case of urgent necessity, "because Greene had his hands on us, and McNaught had his fins on us."

The accommodation had by Smith & Harrington of the defendant on two or more occasions of their temporary embarrassment are urged as evidence that Sayward was not then a debtor of the firm. The argument has force; yet the fact is not a conclusive one. I conclude that the arrangement entered into was in the expectation of all the parties that the mill would pay all the obligations assumed, and that it would not be necessary for defendant to make payments out of other funds; that it was tacitly understood that he should stand, as to the advances to be made, as a surety, and that he would not be called upon until there was a failure of payment

out of the business; that Crawford & Harrington were desirous of helping the business upon such a footing. Under such circumstances, it would not be unusual if they called upon the defendant in the manner referred to. On the contrary, the fact of his liability to them may furnish a reason for calling on him as they did. However this may be, I cannot consider the various circumstances in the case relied upon, as conflicting with the conclusions found by the referee. The most that can be said is that these objections create a conflict in the evidence, and in such case the findings, if fairly supported by evidence, must stand.

It is argued that the bill of sale made on April 2, 1880, by defendant to Crawford & Harrington, to secure about \$4,000 for merchandise advanced and future advances, is inconsistent with the existence of any previous arrangement for such advances. It is not improbable that, as claimed by plaintiffs, the arrangement in question was not made in February, 1880, as testified to by their witness in the opening of their case, but was subsequent to the bill of sale. If the case was otherwise doubtful, the argument of defendant from this fact might be conclusive of the question. But it is abundantly established that there was a guaranty to Crawford & Harrington by the defendant early in the year 1880 for advances, at least, of merchandise and current mill expenses, whatever of doubt there may be as to advances on judgments; whereas the bill of sale, in the inference drawn from it, is against any guaranty whatever. I mean by this statement that such fact is testified to directly and with positiveness by Hanford, Struve, and Harrington, and a finding upon such testimony cannot be disturbed on this motion, but must be held as conclusive of the fact found.

The money advances for insurance upon the mill were not within the terms of the order relied upon. As already stated, the authority to Crawford & Harrington to make advances was limited to such advances as Meigs, as the representative of defendant, should require. The insurance was effected without the consent of Meigs, and the charge therefor was against his protest. The question as to whether the insurance was to the defendant's benefit is immaterial. It was to the interest of Harrington & Smith, who looked to the insured property as security for what they had advanced on the defendant's account, that the property should be insured. Whatever the financial standing of the defendant may have been, the evidence warrants the conclusion that the property of the mills company was all the property he had within the United States, and therefore all the property to which they could have recourse under a process issued against him out of the courts of this country. The protection of this security was made more important by this fact, and was sufficient inducement for the advances of insurance made on this account. If the fact was otherwise, it would make no difference. The defendant could not be made the debtor of Harrington & Smith without his authority, and against the protest of his agent.

It is claimed by plaintiffs that the discount charged in the account sued on means the interest which plaintiffs' assignors were

compelled to pay to get the money advanced to defendant's use, as charged in the account. If this discount is in fact interest, it is but equitable that it should be allowed. If it is in fact interest upon advances charged in the account, as claimed, the manner in which such discount charges are arrived at should appear from the account, or at least from the evidence in connection with the account. The referee is unable to discover the manner in which these discount items were ascertained. I have the same difficulty. It does not help the matter to call the discount items "interest." Given this name, and some of these charges show the principal upon which the interest is charged and the rate of the charge. From this the time for which the charge is made is ascertained. Other of the charges show the time charged for, from which the principal sum may be calculated. The larger part of the items consist of lump sums charged as "discount" (interest), without anything to show the amount upon which this is figured or the time covered by it. On May 31, 1882, there is a charge of discount of \$86 upon \$5,734, at $1\frac{1}{2}$ per cent. The cash advanced for that month, as appears from the account, is not \$5,734, but very nearly \$1,000 less. It might be inferred from this and the explanation given in the evidence that Harrington & Smith borrowed that amount at the bank to provide for advances, paying the discount charged. If so, the discount is not upon what was actually advanced, but upon what they expected to advance. I am satisfied that, as a matter of equity, Harrington & Smith were entitled to something in the way of these charges, but the state of the account makes it impossible to ascertain what that something is. If these items are called "interest," there is nothing in the account or the evidence to make them a legal charge against the defendant.

The Cochrane & Day litigation grew out of a dispute as to the quantity of logs sold by Crawford & Harrington for Cochrane & Day to Meigs, as the agent of defendant. Meigs scaled the logs, and reported the measurement at 478,861. The price allowed was \$4.50 per thousand, being a total of \$2,154.87. This amount was charged to the defendant by Crawford & Harrington. Cochrane & Day disputed the measurement and price, and brought an action against Crawford & Harrington to recover the value of the logs. They prevailed in the litigation, and recovered \$3,627, instead of the \$2,154.87 for which Crawford & Harrington had sold the logs to the defendant. The plaintiffs seek to charge the defendant with the difference between these amounts, and with all the costs and charges, including attorneys' fees, paid by Crawford & Harrington in the litigation. Plaintiffs claim that Meigs practiced a fraud in measuring the logs. Assuming that such fact would be conclusive upon the defendant, how can it be determined here that the fact is as charged? The adjudication between Crawford & Harrington and Cochrane & Day does not bind the defendant. More than half the entire charge in dispute consists of expenses incurred by Crawford & Harrington in an unsuccessful endeavor to maintain the correctness of the measurement and price at which they sold the logs to the defendant. The Cochrane & Day judgment cuts no figure

here. If the logs were undermeasured or sold below their value, the parties affected thereby might have corrected the mistake in the account as to this.

What is known as the "Haller Judgment" presents an important question in the case. Crawford & Harrington were parties of the one part, with Meigs and the defendant, in a contract with Haller, made for the benefit of the lumber company and defendant, as the transferee of the property of the company. As found by the referee, the true position of Crawford & Harrington in the contract was that of sureties to Meigs and the defendant. Haller brought an action upon this contract, and recovered judgment against Crawford & Harrington and Meigs in the sum of \$15,548, which sum Crawford & Harrington paid. The defendant was a party defendant, but was not served with process. This judgment is, at least, prima facie evidence of the defendant's liability. Crawford & Harrington could have maintained an action upon it against the defendant to compel him to indemnify them for the recovery against them. Whether in such action the judgment would have been conclusive evidence of the defendant's liability it is not necessary to determine. It is settled that a judgment against a surety is prima facie evidence against the principal, although the latter had no notice of the action. Such judgment is conclusive where the principal had notice of the action. The finding that the position of Crawford & Harrington was that of sureties in the Haller contract is excepted to by defendant. But the finding, except as to that part of it which finds that the logs delivered under the contract were sawed into lumber at defendant's mill and for his benefit, is merely a conclusion from other findings not excepted to, and abundantly established by the evidence. These unchallenged and established findings show that the relations of Crawford & Harrington to the subject-matter of the contract were those of suretyship. Upon the case thus made, Crawford & Harrington could have maintained an action against the defendant for the amount recovered against them on the Haller judgment, and their successors in interest can maintain such action now. Such right is not defeated by the fact that Crawford & Harrington have paid such judgment. On the contrary, payment is necessary to such right. Nor does it make any difference that Harrington & Smith paid to the holder of the judgment the one-half for which Harrington, as between himself and his cosurety, was liable, and debited Harrington with it in his private account with the firm. Defendant says in his brief that this fact, with other facts, shows that there was no intention to look to the defendant for reimbursement for the amount paid. If the fact of the obligation of the defendant was open to dispute, anything that evidenced an intention not to look to the defendant would be pertinent. But there is no room to question defendant's liability upon the contract in question, and, of course, this liability is not discharged or waived by the fact that Crawford & Harrington paid their guaranty, or by the manner of payment, or by any intention there may have been on Harrington's part at any time respecting it. Moreover, the procuring of the money with which to pay

his part of this judgment by Harrington from Harrington & Smith, or the fact that the firm made payment for Harrington, in no way tends to show that Harrington did not intend to look to the defendant to reimburse him for the payment which he was thus compelled to make. In so far as the obligation thus created has passed by assignment to plaintiffs, they are entitled, upon the facts found by the referee, to recover therefor in this action.

The several exceptions of both parties to the findings of fact by the referee are overruled, and upon such findings it is ordered that plaintiffs have judgment against the defendant for the sum of \$153,128.89, with interest thereon from September 30, 1891.

UNITED STATES v. MORGAN.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1895.)

No. 432.

CLERKS OF COURT—FEES—PRACTICE—VAN DUZEE v. U. S., 59 FED. 440, FOLLOWED.

Appeal from the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri.

This was a petition filed by William Morgan to recover from the United States for services rendered as clerk of a United States court. The circuit court rendering judgment for the petitioner, and defendant appealing to the circuit court of appeals, the appellee moved to dismiss the appeal. This motion was denied (12 C. C. A. 6, 64 Fed. 4), and the case was now heard on an exception to the ruling of the court below allowing fees to the appellee for making accounts of jurors for mileage and attendance.

William H. Clopton (Walter D. Coles, on the brief), for the United States.

Eleneious Smith (Joseph Dickson, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The single question in this case is whether the clerk is entitled to 15 cents for making out the accounts of jurors and witnesses, in addition to 10 cents for swearing the witness or juror, and 15 cents for the jurat. It is the settled practice of the circuit court of the United States for the Eastern district of Missouri for the clerk to make out these accounts. This practice has the force and effect of a rule of court, of which this court will take judicial notice. On the authority of Van Duzee v. U. S., 59 Fed. 440, the judgment of the circuit court is affirmed.

TURNER et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1895.)

No. 253.

1. CRIMINAL LAW—EVIDENCE—UNOFFICIAL MAPS.

There is no error in admitting an unofficial map made by a witness, when the same is offered only in connection with his testimony, and not as independent evidence.

2. SAME—APPEAL—PREJUDICIAL ERROR.

Overruling an objection to a question will not be held as prejudicial error when the record fails to show what answer was made by the witness.

3. SAME:

Exclusion of questions will not be held as prejudicial error where the record fails to show what the witness would have answered, or what the party interrogating him proposed to prove by the question.

4. SAME—EVIDENCE—HEARSAY.

In a prosecution for cutting timber on government lands, a witness for the government testified that he had cut some trees on the sections in question, and that all his knowledge as to the location of the section lines was derived from a third person. *Held*, that the fact of obtaining his knowledge by hearsay went rather to the effect than the admissibility of his evidence, and there was no error in its admission.

5. SAME—ORDER OF EVIDENCE—DISCRETION OF COURT.

The order of proof is in the discretion of the trial court, and a reviewing court cannot review its action in receiving, after the defense had rested, certain evidence alleged to be not properly in rebuttal.

6. OBJECTIONS TO JURY—WAIVER.

Objections to the manner and mode of drawing and impaneling the grand and trial juries should be prosecuted as grounds of challenge to the entire array, or to the objectionable juror before the trial, and if not so presented are cured by the verdict.

7. CRIMINAL LAW—JOINT VERDICT—SEPARATE SENTENCES—CUTTING TIMBER FROM GOVERNMENT LANDS.

Where indictments against two persons for cutting timber from government land contrary to Rev. St. § 2461, are consolidated, and the jury returns a single verdict fixing the amount of damages, the court is justified in assessing against each separately the triple damages authorized by the statute, and is not required to impose a joint penalty.

8. SAME—CONSOLIDATION OF INDICTMENTS.

Two indictments may be consolidated, under Rev. St. § 1024, although two persons are jointly charged in each.

In Error to the District Court of the United States for the Southern District of Alabama.

These were indictments against Noel E. Turner and Martin Lankford for violating the statute against cutting timber from the public lands. Rev. St. § 2461. The indictments were consolidated, and defendants, having been convicted and separately sentenced, sued out this writ of error.

On the 16th of February, 1894, the grand jury impaneled in the district court for the Southern district of Alabama found two indictments against the plaintiffs in error, each containing two counts, for cutting and procuring to be cut, with intent to export, dispose of, use, and employ the same in some manner other than for the use of the navy of the United States, certain timber upon lands then and there belonging to the United States, to wit: In the first indictment, No. 1,141, the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of section 13, and all that part of the W. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of section 13 lying east of the state line between the state of Alabama

and the state of Mississippi, all in township 3 N., range 5 W., St. Stephen's meridian; and, in the second indictment, No. 1,142, the N. $\frac{1}{2}$ and S. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, section 19, township 3, range 4, all in the county of Washington, state of Alabama,—and duly charging other necessary ingredients to make offenses under section 2461 of the Revised Statutes of the United States. After the finding of said indictments, the court ordered as follows: "It is ordered by the court that the above-stated cases, numbers 1,141 and 1,142, United States v. Noel E. Turner and Martin Lankford, be and the same are hereby consolidated, and to be considered and tried together;" and thereupon the defendants pleaded, each for himself, not guilty, a jury was duly elected, tried, and sworn, and the trial of the consolidated cases was proceeded with, resulting in a verdict of not guilty in case 1,141, and of guilty as charged in the indictment, and assessing the damages at \$248.80, in case 1,142. Thereupon the defendants moved the court to grant a new trial in said consolidated causes, on the ground "that the verdict as rendered by the jury was contrary to law, the evidence, and the charge of the court, and because one or more of the jurors sworn to try the cause were not impartial, in this, to wit, they had served upon a former jury at this same term of the court, convicting one of the defendants upon a similar charge from testimony elicited from one of the same witnesses, and because the jury arrived at the verdict by methods other than the consideration of the evidence." In the record following this motion for a new trial are affidavits purporting to be the several affidavits of each of three jurors sworn in the case, in each of which is recited the manner in which the jury ascertained and arrived at the number of trees cut and removed by the plaintiffs in error. At a later day of the term, April 7, 1894, the motion for a new trial was overruled and denied as of date April 5, 1894. On April 3, 1894, the plaintiffs in error also filed a motion in arrest of judgment as follows: "Now come the defendants in the above-stated cause, after verdict and upon sentence, and move the court to arrest the judgment in said cause on the following grounds: First. Because the grand jury that returned the indictment was not summoned according to law, in this: that the record fails to show that the court ordered the venire to issue therefor. Second. Because the record fails to show that the foreman of the grand jury was appointed according to law. Third. Because the record fails to show the talesmen summoned to serve on the grand jury were ordered to be summoned by the court and from the body of the district, as required by law. Fourth. Because the record fails to show that the grand jury which returned the indictment in this consolidated cause was drawn from the jury box, containing at the time of said drawing the names of not less than 300 persons, as required by law, and the record fails to show that the names composing said grand jury had been placed in the box by the commissioners, as the law required. Fifth. Because the record shows that one or more of the petit jurors who served in the trial of this cause were drawn from the jury box after the number of names in said jury box were reduced below 300. Sixth. Because the defendants in this cause were indicted and tried jointly, and the verdict of the jury fails to assess a separate penalty against each of them. Seventh. Because the record shows that this cause was consolidated by the court with another cause, and became one case, and the jury returned a verdict of not guilty in the other case, and that operated an acquittal in this case." In the transcript of record following this motion is a list of names of persons, with the post office or residence of each, the same purporting to be the jury-box list for the November term, 1893, but which is not otherwise verified, nor shown to be a part of the record. On April 5, 1894, the court overruled and denied the motion in arrest of judgment, and thereupon proceeded to sentence the plaintiffs in error, respectively, as follows: Noel E. Turner to pay a fine of \$746.40 and the costs of the prosecution, and be imprisoned for the period of six months in the Mobile county jail, and stand committed until the payment of said fine and costs; said imprisonment to commence on the expiration of a former sentence pronounced on this day on the said defendant in another case. Martin Lankford to pay a fine of \$746.40 and the cost of the prosecution, and be imprisoned for the period of one month in Mobile county jail, and stand committed until the payment of said fine and costs. Thereupon the plaintiffs in error brought the case to this court for review upon some 16 assignments

of error, mainly relating to errors on the part of the court in the admission or rejection of evidence, but all of which are specially noticed, so far as the same is necessary, in the opinion of the court.

M. D. Wickersham, W. H. McIntosh, and J. C. Rich, for plaintiffs in error.

J. N. Miller, U. S. Atty.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge (after stating the facts). The first assignment of error is that the court erred in permitting a map made by one Capt. Dan Williams, a surveyor, to be received in evidence, because it was not shown that the said map was made by authority of law. The bill of exceptions recites that on the trial the United States called as a witness one Capt. Dan Williams, who testified that he had been employed by the United States to make a survey of the land in said section 19, and also to run the lines upon said section 13, township 3 N., range 5 W., in said Washington county; that he had made a map of said lands and surrounding lands, but that he was unable to state that any portion of his map was correct, except those portions of said sections 19 and 13 which are represented upon said map. The United States attorney then offered in evidence the map so made by the said Williams, to which the defendants objected, on the ground that the said map was not shown to be made by any authority of law. We understand from this that the court admitted the map of the lands in question made by Capt. Dan Williams in connection with and as a part of his evidence. It certainly was not a case of offering an unofficial map or plat as independent evidence.

The second, third, and fourth assignments of error relate to the evidence given by one Forbes, a witness for the United States, who testified that he was a special agent of the general land office, and that he made a personal examination of the alleged depredations upon sections 19 and 13 in August of 1893. Upon being asked what number of trees, in his best judgment, as estimated by him on examination, had been cut or removed from the public land in said sections 13 and 19, respectively, said Forbes replied, "About 200 on section 13, and at least 2,000 on said section 19," to which question and answer defendants objected. No reason for the objection was given at the time, and no reason is given in the assignment of error. The United States then, by its attorney, asked said witness Forbes, "Did you know the market value at that place of timber or trees like those cut on said section 19?" to which question the defendants objected. The court overruled said objection, but the bill of exceptions does not show what, if any, answer was made by the witness to the question. Thereafter the witness Forbes testified to an altercation and difficulty that he had had with the defendant Noel E. Turner at the store of the latter in Washington county, whereupon the defendants asked said witness the following question: "Did you attempt to get a gun, after the altercation in which you were assaulted by the defendant Turner, to shoot him with?" The

United States, by its attorney, objected to this question; the court sustained said objection, but the record is silent as to what answer witness would have made to the question if permitted by the court, and also silent as to what was the defendants' purpose to prove by the question propounded. It would seem from this statement of the objections made to the evidence of the witness Forbes that no error prejudicial to the plaintiffs in error can be predicated upon it.

The fifth assignment of error is that the court refused to allow one Green, a witness for the United States, to answer the following question: "What would be the value of the timber if there was no tramway there?" We find in the bill of exceptions that such question was propounded to the witness Green on cross-examination, but, as in the case of Forbes, no showing is made as to whether or not the answer would have been material in the case.

The sixth assignment of error is that the court erred in overruling a motion of the defendants to exclude all of the testimony as to the cutting of timber by one John Turner, a witness sworn by the government, because the said Turner had testified that he only knew the lines of the land from which he cut timber from the statements of one Logan, who had not been previously shown to be familiar with the lines bounding the lands upon which the alleged depredations had been charged. It appears from the bill of exceptions that one John Turner, called as a witness for the United States, testified in chief that he knew the north line of section 19, and that he cut upon said section about 30 trees; that he only knew the western line of said sections 13 and 19 of the survey made by the aforementioned witness Daniel Williams, who was accompanied by the witness Forbes. According to the said survey, he cut on section 13 20 trees, more or less, and on section 19 about 30 trees. On cross-examination he testified that "all of his information about said sections he knew from information made to him by one Logan." We are of opinion that the motion to exclude all the testimony of Turner as to the cutting of timber on sections 13 and 19 because his knowledge of lines was derived from others was properly overruled. The witness, according to his evidence, had cut trees on sections 13 and 19, according to the survey made by the witness Dan Williams, who was accompanied by the witness Forbes. Without running the lines himself, his exact knowledge of the section lines would necessarily be dependent upon hearsay. As the whole matter went to the jury, we think the objections made were rather to the effect of the evidence than to its admissibility.

The seventh assignment of error relates to the evidence of one Thad Holland, a witness for the United States, who testified in chief that he had cut timber on section 19 during the summer of 1893, but that he did not know how many trees he cut; that he did not cut on section 13; that timber on both sections had been boxed, for turpentine purposes, many years ago; that some of the timber had burned down, and some of the timber was dead. On cross-examination the said witness testified that he knew the settlement of the defendant Noel E. Turner on said section 19. He was then

asked by the defendants, through their attorney, what improvements the said Turner, one of the defendants, had on said section 19, to which question the United States, through its attorney, objected, and said objection was sustained by the court. Defendants then asked said witness Holland whether defendant Turner lived on said section 19; he answered that Turner did not live on the land, but he had a house on it. The statement that "he had a house on it" was, on motion of the United States attorney, excluded by the court as irrelevant and immaterial. Said witness Holland was then asked by defendants, "What is the character of that house?" to which question the United States, through its attorney, objected, and this objection was sustained by the court. The defendants thereupon further asked said witness Holland the following question: "Is it not a fact that there was land in preparation for cultivation there?" The United States, through its attorney, objected to said question, and the court sustained the objection. The defendants further asked the witness Holland, "What improvements had the defendant Turner made on the place where you cut timber?" The United States, through its attorney, objected to said question, which objection was sustained. None of the questions propounded to the witness Holland, to which objections were sustained by the court, were answered, and the bill of exceptions is silent as to what answers were expected, or as to what defendants proposed to prove by the said witnesses. We infer from the discussion of the assignment in the brief that the questions were propounded with a view of showing that one of the defendants had a homestead entry upon part of one of the sections, upon which he had made improvements, and perhaps upon which he was living, with a view to justify the cutting of timber charged in the indictment as within the homestead right; and we notice that a previous recital of the bill of exceptions shows that on September 7, 1893, the defendant Noel E. Turner had made application for and entered as a homestead the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, section 19, township 3, range 4 W., Washington county, Ala.; but, as the entry of homestead was subsequent to the alleged trespass, we cannot presume that the answers to the questions propounded to Thad Holland would have been favorable to the plaintiff in error, and we are unable to say that the rulings of the court in sustaining the objections to the questions propounded were prejudicial to them.

The eighth, ninth, tenth, and eleventh assignments of error are also based on rulings of the court sustaining objections to questions propounded to the witnesses by the plaintiffs in error, but no showing was made as to what they proposed to prove by the questions propounded, and therefore these assignments are disposed of by what has been already said.

The twelfth assignment of error is that the court erred in permitting the United States to offer in evidence, after defendants had rested, certain warrants of arrest; the objection to the introduction of said warrants in evidence being that they were not in rebuttal. It seems that the defendants were permitted to offer in evidence, to make out their defense, receivers' receipts showing homestead

entries of Noel E. Turner, one of the defendants, one H. C. Turner, and one Callaway, in said section 19, on the 7th day of September, 1893, and, further, to offer evidence that settlements and improvements were made upon said lands thus entered for homestead, the same being the identical land upon which the defendants Turner and Lankford were charged with cutting and removing timber. The warrants showed that in August of 1893, before the homestead entries were made, or pretended to have been made, affidavits had been made and warrants issued charging the defendants with the offense contained in the indictments. It would appear to have been admissible in rebuttal on the case made or sought to be made by the defendants; but, as a matter of law, the order of proof in the trial court is within the discretion of the trial judge, and his rulings in that respect cannot be reviewed on error.

The motion in arrest of judgment was properly overruled, but, if not, the record does not present any case for review in that respect. All the objections to the manner and mode of drawing and impaneling the grand jury and trial jury should have been presented as grounds of challenge either to the entire array or to the objectionable juror prior to the trial, and, not having been made prior to, were cured by the verdict.

The fourteenth assignment of error is "that the court erred in assessing the fine against each of the defendants separately, the same having been jointly indicted and tried, and only one verdict having been rendered by the jury"; and the fifteenth assignment of error is "that the court erred in receiving two verdicts from the jury in the same case, for the reason that the cause had been consolidated." There is some little conflict between these two assignments of error, but neither is well taken. The defendants were indicted, tried jointly, and both were convicted, and the jury found the damages committed by them to be \$248.80. Section 2461 of the Revised Statutes provides that "every such person [meaning every person who has violated the section] shall pay a fine of not less than triple the value of the trees and timber so cut, destroyed or removed, and shall be imprisoned not exceeding 12 months." The fine provided for is a part of the punishment as much as is the imprisonment; it is necessarily assessed against each, just the same as the imprisonment. Any reasoning which would make the money penalty joint would necessarily make the imprisonment joint. Some question has been made as to the power of the court, under section 1024 of the Revised Statutes of the United States, to consolidate two or more indictments where two persons are jointly charged in each indictment, but we consider the statute broad enough to cover the case in hand. Under the statute, two or more indictments can be consolidated, if all the counts in all the indictments could have been included in one indictment in the first instance. As consolidated, the two indictments stood practically as one indictment with four counts; the verdict rendered by the jury, construed in the light of the indictments consolidated, must be considered as a verdict of not guilty on two of the counts, and of

guilty on the other two; and, if informal, it was still too plain for any misunderstanding as to the real finding of the jury.

The sixteenth assignment of error is a formal one, not necessary to be noticed. The judgment of the district court is affirmed.

TURNER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1895.)

No. 254.

CRIMINAL LAW—INSTRUCTIONS—PROVINCE OF COURT AND JURY.

A statement by the court, after summing up the evidence for the prosecution, that "evidence of circumstances tending to show guilt is competent evidence," is not an invasion of the province of the jury when they are also told that they are the sole judges of the weight and sufficiency of the evidence.

In Error to the District Court of the United States for the Southern District of Alabama.

This was an indictment against Noel E. Turner for cutting timber from the public lands of the United States. Defendant, having been convicted, brought a writ of error to this court.

M. D. Wickersham, W. H. McIntosh, and J. C. Rich, for plaintiff in error.

J. N. Miller, U. S. Atty.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. The plaintiff in error was tried and convicted in the court below for cutting timber on public lands in violation of section 2461, Rev. St. U. S., and was sentenced to pay a fine of \$36 and the costs of prosecution, and to be imprisoned for the period of three months in the Mobile county jail, and stand committed until the payment of said fine and costs.

The bill of exceptions recites that the court in its charge summed up the evidence, direct and circumstantial, on the part of the government, and said: "This is in substance the testimony on the part of the government tending to show the defendant's guilt. Evidence of circumstances tending to show such guilt is competent evidence." The court also summed up the evidence favorable to the defendant, and stated: "This is in substance the evidence for the defendant," and instructed the jury that they were the sole judges of the weight and sufficiency of the evidence, and, to justify a conviction of the defendant, they must be satisfied of his guilt beyond a reasonable doubt. The defendant below, plaintiff in error here, excepted to that part of the charge which is as follows: "This is in substance the testimony on the part of the government tending to show the defendant's guilt. Evidence of circumstances tending to show such guilt is competent evidence." No ground of objection to the charge was then stated by the defendant, nor is any ground of error assigned in this court, except that in the assignment of error it is

said: "The substance of the testimony was a matter which should have been left solely and exclusively for the jury to determine, because the jury are the sole and exclusive judges of the circumstances and the tendency of said circumstances to show guilt or innocence." We do not think that the trial judge invaded the province of the jury. The weight and sufficiency of the evidence was left entirely to the jury. *Starr v. U. S.*, 153 U. S. 614, 14 Sup. Ct. 919.

The third assignment of error is that the court erred in overruling the defendant's motion in arrest of judgment. This motion in arrest of judgment is, in all respects, like a similar motion in *Turner v. U. S.* (No. 253; just decided) 66 Fed. 280, where we held the motion to have been properly overruled.

The last assignment of error is that the court erred in refusing a charge as asked in writing by the defendant. We do not find in the bill of exceptions that any charge in writing was asked for by the defendant. We do find, however, that, at some stage of the case not mentioned, the defendant requested the court to give the following: "If the jury believe the evidence, you must find the defendant not guilty"; and reserved an exception to the refusal of the court to give this charge. The evidence recited in the bill of exceptions tended to show that the defendant on trial was guilty as charged in the indictment, and was sufficient, if believed by the jury, to warrant a verdict of guilty. The refusal to give the general charge in favor of the defendant was not in any sense erroneous. The judgment of the district court is affirmed.

TURNER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1895.)

No. 313.

1. CUTTING TIMBER FROM PUBLIC LANDS—EVIDENCE.

In a prosecution for cutting timber from public lands, a special agent of the land office testified that he visited the land after part of the timber had been cut. He was then asked who went with him on that occasion. *Held*, that there was no error in receiving his answer over defendant's objection to the competency of the question.

2. SAME—SENTENCE IN MISDEMEANORS.

In misdemeanors it is not necessary for the court to ask defendant if he has anything to say why sentence should not be pronounced against him. *Turner v. U. S.*, 66 Fed. 289, followed.

In Error to the District Court of the United States for the Southern District of Alabama.

This was an indictment against Herbert C. Turner for cutting timber from the public lands of the United States. Defendant was convicted, and now seeks a review of the case by writ of error from this court.

M. D. Wickersham, W. H. McIntosh, and J. C. Rich, for plaintiff in error.

J. N. Miller, U. S. Atty.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. The plaintiff in error, Herbert C. Turner, was tried and convicted in the court below for cutting timber on the public lands in violation of section 2461, Rev. St. U. S., and was sentenced to pay a fine of \$225 and the costs of prosecution, and be imprisoned for a period of 20 days in the Mobile county jail, and stand committed until the payment of said fine. He says to this court that the court below erred in overruling his motion to rule out the answer of Charles T. Forbes (a witness examined by the United States) to the following question, to wit: "Who went there [that is, to the land described in the information] with you?" Answer: "N. E. Turner." The reason assigned for ruling out the question and answer was that the same were not competent. Exactly what was meant by the objection we are not advised. The witness Forbes had testified that he was a special agent of the general land office, and that he visited the land in question after about two-thirds of the timber, or from four to five hundred trees, had been cut and removed from said land. He was then asked who went with him. The assignment of error seems to be without any particular merit.

The bill of exceptions further shows that one Allison Holland, a witness for the United States, who testified that he knew section 19, which embraced the land described in the indictment; that he did not know where the defendant's homestead entry was; that the timber on that section was worth about 25 cents per tree; and that he went into the store belonging to defendant's brother some time in June, 1893, where defendant was employed as a clerk, some eight or nine miles from the land, and there heard the defendant say that they could have their own way now about cutting timber, as Wickersham and Mayfield were out now, and defendant remarked, "We will cut it as we come to it." The said Holland was then asked by the defendant the following question: "What articles of provision did you buy from the defendant at the time of this conversation?" The United States attorney objected to the question, and his objection was sustained by the court. The relevancy of this question does not appear even by suggestion.

The third assignment of error is that the court erred in refusing to permit the defendant below to offer in evidence the record of indictment and conviction of Noel E. Turner and Martin Lankford, who had at the November term of this same court been tried, convicted, and sentenced for cutting and removing for their benefit the identical timber charged in the indictment against the defendant, and for which he is now on trial. The counsel for the United States in this court says that the record of the trial and conviction of Noel E. Turner and Martin Lankford for trespass in cutting timber from the land named in this indictment, along with other lands, has no bearing on the guilt or innocence of the defendant, and to this we agree.

The plaintiff in error also complains that he was not asked by the court, at the time of sentence and prior thereto, if he had anything to say why the sentence of the court should not be pronounced against him. A similar objection was disposed of adversely in *Turner v. U. S.* (No. 312; just decided) *infra*. The judgment of the district court is affirmed.

TURNER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1895.)

No. 312.

1. CRIMINAL LAW—EVIDENCE—UNOFFICIAL MAP.

The admission of an unofficial map in connection with the testimony of a witness who made it is not error. *Turner v. U. S.*, 66 Fed. 280, followed.

2. SAME—REVIEW—DEFECTIVE RECORD—PREJUDICIAL ERROR.

The exclusion of a question is not to be *held* prejudicial error when the record fails to show what was proposed to be proved by the answer. *Turner v. U. S.*, 66 Fed. 280, followed.

3. SAME—SENTENCE.

In misdemeanors it is not necessary for the court to ask defendant if he has anything to say why sentence should not be pronounced against him.

In Error to the District Court of the United States for the Southern District of Alabama.

This was an indictment against Noel E. Turner for cutting timber from the public lands of the United States. Defendant was convicted in the court below, and now brings error to this court.

M. D. Wickersham, W. H. McIntosh, and J. C. Rich, for plaintiff in error.

J. N. Miller, U. S. Atty.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. The plaintiff in error was tried and convicted in the court below for cutting timber on public lands in violation of section 2461, Rev. St. U. S., and was sentenced to pay a fine of \$150 and the costs of prosecution, and be imprisoned for the period of three months in the Mobile county jail, and stand committed until the payment of said fine and costs; said imprisonment to commence on the expiration of the former sentences pronounced on said defendant in cases 1,140, and 1,142, respectively, of the docket of the court.

The first assignment of error is that the court erroneously permitted a map made by one Dan Williams, surveyor of Mobile county, to be given in evidence, because it had not been previously shown that said map had been made by competent authority, nor had it been previously shown that said map was correct. The map in question appears to have been a map made by Dan Williams himself, and to have been permitted to go to the jury in connection with his

evidence. As just decided in *Turner v. U. S.* (No. 253) 66 Fed. 280, this was not error.

The second assignment of error is that the court erred in permitting one Huggins to answer, after objection by the defendant below, the following question, to wit: "Did you, Mr. Huggins, go to Gardner, or did Gardner go to you, and propose to go to the defendant Turner?" The bill of exceptions shows that this question was asked of the witness Huggins by the defendant, plaintiff in error here; it further shows that the United States objected to the question, the objection was sustained by the court, and the defendant below excepted. Assuming that this ruling is the one suggested as error, all that need be said is that the record fails to show what was proposed to be proved by the answer.

The third assignment of error is that the court erred in refusing to permit one Frank Wilkins to answer the following question: "Who did you first tell about this conversation, when was it, when did you tell it, and how long after said conversation occurred?" The bill of exceptions in no wise sustains this assignment of error.

The fourth assignment of error seems also to be without any predicate in the bill of exceptions.

The fifth assignment of error, relating to the examination of one Hutchinson, seems also to be a mistake; but, assuming that it means the reverse of what it says, the assignment is still worthless, because no showing is made as to whether the question propounded and the answer expected were material.

The general charge requested by the defendant below was properly refused, because the evidence was conflicting.

The seventh assignment of error is that the court erred in not asking the defendant Turner if he had anything to say why the sentence of the court should not be pronounced against him when said sentence was pronounced. Whatever may be the rule in capital cases and other felonies, we are clear that no such question is necessary in misdemeanors. See *Bish. Cr. Proc.* § 1118, note; 1 *Archb. Cr. Law & Prac.* (Pomeroy's Notes) p. 580. The judgment of the district court is affirmed.

In re ACKER.

(Circuit Court, D. Montana. August 30, 1894.)

No. 279.

1. CONTEMPT—PUNISHMENT—CONFINEMENT WITHOUT EXAMINATION.

The U. S. circuit court made an order directing a United States marshal to take into his service as many deputies as should be required to afford all necessary protection to the receivers of the N. P. R. Co., appointed by said court, and to the property in their hands, and to attach and bring before the court any persons wrongfully interfering with such property, to show cause why they should not be punished for contempt. Pursuant to said order, a deputy marshal arrested one A., who was confined, under such arrest, for more than a month, without being taken before any magistrate or examined or held to bail. *Held*, upon habeas corpus seeking A.'s discharge from such confinement, that his detention, without examination and regular commitment, was illegal, and he should be discharged.

2. SAME—CLASSIFICATION AS A CRIMINAL OFFENSE.

Contempt of a court of the United States, if classified at all as a criminal offense, must be designated as a misdemeanor, and not as a felony.

3. SAME—WHO MAY COMMIT.

In order that a person may be guilty of contempt of court in interfering intentionally with the possession by a receiver, appointed by the court, of the property in his charge, it is not necessary that such person should be an officer of the court or an employé of the receiver.

4. MARSHALS—RIGHT TO ARREST WITHOUT WARRANT.

Under section 788, Rev. St., a United States marshal, in executing the laws of the United States, has the same right to arrest without warrant as the sheriffs of the state within which is situated the district for which the marshal acts.

This was a petition by W. E. Acker for a writ of habeas corpus, alleging that the petitioner was illegally restrained of his liberty by the marshal of the district of Montana.

David B. Carpenter, for petitioner.

Preston H. Leslie, U. S. Dist. Atty., for respondent.

KNOWLES, District Judge. In this cause the petitioner, W. E. Acker, was arrested by a deputy United States marshal upon the charge of contempt of this court, committed in interfering with the receivers of the Northern Pacific Railroad Company in the management of the property of said company held by said receivers by virtue of an order of the above circuit court. By affidavits filed, the contempt was charged to have been committed by intimidating and seeking by means of certain statements to induce certain employés of the said receivers to desist from working therefor. Some time in the month of November, 1893, the above court appointed Thomas F. Oakes and others receivers of all the property of said the Northern Pacific Railroad in Montana, and authorized and required of them that they operate the railroad belonging to said company in this district. Upon the 30th day of June, 1894, the above court, upon certain representations made to it by the said receivers, showing a necessity therefor, made the following order:

"Now, therefore, in consideration of the premises, it is hereby ordered that the United States marshal within and for the district of Montana take into his service a sufficient number of deputies for that purpose, and he is hereby directed and required to furnish and afford all necessary protection to the receivers appointed by this court in the above-entitled action to enable them to manage and operate the said Northern Pacific Railroad; and the said marshal is hereby directed and required to take from the possession of all persons now unlawfully holding the same such portion of the train equipment of the said road, such telegraph offices or other portions of the property of the said Northern Pacific Company, to which the receivers are entitled to the possession, and to restore the possession thereof to the said receivers; and he is further directed and required to attach and bring before this court any and all persons who shall wrongfully and unlawfully or in any manner interfere with the possession, management, control, or operation of said railroad and its equipment by the said receivers, to show cause, if any they have, why they should not be punished as for contempt of this court for wrongfully interfering therewith."

Through said receivers, the above court was in the possession, or entitled to the possession, of all the railroad property of said company in Montana. The marshal is the executive officer of the court,

and, when an emergency is presented requiring such action, the court can call upon said officer to preserve in the hands of the receivers, appointed by the court, the property intrusted to them, and to insure to them its management and operation. Out of necessity, the court must have this right to call upon its chief executive officer. Many federal courts within the last few months have exercised this right throughout different portions of the United States. Said railroad, by its charter, is required to transport the military stores and mails of the national government, and it seemed from facts presented to the court that all effort the court was capable of making should be made to the end that the charter of the company should not become void, and that it should be operated to the end that it might be so used. The above order, so far as it directed the marshal to arrest all persons who might be guilty of contempt in interfering with the said receivers in the possession and management of said property, was not considered as a warrant of arrest. If it could be so classed, it would be void in not naming the person to be arrested. It will be noticed that this order was not to arrest persons who previous thereto had committed any offense, but was intended for future guidance. It was then thought that said officer might have this authority to arrest any one who should interfere with the said rights of the said receivers, and which rights he was ordered to maintain without any such order, and that this order only pointed out the legal duty of the officer that existed in the absence of any such order. About the only power provided by law for enforcing the other parts of the order to preserve the possession and rights of said receivers in said railroad property was this right to arrest for contempt. He could not arrest under the present state of the law for a breach of the peace or an assault and battery. Without authority to act in some way, if necessity required, the first part of the order would be useless.

In the case of *New Orleans v. Steamship Co.*, 20 Wall. 387, the supreme court said: "Contempt of court is a specific criminal offense. The imposition of a fine was a judgment in a criminal case." This was said in a case when the mayor of New Orleans, Clark, was under a rule ordered to show cause why he should not be punished for contempt, and was punished by a fine. The same language is used in *Re Swan*, 150 U. S. 637, 652, 14 Sup. Ct. 225. What class of criminal offenses contempt belongs to is nowhere, I think, defined. It may be punished by fine or imprisonment at the discretion of the court. And there is no limit placed to the extent of either. It is proper to say, however, that courts have not been disposed to be arbitrary and unreasonable in inflicting punishment in such cases. In some cases it would seem that contempt should not be classed as a criminal offense. In cases where a person is imprisoned in order to compel the submission of a party to a decree in equity, it would seem that the power to punish for contempt was assimilated to a civil remedy. The case under consideration, however, would come under the class denominated as a "criminal offense." The right of an officer to arrest in criminal cases varies with the nature of the

offense. In case of felony the officer may arrest after the commission of the offense, as well as at the time thereof, without a warrant; but in cases of a misdemeanor, except in certain cases, and where the statute authorizes it, he cannot arrest without a warrant after the offense has been committed, while he has full power at the time of the commission thereof to arrest without warrant. This appears to have been the common-law rule. It was contended in this case that the fourth amendment to the constitution of the United States prohibited a federal officer from arresting any one without a warrant. The inspection of the language of that amendment will show that such should not be its interpretation. It reads as follows:

"The right of the people to be secure in their persons, homes, papers and effects against unreasonable searches and seizure shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

To fully understand the meaning of this clause, quite an extensive consideration of the provisions of the common law pertaining to individual rights would have to be examined. In the main, this provision makes a part of our national constitution well-known provisions of the common law. But these common-law provisions never established the rule that no one could be arrested for a criminal offense without a warrant. Such was not the case. It is plain from this provision that, when a warrant is issued to arrest a person, it must be upon probable cause, and the person to be arrested thereunder described therein.

That the force of this provision contended for was held not to be correct in the case of *Rohan v. Sawin*, 5 Cush. 281. Archb. Cr. Prac. & Pl. 97.

In considering the character of the criminal offense to which contempt belongs, as to whether a misdemeanor or a felony, we have no guide at common law. But it is an established rule under federal criminal procedure that no offense against the laws of the United States is a felony, unless especially declared to be such by statute. The offense in this case, then, cannot be declared a felony, and, if it is to be classified at all, must be designated as a misdemeanor.

It was also urged that the practice that pertained to the Code of Criminal Practice of the state of Montana in regard to the arrest of offenders should prevail. Except where there is some special statute, the criminal practice of the state should not prevail, but the practice in the federal courts where there is no federal statute should be assimilated to the practice at common law. *U. S. v. Block*, 4 Sawy. 211, Fed. Cas. No. 14,609.

It was suggested in the hearing that section 1014 of the Revised Statutes adopted the practice of the state courts in this matter of arrest. The part of said section pertaining to the question in hand is as follows:

"For any crime or offense against the United States, the offender may by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court,

chief, or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate of any state where he may be found and agreeably to the usual mode of process against offenders in such states, and at the expense of the United States be arrested, imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

It would appear from the language of this statute that it applied only to the officers named, and did not apply to United States marshals.

In the case of *U. S. v. Horton*, 2 Dill. 94, Fed. Cas. No. 15,393, says that to the above section we must resort to ascertain the powers of commissioners in respect to arrest, imprisonment, and bail of offenders against the laws of the United States.

In the case of *U. S. v. Harden*, 10 Fed. 802, the language of the court is similar to that in the previous case cited above.

In the case of *U. S. v. Rundlett*, 2 Curt. 41, Fed. Cas. No. 16,208, Mr. Justice Curtis said:

"My opinion is that it was the intention of congress by these words, 'agreeable to the usual mode of process against offenders in such state,' to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings had for similar purposes by the laws of the state when the proceedings should take place, and as a necessary consequence that the commissioners have power to order a recognizance to be given to appear before them in these states where justices of the peace or other examining magistrate, acting under the laws of the state, have such powers."

And Judge Dillon, after quoting this in *U. S. v. Horton*, supra, adds:

"The prisoner is not only to be arrested and imprisoned, but bailed, agreeably to the usual mode of process in the state."

It may be that the learned judge in the case last cited intended to hold that the laws of the state in making arrests should apply. Of this I am not entirely certain. There is a noted lack of authority in the federal decisions in regard to arrests to be made by the United States marshal.

There is another provision of the statute law of the United States which would seem to me to have a bearing upon the question under consideration; namely, section 788 of Revised Statutes:

"The marshals and their deputies shall have in each state the same powers in executing the laws of the United States as the sheriffs and their deputies in such state may have by law in executing the laws thereof."

In turning to the statutes of Montana, we find section 66, p. 417, Comp. St. Mont.:

"An officer having authority to make arrests shall arrest a person without a warrant: First. When a person is attempting or has committed a public offense. Second. * * * Third. Where he has reasonable grounds to believe that a person has committed an offense, and that he may escape or attempt to escape before he can be arrested by a warrant issued by some proper officer."

The deputy marshal who arrested the petitioner, considering this provision of the statute applies to arrests (which I think it does), had the right to arrest the defendant if he had committed an offense against the laws of the United States, or if there was reasonable

ground to believe he had committed such an offense, and that he might escape before he could be arrested by a warrant issued by some proper officer.

In considering these matters, we are to look to the evidence presented. It is contended that the petitioner could not be guilty of the crime of contempt, because he was not an employé of the receivers of the Northern Pacific Railroad Company; that, under section 725 of the Revised Statutes, a person, to be guilty of contempt, must be an officer of the court; and that an employé might be such officer. The counsel for petitioner ignores that part of said section which provides that contempt may be committed in the resistance of any officer of the court or any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the court. The circuit court appointed certain parties receivers of the property of the Northern Pacific Railroad Company, and authorized them and commanded them to operate the railroad belonging thereto. Now, it has been held by several courts that the interfering with the operation and running of said road by any person, whether an employé of said receivers or not, was a resistance to this order, and was a contempt of court. The facts in the following cases will show that this was the rule established by the courts rendering the decision of *Secor v. Railway Co.*, 7 Biss. 513, Fed. Cas. No. 12,605; *King v. Railway Co.*, 7 Biss. 529, Fed. Cas. No. 7,800; *In Re Doolittle*, 23 Fed. 544. In this last case it will be seen that the persons adjudged of contempt were the employés of another road. The cases of *U. S. v. Kane*, 23 Fed. 748, and *In re Higgins*, 27 Fed. 443, assert the same doctrine. In the case of *In re Tyler*, 149 U. S. 181, 13 Sup. Ct. 793, the supreme court says that any one who intentionally interferes with the possession of a receiver "necessarily commits a contempt of court, and is liable to punishment therefor." Here there is no limit as to the character of person who may commit the offense. To the same effect is *In re Swan*, 150 U. S. 637, 14 Sup. Ct. 225. If a person cannot intentionally interfere with the possession of property in the hands of the receiver of the court without being in contempt of said court, it would be evident that the same rule would apply to the interfering with the use and operation of such property as a railroad in the hands of a receiver. It would seem, upon consulting the authorities upon the point, a court should hardly be called upon to discuss the proposition that the rule did not apply to all persons who should intentionally violate the rights of a receiver, but only particular persons, such as employés, officers, or parties to the suit in which a receiver may be appointed. The rule claimed is not supported by statute, decisions of courts, or reason.

Next, it is urged that petitioner had no notice that the Northern Pacific Railroad Company's property was in the hands of receivers. His evidence is to this effect. But it would seem that such evidence might have been induced by the great desire of the defendant to achieve his liberty. According to his own statements, petitioner entered into a contract to labor for those very same receivers; that he traveled over the railroad operated by those receivers from St. Paul, Minn., to Missoula, Mont. According to affidavits on file, the peti-

tioner sought to induce men to quit work for these very receivers. In trying to influence these men not to go to work, it was strange that he did not learn for whom they were to work. He appears to be a man of intelligence. It is not pretended that petitioner claimed any right to influence the men named in the affidavit not to go to work for the receivers. It had been a notorious fact, published in all the newspapers on the line of the Northern Pacific Road for months, that the said road was being managed by receivers, appointed by the federal courts. Under all the circumstances, if the petitioner did not have actual notice of the fact that the said road was being operated by receivers, he must be considered as having constructive notice thereof. There are authorities to the effect that, in such a case as is here presented, it is not necessary that petitioner should have had notice of the rights of the receivers. Every man, when he does an intentional and willful act, is presumed to intend what would be the natural consequences of the act. In the note of Francis Wharton to the case of *In re Doolittle*, 23 Fed. 549-551, this matter is discussed. It is there maintained that a person who ignorantly resists the receivers of a court cannot justify an account of his ignorance. In a case like this, where the petitioner acted without right or the claim of right, I think this rule should be maintained in contempt cases.

It is also urged that the deputy marshal should have notified petitioner of his official character. The deputy states that he wore a badge upon his coat, and that the petitioner knew his official position. In the case of *People v. Pool*, 27 Cal. 573-578, the supreme court of that state held that the words "You are my prisoner" were sufficient to notify a person of the official character of the person making the arrest. More than this was done in the case at bar to notify the petitioner of the character of the person arresting him. Petitioner says in his petition that the person arresting him represented himself as being a United States deputy marshal.

I have already held in another proceeding that the facts were sufficient to justify the arrest of petitioner. From all these considerations, I am satisfied the petitioner was properly arrested.

But I am confronted with another fact. It appears that the petitioner is held under arrest, and is confined under the original arrest, which was made somewhere about the 18th day of July, 1894; that petitioner has never been taken before a committing magistrate or commissioner of this court. As we have seen already, section 1014 of the Revised Statutes gives power to certain officers (among them commissioners of the United States circuit court) to examine persons charged with offenses against the laws of the United States, and that United States marshals, by virtue of section 788 of said statutes, have the same authority in making arrests against the laws of the United States as a sheriff of the state where the arrest is made. It is contemplated by the statute law of Montana that, when any officer arrests a party for a criminal offense, he should take the prisoner before a committing magistrate, and that a complaint should be made out, in which the charge against the prisoner should be specified; and, unless the prisoner should waive examination, an ex-

amination into the character of the offense of which the accused is charged should be had, and, if the committing magistrate found that there was probable cause to believe the prisoner guilty of the offense charged, he should be committed in default of bail (which such magistrate is authorized to fix if the offense should be bailable) to the custody of the proper officer, to be held to answer the charge before the proper court. See Comp. St. Mont. pp. 415-425. It is generally the duty of any officer or person making an arrest to take the person before a magistrate having authority to examine as to the charge made against the person arrested without delay. 1 Bish. Cr. Proc. § 214. After examination, the prisoner, if held in confinement, should be held under the order or commitment of the examining officer, in accordance with the provisions in the district of Montana of the 115th section of the Compiled Statutes of Montana (page 425). The petitioner is not so held, but has been held under the original arrest for over a month, which arrest was made without warrant. It is therefore ordered that the said petitioner be, and he is hereby, discharged from arrest.

Ex parte MURRAY.

(Circuit Court, E. D. Louisiana. February 27, 1895.)

No. 12,380.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT.

M., a colored man, applied for a writ of habeas corpus, alleging that he was in custody under an indictment for murder found by a grand jury in the selection of which the jury commissioners had violated the fourteenth amendment of the constitution of the United States, and the constitution and laws of Louisiana, in failing to summon persons of M.'s race; and that he had been denied due process of law, and the equal protection of the laws, by the refusal of the judge of the court in which he was indicted to grant him a subpoena duces tecum to procure evidence in support of his challenge to the grand jury, or to entertain a petition for removal of the cause to the United States court on the ground of local prejudice. *Held*, that the petition stated no violation of the constitution or laws of the United States, and did not entitle M. to a writ of habeas corpus.

This was a petition by James Murray for writs of habeas corpus, certiorari, and prohibition, alleging that he was illegally restrained of his liberty under an indictment, and that he had been denied due process of law, and the equal protection of the laws, in violation of the constitution of the United States.

Thomas F. Maher, for petitioner.

PARLANGE, District Judge. The applicant alleges, substantially, that he is an American citizen of the African race; that he is in custody of the criminal sheriff for the parish of Orleans, La., under an indictment for murder, which indictment was presented in the state court by grand jurors selected by the jury commissioners under Act No. 170 of the legislature of Louisiana held in 1894; that said jury commissioners violated the fourteenth amend-

ment of the constitution of the United States by failing to summon before them for qualification, citizens of applicant's race, in compliance with the constitution and laws of the state of Louisiana; that said jury law No. 170 of 1894 is unconstitutional, and violates the fourteenth amendment; that the right secured to applicant by the state constitution and the law providing for equal rights to all citizens of the United States was denied him by the state court, in this: that having filed a challenge to the grand jury which indicted him, which challenge was ordered filed for argument on the face of the papers, applicant moved for a subpoena duces tecum to issue to the register of voters and jury commissioners, requiring them to furnish evidence necessary to support the challenge, and said subpoena was refused by the state judge, thereby denying applicant due process of law and the compulsory attendance of witnesses, in violation of the state constitution and the fourteenth amendment; that the man with whose murder applicant is charged was a white man, and local prejudice is so strong as to prevent an impartial trial in the state courts; that applicant requested the state judge to fix for argument a petition, filed by applicant, for the removal of the cause to this court, and applicant asked to be allowed to summon witnesses in support of said petition, which requests the state judge refused to entertain, and from such refusal applicant's counsel reserved a bill of exceptions; that the act of the state judge in refusing said requests was the act of the state of Louisiana denying applicant due process of law, and the equal protection of the law, in violation of the fourteenth amendment; that his trial in the state court is fixed for February 28, 1895. Applicant prays for a writ of habeas corpus, and also for writs of certiorari and prohibition to the state judge and state district attorney, enjoining them from further proceeding in his case until the further order of this court.

While the writ of habeas corpus is a writ of right, it will not issue as a matter of course. Section 755, U. S. Rev. St., provides that the writ shall issue "unless it appears from the petition itself that the party is not entitled thereto." Nor will the writ issue if it appears, upon the showing made by the applicant, that if brought into court, and the cause of his confinement inquired into, he would be remanded to prison. *Ex parte Terry*, 128 U. S. 301, 9 Sup. Ct. 77; *In re King*, 51 Fed. 435, and cases there cited. Applicant, upon his own showing, is not entitled to the issuance of the writ. Section 641, U. S. Rev. St., affords protection against state action, not against judicial action. The jury law No. 170 of 1894 does not violate the constitution of the United States. It directs the jury commissioners to select the jurors at large and impartially from the citizens of the parish of Orleans having the requisite qualifications as voters. It provides qualifications for jurors which do not discriminate against men of African race. The act of the legislature of Virginia which the United States supreme court held to be constitutional in *Virginia v. Rives*, 100 U. S. 315, seems to have been almost identical with said Act No. 170 of 1894. In *Strouder v. West Virginia*, 100 U. S. 304, the state law provided that only

white men should be jurors. The following authorities are decisive of this matter adversely to the applicant: *Virginia v. Rives*, Id. 315, 320-322, 333; *Neal v. Delaware*, 103 U. S. 387; *U. S. v. Harris*, 106 U. S. 639, 1 Sup. Ct. 601; *Civil Rights Cases*, 109 U. S. 11, 3 Sup. Ct. 18; *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. 780; *In re Wood*, 140 U. S. 278, 11 Sup. Ct. 738; *In re King*, 51 Fed. 435, and authorities therein cited. The case of *Andrews v. Swartz* (recently decided by the supreme court of the United States, Feb. 4, 1895) 15 Sup. Ct. 389, is in point. I therefore decline to issue the writs.

UNITED STATES v. BENNET.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 55.

CUSTOMS DUTIES—CLASSIFICATION—RAW ANGORA GOAT SKIN.

Raw Angora goat skins, with the hair on, being for all commercial purposes undressed fur skins, it being unprofitable to separate the hair from the skin and to use the hair as wool, cannot be classified as "wools on the skin," under Act Oct. 1, 1890, par. 387, but are free of duty, under paragraph 588, as fur skins "not dressed in any manner." Paragraph 605, which provides for the free entry of such skins without the wool, does not imply that, with the wool on, they are dutiable.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by Henry Bennet, importer of certain Angora goat skins, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise. The circuit court reversed the decision of the board of general appraisers. The United States appealed.

Charles Duane Baker, Asst. U. S. Atty.

Wm. B. Coughtry (Stephen G. Clarke, of counsel), for importer.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In the year 1891, the appellee, Henry Bennet, imported into the port of New York an invoice of raw Angora goat skins with the wool or hair on. The appraiser classed the hair upon the skins as "Class 2 Mohair," under paragraph 377 of the tariff act of October 1, 1890; and the collector, adopting this classification, assessed duty upon the estimated weight of the hair upon the skins, at the rate of 12 cents per pound, under the provisions of paragraph 387 of the same act, which provides that "wools on the skin shall pay the same rate as other wools, the quantity and value to be ascertained under such rules as the secretary of the treasury may prescribe." If the merchandise was properly dutiable as wools or hair, the rate of 12 cents per pound was properly assessed thereon as wool or hair of the second class, under paragraphs 377 and 384 of the act of October 1, 1890. The importer protested that his goods were entitled to free entry, under the pro-

visions of paragraph 588 of the same act, which places in the free list "fur skins of all kinds not dressed in any manner." The collector's decision was affirmed by the board of general appraisers, and their decision was reversed by the circuit court.

Raw Angora goat skins, with the wool on, are used exclusively as fur skins, and for no other purpose than as fur. It is not profitable to separate the hair from the skins, and to use the hair as wool. They are for all commercial uses undressed fur skins, and while they are also, literally, undressed wool skins, or skins with the wool on, their classification for tariff purposes should not be under the head of "wools," because practically they are not such. While bearing the name of "wool," they are not the wools to which the wool schedule relates, and it is too close an adherence to literalism to classify them as something which they are not. The board of general appraisers recognized this difficulty, but were of the opinion that paragraph 605, which provided for the free entry of raw Angora goat skins without the wool, implied that the same class of skins with the wool on was dutiable. A raw goat skin without the wool is expressly within the paragraph which relates to hides which are to be transformed into leather. A goat skin with the wool is a different article, and its commercial characteristics are accurately described in paragraph 588. The two paragraphs relate to different subjects, and from the legislative intent in regard to the duty upon hides no inference can be drawn as to the intent in regard to the duty upon unmanufactured furs. The decision of the circuit court is affirmed.

UNITED STATES v. LEGGETT et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

1. CUSTOMS DUTIES—CLASSIFICATION — GLASS JARS AS COVERINGS FOR ROQUEFORT CHEESE.

Small glass jars without necks, having straight inside walls and metal tops, are not unusual coverings for Roquefort cheese, within the meaning of Act June 10, 1890, § 19, providing that unusual coverings of merchandise shall be subject to an additional duty at the rate to which the same would be subject if separately imported; nor can they be classified as bottles or bottle glassware, under paragraph 103 of the Act of October 1, 1890.

2. SAME—CONSTRUCTION OF STATUTE.

The first clause of Act Oct. 1, 1890, declaring that, unless otherwise specially provided for, there should be levied upon all imported articles mentioned in the schedules the rates of duty respectively prescribed in such schedules, is not sufficiently definite to suggest that congress intended a reconstruction of the tariff system in regard to usual coverings of goods subject to a specific duty, so as to make glass jars, which otherwise would be entitled to free entry as usual coverings for Roquefort cheese, dutiable under paragraph 104, relating to glassware not specially provided for.

This was an application by the United States for a review of the decision of the board of general appraisers reversing the decision of the collector of the port of New York as to the rate of duty on certain glass jars containing Roquefort cheese, imported

by Francis H. Leggett & Co., The circuit court affirmed the decision of the board. The United States appealed.

James T. Van Rensselaer, Asst. U. S. Atty.
Comstock & Brown, for importers.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Section 2907 of the Revised Statutes provided that in determining the dutiable value of imported merchandise "the value of the sack, box, or covering of any kind in which such merchandise is contained" should be added to the cost or the actual wholesale price of the merchandise at the time of exportation in the market of the country from whence imported. This section was repealed by section 7 of the tariff act of March 3, 1883, but with the proviso:

"That if any packages, sacks, crates, boxes or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem, upon the actual value of the same."

Section 19 of the act of June 10, 1890, known as the "Customs Administrative Act," altered the seventh section of the act of 1883, and with respect to the usual coverings containing imported merchandise subject to an ad valorem rate of duty, returned to the pre-existing system. It provided "that the value of all coverings containing imported merchandise subject to an ad valorem rate of duty should be added in ascertaining the dutiable value of such merchandise," and instead of the penal duty of 100 per cent. ad valorem, imposed by the prior statute upon unusual coverings provided that unusual coverings of dutiable or free merchandise should be subject to an additional duty at the rate to which the same would be subject if separately imported. The statute was silent in regard to the usual coverings of imported merchandise subject to specific duties. Unless a change was made by subsequent legislation in regard to such coverings upon merchandise of that dutiable character, the usual glass coverings, not provided for as such, were not dutiable. *Oberteuffer v. Robertson*, 116 U. S. 499, 6 Sup. Ct. 462; *Magone v. Rosenstein*, 142 U. S. 604, 12 Sup. Ct. 391; *Karthauss v. Frick*, Taney, 94, Fed. Cas. No. 7,615. The tariff act of October 1, 1890, made the following provisions in regard to bottles and bottle glassware: "Duties are imposed by paragraph 103 upon all * * * bottles, * * * demijohns and carboys * * * and other molded or pressed, green and colored, and flint or lime bottle glassware;" by paragraph 104, the value of such bottles, etc., if filled with contents subject to an ad valorem duty, shall be added to the value of the contents; but, if filled with contents not subject to an ad valorem duty, or free of duty, such bottles or other vessels shall pay, in addition to the duty on the contents, the rates of duty prescribed in paragraph 103, "provided, that no article manufactured from glass described in the preceding paragraph, shall pay a less rate of duty than forty per centum ad valorem." In this state of the statutes, Francis

H. Leggett & Co. imported into the port of New York, in 1892, Roquefort cheese, contained in small glass jars or pots, without necks, having straight inside walls, and metal tops or covers. The collector properly assessed a specific duty of six cents per pound upon the cheese, according to the appropriate provision of the act of October 1, 1890, and furthermore assessed upon the jars a duty of 40 per cent. ad valorem, under the provision of paragraph 104, *supra*. The importers protested against the assessment upon the jars, because they were coverings of merchandise which was not subject to an ad valorem duty, or to a duty based upon the value thereof, were not unusual articles or forms designed for any use otherwise than in the bona fide transportation of the merchandise to the United States, were not covered by paragraphs 103 and 104, and were free of duty. The board of general appraisers reversed the decision of the collector, and the circuit court sustained the decision of the board, whereupon the United States appealed to this court.

The jars were not unusual coverings for Roquefort cheese, and were not intended for use otherwise than in the bona fide transportation of the merchandise. The principal claim of the United States is that they were bottle glassware. It is conceded that this term has no commercial meaning, and that the jars were not known commercially as bottles. We have been referred to the preceding tariff acts for a definition of the term, but they throw little light upon the meaning. In paragraph 133 of the tariff act of March 3, 1883, the term "bottle glass" is used, which apparently includes also "pickle or preserve jars." "Bottle glass" and "bottle glassware" probably are synonymous, and mean glassware of a nature like that of glass bottles, and therefore would, with reasonable clearness, include pickle and preserve jars, which ordinarily have a neck and an inside shoulder. The jars or small pots with metal covers, which are the ware in the case, do not resemble bottles any more than do tumblers; and we are clearly of opinion that they are not included within paragraphs 103 and 104.

The government next insists that the first clause of the act of October 1, 1890, declares that, unless otherwise specially provided for in the act, there should be levied upon all articles imported from foreign countries, and mentioned in the schedules, the rates of duty respectively prescribed in such schedules; that there was no general provision for free coverings; that there was a provision for manufactures of glass not specially provided for; and that, therefore, coverings of glass, which were not by name exempted from duty, were dutiable. The usual and necessary coverings of goods subject to specific duties have not been considered by the treasury department to be dutiable, unless such coverings were directly provided for in the tariff acts, since the decision of *Karthauss v. Frick*, *supra*, decided by Chief Justice Taney in 1840, who so construed the tariff act of 1832. The term of the decision in *Oberteuffer v. Robertson*, *supra*, is in harmony with this uniform construction. The very general language of the first clause of the tariff act of October 1, 1890, which is relied upon, is not sufficiently definite to suggest

that congress intended a reconstruction of the tariff system in regard to usual coverings of goods subject to specific duty. The decision of the circuit court is affirmed.

ROSENFELD v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

No. 92.

CUSTOMS DUTIES — PROFESSIONAL INSTRUMENTS OR TOOLS OF TRADE—ACTUAL POSSESSION.

Articles that do not arrive in the United States at the same time or in the same vessel with the importer are not in his "actual possession," within the meaning of Act Oct. 1, 1890, par. 686, placing upon the free list "professional books, implements, instruments and tools of trade, occupation or employment, in the actual possession at the time of persons arriving in the United States."

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by Carl J. Rosenfeld, the importer of certain theatrical costumes and scenery, for a review of the decision of the board of general appraisers at New York as to the rate of duty on such importations. The circuit court affirmed the decision of the board of general appraisers. The importer appealed.

Hess, Townsend & McClelland, for appellant.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. By paragraph 686 of the tariff act of October 1, 1890, the following articles were placed upon the free list:

"Professional books, implements, instruments and tools of trade, occupation or employment, in the actual possession at the time of persons arriving in the United States; but this exemption shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for any other person or persons, or for sale."

The question before us is whether the articles imported by the appellant were entitled to free entry by the terms of this provision, the claim that they were entitled to free entry under paragraph 752 of that act having been abandoned. It appears by the record that in July, 1891, the appellant caused to be shipped at Berlin, where he then was, for Bremen, with instructions to a broker at Bremen to forward them to this country by the first freight steamer, certain costumes, properties, and scenery belonging to the appellant and his brother, for use by them in theatrical representations to be given in this country. The articles arrived at the port of New York and were entered for duty about the middle of October, 1891. The appellant had meantime taken passage by a steamer which arrived at the port of New York about the middle of July, 1891. We do not doubt that the importations were professional instruments or tools

of trade, and, as such, would have been within the liberal meaning given to those terms in construing statutory exemptions, and entitled to free entry, if they had been in the actual possession of the importer at the time of his arrival in the United States. As we have lately had occasion to adjudge, in *Henderson v. U. S.*, 66 Fed. 53, the limitation by which the exemption is not to include articles imported "for any other person or persons" is intended to exclude such articles as are brought by the one arriving with them, not for himself, but for some other person, and the fact that they are not to be used by him exclusively is not material.

The exact inquiry is whether articles which do not arrive in the United States at the same time or in the same vessel with the person importing them are to be deemed in his "actual possession at the time of his arriving," within the meaning of the statute. The previous statutes placing professional implements and instruments of trade upon the free list do not throw any light upon the inquiry, because until the statute in question the only limitation was that the articles should "belong" to persons arriving in the United States, and should not be imported for sale or for use in any manufacturing establishment. The words "in the actual possession at the time of his arriving" constitute a new and further limitation. Pursuant to this language, it is not enough that the articles should belong to the person arriving, or be in his possession constructively, but they must be in his actual possession at the time. "'Actual possession,' as a legal phrase, is put in opposition to the other phrase, 'possession in law,' or 'constructive possession.'" *Churchill v. Onderdonk*, 59 N. Y. 134, 136. "Actual possession exists where the thing is in the immediate occupancy of the party; constructive is that which exists in contemplation of law, without actual personal occupation." *Brown v. Volkening*, 64 N. Y. 76, 80. Literally, and giving the words their ordinary meaning, the "actual possession" of the statute is an open, visible, present occupancy and possession of the articles imported. In order to leave no doubt that this is the meaning, the actual possession and the arrival of the owner must be coincident. We suppose that articles which are brought with the owner, in the same vessel, are to be deemed in his actual possession at the time of arriving, although they are in the immediate custody of the carrier. The carrier is his custodian, and the goods, under such circumstances, would be in the actual possession of the owner, equally as if they were in the custody of his personal servant. If, however, the articles arrive in a different vessel and at a different time from the owner, it would seem plain that they are within the excepted category.

These conclusions lead to an affirmance of the judgment.

CAVERLY v. DEERE et al.¹

(Circuit Court of Appeals, Seventh Circuit. February 23, 1895.)

No. 112.

1. PATENTS—ANTICIPATION—MACHINE FOR ROUNDING BENT HANDLES.

The Caverly patent, No. 303,116, for a machine for rounding bent handles by means of a cutter head consisting of a cylinder with a groove in the center of its periphery, and recesses from either side, terminating in narrow openings on such groove, for the adjustment of the cutter knives, is void because of anticipation. 52 Fed. 758, affirmed.

2. SAME—INTERPRETATION OF SPECIFICATIONS AND DRAWINGS.

The fact that the drawings of a patent show the knives of a cutter head set at a certain angle will not enable the patentee to rest his invention on that particular degree of angularity, when there is nothing in the specifications to show that he intended to limit the pitch of the knives to that angle. 52 Fed. 758, affirmed.

3. SAME—INVENTION—CUTTER HEADS.

There is no invention in setting the knives of a cutter head at the precise angle of 45°. 52 Fed. 758, affirmed.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was a suit in equity by Herschel Caverly, administrator of Sarah Caverly, deceased, against Deere & Co. for infringement of a patent. The circuit court entered a decree dismissing the bill. 52 Fed. 758. Complainant appeals.

Suit for damages, and to enjoin infringement of letters patent No. 303,116, issued August 5, 1884, to Sarah Caverly, assignee of Amos K. Caverly, for a machine for rounding bent handles, of which the four claims are as follows:

"(1) A cutter head consisting of a cylinder with a groove in the center of its periphery, and recesses from either side, terminating in narrow openings on such groove, for the adjustment of the cutter knives.

"(2) A cutter head constructed of two cylindrical disks, each with such a concave on its inner face, extending from beyond the diameter to the periphery, that when secured with their curved faces together the concaves form a groove on the periphery of the head corresponding to the shape and size of the dressed work, with one or more recesses extending from the outer face of each disk, diminishing in width as they progress, and terminating in a narrow opening in the curve, forming beds for the cutters and spouts for the discharge of chips, with knives secured in the openings.

"(3) A cutter head constructed of two cylindrical disks, each with such a concave on its inner face, extending from beyond the diameter to the periphery, that when secured with their curved faces together the concaves form a groove on the periphery of the head corresponding to the shape and size of the dressed work, with one or more recesses extending from the outer face of each disk, diminishing in width as they progress, terminating in a narrow opening in the curve, forming beds for the cutters and spouts for the discharge of chips, with slotted knives secured in the openings, and adjustable longitudinally therein by set screws.

"(4) The combination of the frame, the cutter head with groove in its periphery, and one or more openings from each side, terminating in a narrow slit on the groove, one or more knives so curved that the bevel on their cutting ends presents a flat surface, and gearing by which the head is actuated."

The following extracts from the brief will illustrate the argument of counsel for the appellant:

"With respect to the general features of rotary planing devices for rounding bent handles: (1) The corpus of such a device, as to form, is cylindrical, and having its external sides of the form of a plane circular disk, and bounded by the peripheral circle. (2) Such plane circular disk, when geometrically de-

■ Rehearing pending.

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scribed, constitutes the plane of the peripheral circle, and which possesses the following geometrical properties: (a) Diametrical and radius or radial lines; (b) divisibility of the arc of the peripheral circle into quadrants and degrees; (c) sine lines of the arc of the peripheral circle, denoting the degrees of any given arc upon the quadrant. (3) The peripheral groove also is bounded by a complex curved surface, wherein the lines of the vertical curvature cross the lines of the longitudinal curvature at right angles; and also wherein the longitudinal curvature is the greatest at the central portions of the groove, and become diminished along the ascending line of the vertical curvature; such diminution of curvature being in the inverse ratio of the increase of the distance extending from the center of the groove along the ascending line of the vertical curvature. Such are the general characteristics of the corpus of rotary cylindrical planing devices having a peripheral groove with planing knives adjusted thereto. The task of adjusting a planing knife to such complex features of curvature, with any hope of accomplishing anything like perfection in operative work, is most manifestly attended with great difficulty. It will at once be perceived that the problem to be solved by the invention under consideration was not simply the construction of a common carpenter's plane, designed only to dress plane parallel surfaces; nor was it simply to discover at what particular degree of angularity the bit or knife of such carpenter's plane would produce the most perfect planing work; nor, again, was it simply the task of varying the diagonal pitch or angle of the cutting edges of the planing bit of such carpenter's plane in search of the best planing angularity. But the task constituted another and different problem. It was to discover a plan of organic mechanical construction, embodying a rotary cylindrical body possessing a curved peripheral groove, whereby the formidable difficulties above explained, arising from the complex and varied features of curvature, could be overcome, and that by and through such plan of construction it would be rendered possible and easily practicable to adjust the plane of the cutting edges of the cutter knives to the plane of such complex and varied features of the curved surface of the groove in such a manner, and in such a position, and with such a uniform angularity as would practically accomplish such operative work as would be indicative of superior excellence and utility. Such was the problem which the invention under consideration was designed to solve. The old devices for rounding bent handles by means of a rotary cylindrical body having a peripheral groove, and knives adjusted thereto, were, by reason of the radical defects and imperfections of their organic construction and mode of operation, practical failures as planing devices, and have passed out of use. * * * The geometrical properties above enumerated of the peripheral circle, and of the plane of such circle, are important to be understood. They serve to describe with absolute mathematical certainty all the several constituent parts of such rotary cylindrical devices, and their combination and mode of operation, including the location and position of the cutter knives as adjusted to the peripheral groove; and also indicating with like absolute certainty the number of degrees of the arc of the peripheral circle upon which the plane of the cutting edges of the cutter knives is located and adjusted to the groove. It is therefore manifest that a description of the constituent parts of such devices, and of their relative positions with respect to each other, and of their combination and mode of operation, expressed and indicated by such geometrical lines, arcs, and properties of the plane of their peripheral circle, must, of mathematical necessity, be absolutely correct. * * *

"In the patent act of 1870 (section 4889, Rev. St.) it is expressly provided that the drawings shall constitute a part of the specification. The statute provides that a copy of the drawings 'shall be attached to the patent as a part thereof.' * * * It will be observed that, upon inspection, Figure III. exhibits a pattern drawing of the adjustment of the cutting edges of the knives to the plane of the curved portions of the disks, including the angularity of the diagonal pitch of the cutting edges of the knives. The pattern drawing constitutes such a practical and perfect description in its illustration of such angular, diagonal pitch of the knives that any person of common understanding, whether a mechanic or otherwise, would be enabled to procure from such pattern drawing, immediately and without the slightest difficulty or mental contrivance whatever, such angularity of diagonal pitch; any person capable of

following the lines of a perfect pattern diagram with a pencil would be able readily to procure such angularity. * * * Should it be regarded as being one feature of the invention that the inventor intended to limit the diagonal pitch of the cutting edges of the knives to particular angularity, and that such feature was a constituent part of the structural organism of the invention, then, under such theory or view, the verbal reference, 'as shown in Figure III,' pointed with perfect certainty to the perspective pattern, or pattern drawing, of such intended and required angularity of diagonal pitch, whereby the general public, or any person desiring to procure the same, would be in possession of the easy, simple, and ready means of so procuring the same, by simply following with a pencil the lines of the perspective diagram of such angularity, without the exercise of any skill. Under such a view of the invention, it is obvious that the verbal reference in the specification to the perspective drawings, together with the written description in the specification, constitutes, as a descriptive unity, such a full, clear, concise, and exact description of such angularity of diagonal pitch as to enable any person skilled in the art to construct and use the same. On the contrary, should it be regarded as being a feature of the invention that the inventor intended not to limit the diagonal pitch of the cutting edges of the knives to any particularly expressed degrees of angularity, but intended simply, by means of the verbal reference to the perspective drawings, to exhibit a perspective pattern of such angularity in order to plainly denote the angularity which the inventor regarded as being productive of the best results, then, under such a view, the verbal reference in the specification to the perspective drawings, together with the written description, would constitute a full, clear, precise, and exact description of such angularity, within the meaning of the patent act. It is therefore plain that, under either one of such views, it would constitute manifest error in law to eliminate from the written description recitals of the specification, and from all consideration all reference to the perspective description of the drawings. It is shown in the testimony of John W. Bartlett, complainant's expert witness, that the angularity of the cutting edges of the knives to the plane of the curved portions of the disks, as shown and illustrated in the perspective description of Figure III., was, in fact, forty-five degrees. Therefore, the question as to the quantity of the diagonal pitch or angularity of the cutting edges of the knives, within the meaning of the inventor, is manifestly involved in no mysterious obscurity, nor in any recondite problem; but it is rather a question simply suited to the capacity of the untutored schoolboy who has advanced far enough to hold a pencil and to follow the lines of a very plain perspective pattern. * * * It is also shown in evidence that such diagonal pitch or angularity, as perspectively shown in said Figure III., is, in fact, forty-five degrees. But it is manifest, however, that there is nothing in the description of the invention in the specification showing that the inventor intended to limit such diagonal pitch or angularity to the precise number of degrees indicated by the perspective pattern description, but that the inventor did intend to illustrate definitely, and without obscurity, such angularity as was deemed productive of the most perfect results. * * * Under no other possible geometrical position or relation of the planes of the cutting edges of the knives to the curved surface of the groove than that described in the written and perspective description of the specification, could such cutting edges be presented diagonally to the plane of the curved surface of the groove, and on a line of the transverse axis of the material."

The opinion of Judge Blodgett is reported in *Caverly v. Deere*, 52 Fed. 758.

E. Banning, T. A. Banning, and D. B. Nash, for appellant.

L. L. Bond, C. E. Pickard, A. H. Adams, and J. L. Jackson, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after stating the case, delivered the opinion of the court.

Numerous errors have been assigned upon the opinion delivered in the circuit court. They are irrelevant and immaterial, except argumentatively. The opinion may be wrong and yet the finding and decree right. The question involved in the appeal is whether or not the court erred in finding and decreeing the bill to be without equity; and for the presentation of that question the first assignment of error alone is sufficient.

The suit was for the infringement of letters patent No. 303,116, issued August 5, 1884, to Sarah Caverly, assignee, for improvements in machines for rounding bent handles and other wood-work. There are four claims. The first is for "a cutter head consisting of a cylinder with a groove in the center of its periphery, and recesses from either side, terminating in narrow openings on such groove, for the adjustment of the cutter knives." In other claims the cutter head is made of two cylinders secured together, the openings in which are described as converging so as to form beds for the knives and spouts for the discharge of chips. In the third claim the knives are slotted and adjustable longitudinally, and in the fourth claim are so secured that the bevel on the cutting ends presents a flat surface. We agree with the circuit court that there is nothing in any of these claims which had not been anticipated by earlier devices and patents. To use the language of the opinion below:

"The Moline and Louisville cutter heads were made with two disks; they had cutter knives inserted through the recesses extending from the outer face of each disk into the groove, and forming beds for the cutters and spouts for the discharge of chips; the slotted knives were secured in the openings and adjusted longitudinally therein by set screws. In other words, all of the elements of the complainant's patent are found in these old working cutter heads of the Grand de Tour Plow Company, the Moline Plow Company, and the Wilder patent, and most of them date back much earlier than even the witnesses for the complainant would carry the Caverly invention."

It is urged upon us that the patent in suit, when construed as it ought to be with reference to the drawings, shows the knives set at an angle of 45° , and that in this respect the device is novel and useful as compared with the prior art. If it were shown to be true that a machine with knives set at a particular angle had distinct advantages over a machine with knives set at any other angle, the discovery and embodiment of the fact in a working machine ought, we suppose, to be deemed patentable. But nothing of the kind is shown here. While it is argued from the drawings, and geometrically, that the angle of the knives in the patent is exactly 45° , it is at the same time asserted, and is clearly true, that there is in the specification nothing showing that the inventor intended to limit the pitch of the knives to the precise number of degrees indicated by the drawings, but only to illustrate distinctly "such angularity as was deemed productive of the most perfect results." This implies—and, if not admitted, the fact would be evident—that knives set at any angle, say between 40° and 50° , and perhaps within wider limits, will work as well, approximately, as if set at the exact angle of 45° . It follows that there is no patentability in that particular, even if it be conceded that the drawings of the patent are to be regarded as working plans, showing the par-

ticular angle stated,—a proposition which, in view of the fact that the specification is silent on the subject, is not deemed tenable. Every mechanic accustomed to the use of the chisel and the joiner's plane is familiar with the principles upon which such knives work, and if, in a plane or in a cutter head, he should find a knife which stood at an angle of 80° scraping instead of cutting, as it is said the knives in some of the old machines did, he would be at no loss to apply the remedy. It is, of course, true that certain geometrical propositions are applicable to knives in such a machine standing at the angle of 45° which would not be applicable if the angle were different, and, conversely, if the angle were different the geometrical propositions incident thereto would not be applicable to knives inclined at the first-named angle; but patentability does not follow in the one instance more than in the other. It is to be observed, too, that, if the invention consists in the exact angle at which the knives stand, infringement cannot be established without proof that in the infringing machines they stand at that exact angle. The decree below should be affirmed, and it is so ordered.

EDISON ELECTRIC LIGHT CO. v. ELECTRIC ENGINEERING & SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. February 14, 1895.)

1. PATENTS—INVENTION—ELECTRIC LAMP SOCKETS.

The Bergman patent, No. 257,277, for an improvement in the sockets of incandescent lamps, shows patentable invention as to claim 2, which covers a form of construction in which the contacts are compressed instead of drawn apart, while screwing the lamp into the socket. 60 Fed. 401, affirmed.

2. SAME—ANTICIPATION.

The fact that a slight compression of the contacts had existed in a prior lamp does not show anticipation of the Bergman patent, it appearing that such compression was immaterial to the form of construction employed in the prior lamp, and was not in the contemplation of the inventor thereof, or pointed out by him as an improvement, or in any way suggested as a function of the arrangement of the parts.

This was a suit in equity by the Edison Electric Light Company against the Electric Engineering & Supply Company for infringement of certain patents. The circuit court rendered a decree in part sustaining and in part dismissing the bill. 60 Fed. 401. Both parties appeal.

R. N. Dyer and C. E. Mitchell, for complainant.

Alfred Wilkinson, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The suit was brought on five patents, viz.: No. 265,311, to Edison; No. 251,596, to Johnson; and Nos. 257,277, 293,552, and 298,658, to Bergman. All these patents relate to sockets for incandescent electric lamps. The patent to Edison, No. 265,311, was held valid by the circuit court, and was

also found to be infringed, but, because of the expiration of a Russian patent to Edison for the same invention, no injunction was granted. No appeal from that part of the decree was taken. The patent to Johnson, No. 251,596, was held by the circuit court to be invalid as to the claim in controversy. The complainant appealed, but upon the argument in this court the decree of the circuit court as to that patent was sustained on the opinion below. The third patent to Bergman, No. 298,658, was withdrawn at the argument from the consideration of the circuit court, and from so much of the decree as dismissed the bill as to that patent no appeal was taken. The second patent to Bergman, 293,552, was held valid by the circuit court, which decreed an injunction and accounting thereon. The defendant appealed, but upon the argument in this court the decree of the circuit court as to that patent was sustained on the opinion below. The first patent to Bergman, 257,277, was held valid by the circuit court as to the second claim, the only one of which infringement is charged. The defendant has appealed, and the determination of that appeal is the only question remaining to be decided by this court.

This first Bergman patent is one for an improvement in the details of an incandescent lamp socket, devised to overcome a difficulty which was found to exist in the earlier combinations of lamp and sockets. The lamp, which comes separate from the socket, is a glass bulb, surrounding the illuminating filament. Through the insulating material which closes the mouth of this bulb, and constitutes its base, run the leading-in wires which carry the current to the filament. Each of these leading-in wires is connected with a piece of metal on the outside of the lamp base, these pieces of metal being separated from each other by insulating material. When the base of the bulb is inserted in the socket, these pieces of metal come into contact, respectively, with the two wires which bring the current from the source of supply. When both are thus in contact, the current flows through the filament. When one of them is cut off from contact, by a key or other circuit-breaking device, the current ceases to flow, and the light is extinguished. Prior to Bergman's contrivance, the two pieces of metal which connected at the lamp base with the leading-in wires consisted of a screw-threaded band around the base near its lower end, and a broad flaring ring nearer to the bulb. The band engaged with screw-threaded metal in the socket, thus making electrical connection with one of the line wires. The flaring ring engaged with a like ring on the top of the socket, thus making connection with the other line wire. The insulating material of the base of the lamp, which formed a nonconducting body between the band and the flaring ring, was composed of plaster of paris. As the lamp base was screwed down into the socket so as to bring the two rings into proper contact, there was a constant tendency to pull the base apart between the screw-threaded band and the ring; and, as plaster of paris is a fragile material, it frequently happened that the insulating surface was cracked or disintegrated before the filament of the lamp was worn out. Bergman reversed the position of these

metal contacts in both lamp and socket. The screw-threaded band and its engaging thread on the socket were retained, but the rings nearer to the bulb were dispensed with. Instead of the flaring ring on the lamps, he placed, in the center of the base bottom, a metal disk connecting with one of the leading-in wires. Instead of the ring on the top of the socket, he placed a metal projection in the hollow space in the bottom of the socket, connected with one of the line wires, and arranged so as to impinge upon the metal disk in the bottom of the lamp base when the latter was screwed into the socket. In consequence there was no longer any tendency to pull the insulating material apart. On the contrary, as the screw thread drew the lamp base deeper into the socket, pressure on the bottom plate increased, and the insulating material was pressed closer together. The patentee in his specification sets out that the object he had in view was to "produce a socket for incandescing electric lamps which will have the electric terminals or contacts so constructed and arranged that terminals can be used on the base of the lamps, which, from their position, will subject the base to compression when it is screwed into the socket, instead of to tension, thus permitting the use of a molded base without danger of cracking between the terminals." The second claim, which is the only one in issue, is as follows:

"(2) In an electric socket, the combination, with the body of the insulating material, of a plate in the bottom of the socket, and a horizontal screw ring located between the bottom plate and the mouth of the socket, said plate and ring engaging opposite parts of an entering base or plug, and serving to compress the base or plug between the terminals carried by it, substantially as set forth."

It is to be noted that in this patent, which is for the socket alone, only half of Bergman's device is claimed. To its successful operation it was quite as essential that the old lamp base should be remodeled as it was that the form of socket be changed. And the patentee testifies that when he perfected his device, and showed it to Mr. Edison, in whose employ he then was, the latter at once gave instructions to the manager of the lamp factory to stop making the old-style lamp bases, and to make them so as to compress the plaster when screwing the lamp in, instead of pulling it apart. The improvement is, no doubt, a small one, but it seems to be useful. The defect it remedied was a troublesome one, and, so far as the evidence shows, Bergman's change of the relative position of the contacts seems to have overcome it. The various Edison companies at once began to use sockets with the contacts described and claimed in this patent, modifying the Edison lamps accordingly, and that construction became the standard construction for Edison's lamps and sockets, and has remained so down to the present day. For many years no one seems to have infringed, and it is only recently, when the business of electric lighting has grown to such dimensions that there is a profitable field for the manufacture of separate parts of the apparatus employed, that defendants have undertaken the manufacture of sockets suitable for operation with lamps having their contacts arranged as in the Edison, and

which are infringements of the Bergman patent. Several patents and publications have been introduced by defendant to show the prior state of the art, and support the contention that the Bergman device contains no element of patentable novelty. The Powell English patent of 1874 is the best of these references. None of the others are more suggestive than this. It is a device for an electric arc lamp, and a standard or suspending or mural support for the same. It shows the lamp base or stock screwed into a supporting socket. The screw ring provided one contact, and a spring plate in the lower part of the hollow in the socket provided the other contact, with the result that pressure or compression would be applied to a more or less extent to the base. Complainant's experts criticise the Powell patent as an anticipation by pointing out that it belongs to the art of arc lighting; that it is bulky; that it has never been found practically useful. The difficulty with it, however, and the same objection applies to all the other patents and illustrations introduced as anticipations, is that, although compression to a slight degree did result from screwing the lamp stock down onto the spring plate, such compression of the material of the stock between the screw ring and the end of the stock was not in the contemplation of the patentee, or pointed out in the patent as an improvement, or in any way suggested as a function of the arrangement of the parts. Naturally enough the Powell patent was silent on this point, for it was a matter of no concern whether the lamp stock was pushed or pulled. Its materials were, so far as the patent shows, tenacious and strong, and it made no difference to what strains they were subjected. The Powell patent suggests, not the desirability of arranging strains so as to compress the insulating material of the lamp stock or base, but how to obtain such compression. It needed, however, no prior patent to instruct any one that if a screw-threaded plug, with a projection on the end, is screwed into a hole, there will be compression of material between the screw thread and the end of the plug as soon as the latter impinges on the bottom of the hole. The merit of Bergman's invention consisted, not in showing to the world that if you had a screw thread on a lamp base, and a metal plate at the end of the base, with insulating material between screw thread and plate, you would secure the compression of such insulating material when you screwed it into a socket till it touched bottom; but in finding out that the cracking and disintegration of the plaster of paris bases of the older lamps was occasioned by tensile strain between terminals, and that this particular difficulty could be overcome, and the lamp's service improved by reversing the position of the terminals in both lamp and socket, so that the strain should be no longer tensile, but compressive. The record discloses no anticipation, and as we are satisfied that the improvement, although slight, was useful, the decree of the circuit court as to this patent is affirmed. In view of the results of these cross appeals, no costs of this court are allowed to either party.

SCHUYLER ELECTRIC CO. v. ELECTRIC ENGINEERING & SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. February 11, 1895.)

PATENTS—LIMITATION OF CLAIM—PRIOR ART.

The Perkins patent, No. 247,103, for a circuit breaker for electric lamps, consisting of a device in which the current is broken by the snap action of a contact spring, which also acts as a pawl or detent, is limited by the prior state of the art, and by the language of the specifications, to the mechanical details described, and is not entitled to a broad range of equivalents. 62 Fed. 588, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

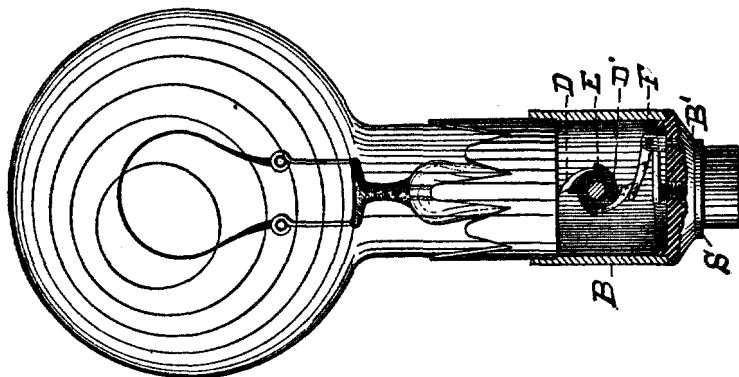
This was a suit in equity by the Schuyler Electric Company against the Electric Engineering & Supply Company for infringement of letters patent No. 247,103, issued September 13, 1881, to Charles G. Perkins. The circuit court dismissed the bill (62 Fed. 588), and complainant appealed.

C. L. Buckingham, for appellant.

Alfred Wilkinson, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The patent is for a switch or circuit breaker for electric lamps. The switch is shown in the drawing and specifications as applied to the base or socket of an incandescent lamp.



A metal shaft, E, is journaled in opposite sides of a cylindrical insulating base, and carries an S-shaped piece of metal, D, on each side of which are insulating ratchet disks, D', so arranged that when the composite structure, D and D', is considered as a whole it is found to be a ratchet wheel with four teeth, two of which are metal connecting electrically through the shaft with one of the conducting wires, and two of which are insulated. The two kinds of teeth are arranged alternately. With the teeth there engages a V-shaped

pawl, F, having one of its arms widened so as to sweep over the entire thickness of whichever tooth it may encounter. The pawl is pivoted to a standard fixed in the lower part of the lamp, and a spring engaging with the lower arm of the V forces its upper arm against the ratchet wheel. The other connecting wire connects electrically, through the spring, with the V-shaped pawl. Therefore, when the pawl engages with a metal tooth of the ratchet wheel, an electrical circuit is made; when it engages with an insulating tooth, such circuit is broken. As the ratchet wheel is turned by the operating button on one end of the shaft, the pawl "wipes over" the tooth on which it rests, and when it reaches the end or point of that tooth, being pressed upon by the spring, slips off with a quick or snap action which carries it at once to the base of the next succeeding tooth. This quick action is of no particular advantage when the pawl springs from an insulating to a metal tooth, but when it springs from a metal to an insulating tooth the rapidity and extent of its movement overcomes a difficulty which would otherwise seriously impair the usefulness of a circuit breaker. When two metal points in contact with each other, and through which an electrical current is flowing, are slowly drawn apart, the space between will be filled by an electric flame or spark commonly called the "arc." The extent to which this arc will stretch between the separated points varies with the strength of the current. "Such spark or arc," as one of the witnesses expresses it, "produces a burning effect, which is the more serious the longer the time is during which the rupture of the circuit takes place. In general, it may be said that the burning caused by the spark or arc produces a disintegration, oxidation, or charring of the contact surfaces, and in this way brings it about that the surfaces are too much roughened to admit of intimate contact, or else that nonconducting or resisting elements are introduced, which lessen the carrying capacity of the switch. Inasmuch, therefore, as the deleterious effects of the spark or arc are increased by a slow separation of the contact surfaces, it has been found necessary to resort to a more rapid movement than that of the hand alone for effecting the desired separation." The witnesses all agree that the range of quick action should exceed the length to which the current to be broken can draw an arc, and that if there be a shorter range of quick action the switch would to that extent fail of its purpose. In the switch of the patent, quick action to an extent abundantly sufficient for a current of the strength employed is secured on every occasion when the circuit is broken, because the organization of the ratchet wheel and pawl prevents any backward revolution of the shaft by careless operators and a consequent re-establishment of circuit, which could thereafter be broken by hand action only.

The first claim of the patent, which is the only one declared on, is as follows:

"(1) The combination, in an electric light switch, of a ratchet having metallic projections, and insulating teeth in the intervals between the same, and a pawl or detent for engaging with the insulating teeth when released from contact with the metallic projections, as and for the purpose specified."

The circuit court held that the patent was a narrow one, and should be confined to the specific mechanical devices which it described. This is assigned as error, appellant insisting that Perkins was a pioneer in the field, and the first to break contact by a quickened motion of a detent or other device. Three patents are relied upon by defendant, and referred to by the circuit judge, as showing such a condition of the art as would preclude any broad construction of the Perkins patent. These patents are discussed at great length by complainant's experts and by its counsel, who insist that none of them show any such snap action as is described in the patent sued upon. That they do disclose the potentiality of such snap action is indisputable; and that there is a trifling springing movement in the Gilliland and Rogers patents as the contact spring slips off the metal tooth into the insulating air space between seems to be quite clear upon inspection. These prior patents were not used in electric lighting, but for telegraphic currents, which are very much weaker than those employed for illumination. In consequence, the extent of separation necessary to disrupt an arc would be very much less in the Gilliland device than would be required if a lighting current were being handled. But it was common knowledge in the art that an arc could be disrupted by a quickened separation to an extent greater or smaller as the current was stronger or weaker. Spaces of insulating material alternating with metal spaces in a wheel revolving under a contact point were old. Notches in a wheel which, although not lined with insulating material, were in fact insulating spaces, since air is a nonconductor, were old. A spring contact point which slipped off the metal tooth of a wheel into an insulating air space was old. A device to check all backward motion of the wheel, thus avoiding the re-establishing of the circuit last broken, was old. There was, indeed, no switch for electric lighting which had a snap action employed under all conditions to disrupt the circuit at the separation of contact. But electric lighting was in 1881 practically a new art, only just beginning to grow clamorous for practical devices; and the sister art of electric writing already possessed devices which disrupted the circuit through which its feeble currents passed by a snap action, very slight indeed, but quite sufficient to accomplish its purpose. These telegraphic devices, as the event shows, were susceptible of adaptation to use in the lighting art, by increasing the strength of the spring sufficiently to throw the contacts further apart within the same space of time, and by making the insulating space an area of insulating material, instead of an air space with conducting boundaries.

If we could be satisfied, as complainant's experts and counsel seem to be, that Perkins was the discoverer of the important fact that the practical, safe, and efficient way to break a current was by imparting a snap action to the contact points, or one of them, thus securing a much quicker separation than could be effected by movement imparted only by the hand of the operator, we should be inclined to give to his patent a broad range of equivalents, and not to

confine it to the mechanical details described. But the state of the art seems to preclude this, and whatever doubt there may be left as to the extent to which the earlier patents indicate structures fundamentally like Perkins', so far as snap action and a locking against backward movement are concerned, is effectually dispelled by the language of the patent itself. The patentee does not set forth that he is the discoverer of the utility of quick-action separation, nor even that his mechanism is the first devised for securing it. On the contrary, he says:

"My invention relates to improvements in that class of switches for incandescent electric lamps in which the break is effected by the snap or instantaneous reaction of a spring when released from contact with a conducting point or plate."

And then follows the statement that:

"It [his invention] consists in mechanical details for effecting this, the principal features of which are a ratchet wheel having both conducting and insulating teeth combined in operative relation with a spring pawl or detent, which acts as a contact maker with the conducting portions of the ratchet, and by engaging with the insulating teeth prevents the ratchet from being turned backward when the pawl has been released from contact with the metallic portions."

The patentee then sets forth specifically and with reference to the drawings the mechanical details of his switch, and then adds:

"Instead of a swinging pawl, I sometimes employ a spring-seated contact stop with a broadened end, as shown in Fig. 4, which acts as a detent with ratchet, D', when not depressed by projections, D, and thus prevents the shaft from being turned in both directions."

The first claim covers both the V-shaped pawl and the spring-seated contact stop, the second claim covers only the V-shaped pawl.

It must certainly be assumed that Perkins knew what it was that he invented, and his patent must be construed to cover only what in unambiguous language he asserts his invention to be, namely, the mechanical details he describes, with the single variation in the form of the contact stop which he sets forth. And if the claim be thus confined, the circuit judge was entirely correct in the conclusion that the defendant's two forms of switch do not infringe. The decree of the circuit court is affirmed, with costs.

FOUGERES et al. v. JONES et al.

(Circuit Court, D. Indiana. February 18, 1895.)

No. 8,819.

1. PATENTS—INVENTION—THILL COUPLINGS.

The Blair patent No. 334,842, for an improvement in anti-rattlers for thill couplings, is void for want of invention.

2. EQUITY PRACTICE.

The court may, of its own motion, dismiss a bill because it fails to state facts sufficient to give any right to relief.

This was a bill by Louis H. Fougères and James M. Haas against William P. Jones and Elmer E. Stephenson for infringement of a patent.

V. H. Lockwood, for complainants.
Chester Bradford, for defendants.

BAKER, District Judge. This is a suit for an injunction and for the recovery of damages for the alleged infringement of letters patent No. 334,842, issued January 26, 1886, to one George W. Blair, for an alleged improvement in anti-rattlers for thill couplings. The bill contains nothing beyond general allegations to show that the combination claimed involved invention. The defendants, by their answer, insist that the patent is void for the following reasons: (1) The production of the combination claimed does not involve invention; (2) the subject-matter of it was anticipated in the prior art; (3) anticipation by prior manufacture and use; (4) the patentee was not the original inventor; (5) the combination could not be validly granted in the present patent, inasmuch as all of its elements except one are shown in a prior patent to the same inventor, and the additional element was old and well known. In the case of *Fougères v. Murbarger*, 44 Fed. 292, the validity of this patent came before this court for consideration on a demurrer to the bill, which was sustained. The specifications and claim are there set forth at length, and for that reason are omitted here. After argument and careful deliberation the court there held that the letters patent in question for an improvement in anti-rattlers for thill couplings consisting of a bent plate, which had been used before, with the addition of another plate, were void for want of novelty. The bill in this case is as barren of specific averments tending to show invention in the patented device as the bill was in that case, and, although no objection to its sufficiency has been made by the defendants, the court may, *sua sponte*, dismiss the bill because it fails to state facts sufficient to give any right to relief. The present bill cannot be supported without overruling the former decision of the court. This the court cannot do, as it seems to it to have been well decided.

Passing from the bill to the case made by the proofs, it seems to me the situation of the complainants is in no respect improved. Devices similar to that of the complainants are old; the forming of such devices made from a plate of steel bent upon itself so as to have two arms is stated in the patent to be old; the forming of a curved bearing face for the eye of the thill iron on the outer or front arm of the device is also old; the turning of the parts of the plate to make a sharp bend or curve is old; the forming of the outer or front arm of the device with a double-curved face, and with a corrugated rib or projection between, is old; and the means of supporting the device against downward movement by extending the top piece to rest upon the jack clip is old. In view of the prior art, and the concession in the body of the patent that anti-rattlers had theretofore "been made of single plates of steel, bent in vari-

ous forms," it cannot be claimed that the combination in question exhibits such novelty as amounts to invention. These considerations make it unnecessary to examine the other grounds of defense. The bill will therefore be dismissed for want of equity, at the cost of the complainants.

WELLS v. CURTIS et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 141.

1. PATENTS—CONSTRUCTION OF COMBINATION CLAIMS—DISCLAIMER.

Where the claim is only for the combination of certain described elements, this amounts to a disclaimer, so far as that patent is concerned, of anything new in any one of the elements, whatever might be its value as ground for an independent application.

2. SAME—ACCIDENTAL FEATURES.

A patent should not be construed to cover a means which, without the inventor's design, performs a function not within his contemplation; nor should it be held to embrace anything which is not pointed out as new, either by express declaration, or by reasonably clear implication from the language used.

3. SAME—LIMITATION OF CLAIMS—EQUIVALENTS.

After describing an "elongated" pinion as one of the elements of his combination, and showing the necessity of a pinion of such form in his specifications, the patentee cannot assert that such description is immaterial, and that any kind of pinion is an equivalent and covered by the claim.

4. SAME—RANGE OF EQUIVALENTS—COMBINATION CLAIMS.

In inventions of specific devices, the range of equivalents recognized is much wider than in inventions of combinations. In the latter an element is not an equivalent, unless it is substantially the same thing as the patentee has described, operating in the same way.

5. SAME—LIMITATION—INFRINGEMENT—SCREW-CUTTING DIES.

The Forbes patent No. 253,996, for an improvement in screw-cutting dies, is of doubtful validity; but, if sustainable at all, it must be limited to the specific devices which make up the elements of the combination, and is not infringed by a machine made according to the Wells patent No. 355,737.

6. SAME—INVENTION—RATCHET WRENCH.

The Forbes patent No. 277,256, for a ratchet wrench, *held invalid*, as disclosing only the exercise of mechanical skill.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

This was a bill in equity by Roderick P. Curtis and Louis B. Curtis against Willett C. Wells for infringement of certain patents. The circuit court entered a decree for complainants, and defendant took this appeal.

The bill in this case was filed by the appellees to restrain the appellant from the alleged infringement by him of the rights secured to William D. Forbes by letters patent No. 253,996, bearing date February 21, 1882, for an "improvement in screw-cutting dies"; and also of the rights secured by letters patent No. 277,256, bearing date May 8, 1883, for an "improvement in ratchet wrenches," issued to said Forbes and the said Roderick P. Curtis, all which rights it is alleged have come by assignment to the appellees. The bill contains the proper averments, showing title in the appellees; alleges

that the inventions described in the two patents are susceptible of connected use in operating screw-cutting dies; and further alleges that the appellant infringes both of said patents. The appellant appeared and answered. He denied that the alleged inventor of the improvements covered by said letters patent was the first inventor or discoverer thereof, and also denied the infringement of either of them. As anticipations of No. 253,996 he set forth the following patents: British patent No. 1,765, of 1873; United States patent to Joshua Heap, No. 153,770, dated August 4, 1874; United States patent to Roberts, No. 158,314, dated December 29, 1874; United States patent to Eaton & Latham, No. 179,530, dated July 4, 1876; and, as an anticipation of No. 277,256, he sets forth United States patent to Gates, No. 198,291, dated December 18, 1877. He also added a clause by way of demurrer on the ground of multifariousness, but that has been abandoned. A replication was filed and proofs were taken. The prior patents shown by the evidence are the patents to Heap and Roberts for inventions of improvements in screw-cutting dies, and the patent to Gates for the invention of improvements in ratchet wrenches.

The invention claimed by Forbes in this patent No. 253,996, consisted of "the combination, in die stocks, of the following elements, namely: First, a casing, A, adapted to be secured to the object to be threaded; second, a threaded die-carrying ring having teeth on its periphery, and a screw head adapted to a corresponding thread in the casing; and, third, an elongated pinion having teeth adapted to those of the die-carrying ring, all substantially as set forth." In his specifications, A is described as a cylindrical casing provided with a hub into which and into the casing is introduced the pipe to be threaded, the pipe being secured in the hub by set screws or otherwise. The die-carrying ring is described as threaded externally and adapted to an internal thread of the casing, and having teeth on its periphery, the screw thread being cut into the edges of these teeth, the latter running parallel with the axis of the die-carrying ring, and extending the whole length of the ring. The ring is thus described as having capacity for being moved forward and backward along the screw thread inside the casing on the axial line of the pipe to be threaded, and also of taking rotary movement from the elongated pinion next to be described. The elongated pinion is small in its diameter, and is located in a chamber projected outwardly from the casing and parallel therewith. It runs along the whole length of the casing, and has teeth adapted to mesh with the teeth on the die-carrying ring, and long enough to operate upon the whole length of the ring during its entire travel in the operation of threading. The pinion is journaled in the ends of the projection, and at one end extends outside of the latter, so as to receive the handle by which power is communicated to the machine. The dies are located in the face of the ring perpendicularly to its center line, and adjustable to the size of the pipe to be threaded. There is also projected inside the casing, from the end at which the hub is located, a sleeve or hollow cylinder, somewhat larger in its inside diameter than the inside of the hub, and long enough to correspond with the length of travel of the die carrier in its operation. The inside of the die-carrying ring "fits snugly, but so as to slide freely" on the outside of this sleeve. In operation, the pipe to be threaded is inserted through the hub and through the ring until it comes to the dies, the ring containing which has been carried back to the rear of its room. The pipe is gripped by the set screws or other like device in the hub. On turning the handle of the elongated pinion, the die carrier is revolved, and is also drawn forward upon the pipe by the screw on its periphery leading upon the screw inside the casing. In this way the dies are made to engage the pipe, and the operation is prolonged until a sufficient length of the pipe is threaded. The pitch of the thread cut will, of course, correspond with the pitch of the thread on the die carrier. The patentee suggests, as a modification of this construction, the omission of the threading on the inside of the casing and the screw thread on the edge of the teeth at the periphery of the die-carrying ring, and accomplishing their purpose by threading the outside of the sleeve projected into the casing, and making a corresponding thread upon that part of the die-carrying ring which in the first construction slides upon the sleeve. He states that the object of his invention is to make a die stock which can be used to advantage and with facility in cutting screw threads on pipes of

large diameter. The advantages which he mentions as peculiar to his invention are that his "improved die stock is one adapted to the threading of large pipes such as are used for oil wells, owing to the facility with which the die-carrying ring can be rotated by turning the elongated pinion," and that it does away with "any necessity for gripping the pipe in a vise or other retaining device, for the threading of the pipe may be accomplished while it is simply resting on any support which may be at hand."

In the Heap patent, No. 153,770, dated August 1, 1874, in which the invention was described as being of an improved machine for threading tubes and bolts, there was a framing, A, which supported the die-carrying ring (called a cutter-head) and its shaft, which were integral, in a journal, which, as illustrated, was somewhat larger than the object to be threaded, but considerably smaller than the die head. The die carrier had teeth on its periphery, and was actuated by an elongated pinion running parallel with the movement of the die carrier, and lengthwise, along which the die carrier moved when in operation. There was also supported by the frame a vise which held the object to be threaded in line with the axis of the die head and shaft. The general method of operation was the same as that of the Forbes machine, as above described, and the construction contained all the elements of the latter, except that it had no casing surrounding the die-carrying ring and shaft, other than the box or cylindrical portion of the frame in which the shaft revolved. The Roberts patent was similar in most respects to that of the Heap, but, as the comparisons made by the court in its opinion are with the Heap machine, it is not deemed necessary to describe that of Roberts.

The appellant uses a machine patented by himself February 11, 1887, as shown by letters patent No. 355,737, with a modification thereof involving the form of the pinion. This machine has a casing surrounding the working parts. The pinion differs from the elongated pinion of the Forbes patent. In the Wells patent there is instead a small worm gear placed transversely across the end of the casing, and this actuates a ring having a corresponding gear revolving within the casing. In the modification which he uses there is, instead, a short pinion placed parallel to the axis of the die carrier, revolving into the teeth on the ring last mentioned. This ring carries teeth on only a portion of its length, the other portion fitting smoothly to the inside of the casing. The ring is stationary as respects longitudinal motion, but revolves freely within the casing, and is much shorter than the member called the "die-carrying ring" in the Forbes patent. On the inside of the ring, and running lengthwise of it, are short tongues or splines, which fit into grooves running lengthwise of the surface of the die carrier. The die carrier has a hollow shaft leading upon a sleeve by screw threads on each, in much the same manner as in the modified form of the Forbes patent, as above described. Thus, when rotary motion is communicated to the die carrier by the splines on the inside of the ring, its shaft is screwed upon the sleeve, and the die carrier slides lengthwise on the splines of the ring, engages the object to be threaded, and performs the operation. There is a vise to hold the pipe, as in the other machines.

The Forbes ratchet wrench, patent No. 277,256: This purports to be an invention for the improvement of ratchet wrenches, the object being, as stated by the patentee, to construct a cheap and compact reversible wrench, which can be readily changed from a right to a left handed wrench. It consists of a combination in a casing of a ratchet wheel having an opening in its center to receive and engage the head of the thing to be turned, and a reversible pawl beveled on the rear edge, of such width, relatively to the distance between the teeth of the wheel, as that it is guided thereby and prevented from accidental reversal, and held down into the teeth of the wheel by a spiral spring surrounding its stem, together with a cap through which the stem projects and offers a thumb piece, by which the pawl can be drawn up against the spring out of engagement with the wheel, and reversed. The casing has sockets at each end for the reception of the handles by which the wrench is turned. The result is a wrench which can be turned continuously either way without removing it from the thing which is turned thereby. The court below sustained both of the Forbes patents, and entered a decree for the complainants.

William Webster and Thomas & Hiett, for appellant.

Morris W. Seymour, Howard H. Knapp, and Almon Hall, for appellees.

Before LURTON, Circuit Judge, and BARR and SEVERENS, District Judges.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

The advantage claimed for the Forbes patent is that the cylindrical casing performs the function in the combination of furnishing a bearing for the die-carrying ring, and thereby more rigidly holding the die ring to a right line in its forward movement upon the material on which it operates. It is claimed that this was a weak point in former machines. It is material to observe that the invention claimed is not of the specific device in providing the casing as a bearing for the ring, but is of the combination of certain described elements, of which that is one. This amounts to a disclaimer of anything new in that element, so far as this patent is concerned, whatever might be its value as the ground of an independent application. That feature must therefore be treated as old. The Corn-Planter Patent, 23 Wall. 181, 224; *Miller v. Brass Co.*, 104 U. S. 350; *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. 507.

But, indeed, it is well known that it was a familiar device in machines. It existed in the cylinder of the steam engine, in the cylindrical guide for the crosshead, in the pump, and in the tubular guides for drills moving directly or spirally through them. There had previously existed devices for accomplishing the same results as those contemplated by Forbes, by similar methods. In the Heap machine was a clamp or vise to hold the object to be threaded, a die-carrying ring having a shaft integral with it, the latter carrying a screw thread which co-operated with a corresponding thread in the casing attached to the frame, to actuate the die in its forward movement when cutting the thread, and an elongated pinion working into cogs on the periphery of the die-carrying ring during every part of the travel of the ring in performing the work of threading. The casing in which the shaft of the ring turned was sufficient, to some extent at least, to hold the die-carrying ring in alignment with the object to be threaded, and resist any lateral thrust or twist of the parts from their alignment during the operation. The Heap machine included all the elements of the Forbes combination, unless it be that the casing in the latter performed a new function.

Much is said in the testimony and in the briefs of the casing as circumferentially journaling the die ring, and thus contributing an additional function to the combination. But it is difficult to find any indication in the claim, as explained by the specifications, of the discovery of anything new or peculiar in that direction, or that the patentee intended the casing to perform any such function. And while it is true that the patentee is not required to point out and describe in express language what he has invented that is

new, or the principle of his invention, and that it is sufficient if they can be gathered by implication from what is set forth, yet the implication ought to be clear, so that it may not be left in obscurity and doubt whether the patentee has in reality invented and produced something new. If nothing appears, either by express declaration or reasonably clear implication, to show that the patentee has made some new and valuable discovery, has thrown a light into a place which before was dark, and illuminated what was inert, there is nothing in the patent law to give him any standing. 1 Rob. Pat. § 79.

In his specifications Forbes says nothing of journaling his die-carrying ring by the casing, which seems singular if he had such an idea in his mind, for confessedly it was the only new thing in his invention, as he now claims it. Such a circumstance was noticed and commented on in *Setter Co. v. Keith*, 139 U. S. 530, 539, 11 Sup. Ct. 621, where counsel for the plaintiff endeavored by argument to prove that their combination performed a function not set forth in the patent. In *Fastener Co. v. Kraetzer*, 150 U. S. 111, 14 Sup. Ct. 48, the suit was for the infringement of a patent for the socket member of a ball and socket glove fastener. The patent was for a combination, the elements of which were described. The plaintiff's counsel contended that there was a peculiar advantage in the means specified by him not mentioned in the patent. As to this it was said (page 116, 150 U. S., and page 48, 14 Sup. Ct.): "If this feature be an advantage, as now claimed, it is strange that no allusion is made to it in the specifications." Then, after pointing out that the patentee had stated what his purpose was and the advantage in making the structure in that form, the opinion of the court goes on to say: "This would indicate that the advantage now claimed of a tighter compression of the leather was not originally within the contemplation of the patentee, but is an afterthought;" and that feature was laid out of the further consideration of the case. In speaking of the advantages claimed for his improved die stock, he says it "is well adapted to the threading of large pipes such as are used for oil wells, owing to the facility with which the die-carrying ring can be rotated by turning the elongated pinion." And again he says: "Another advantage is the operation of my improved die stock without gripping the pipe in a vise or other retaining device, for the threading of the pipe may be accomplished while it is simply resting on any support which may be at hand." If the idea of furnishing a circumferential journal to the die-carrying ring was not present to his mind, but is an afterthought perceived from subsequent experience or scientific inspection and analysis, it is obvious that there was no invention in thus by accident, as it were, supplying the means of a function not contemplated. The most significant indication that the idea now attributed to the patentee was present in his mind is the fact that in his specifications he describes the die-carrying ring as having a thread upon its periphery co-operating with a screw thread on the inside of the casing,

and the drawings also show the necessary contact between the two members for that purpose. But in another part of his specifications, suggesting a modification thereof, he entirely dispenses with this feature of his combination, and transfers it to the inside of the ring and the outside of the sleeve projected from the casing; thus showing that the bringing of the ring and casing in contact was useful in one only of the forms suggested, and therefore not an essential feature. *Trimmer Co. v. Stevens*, 137 U. S. 423, 435, 11 Sup. Ct. 150.

And, inasmuch as in both forms there must be close contact between the sleeve and the part of the ring operating as a shaft in order to answer the specifications, it seems quite as probable, to say the least, that the patentee intended the journaling to be there as that he intended it to be upon the casing. It may be that he had it in mind that the adoption of a cylindrical form would give the frame more strength, as compared with its weight, in order to meet what he says was the object and an advantage of his invention, namely, a machine for threading large pipes, and capable of being used where any support was at hand, apparently contemplating a use out of the shop and where it would be carried about. However, this is conjecture merely, and is not what is claimed for it. But, assuming this function to have been contemplated, it seems difficult to hold that, in view of the prior inventions and constructions in this art, there was any such invention in the provision of this casing as a bearing for the die-carrying ring and its shaft (for that is what the prolongation of the ring really is) as to be worthy to be put upon the plane of new and valuable discoveries, recognized by the patent law. It is sufficient to compare it with the Heap patent, already mentioned, to show in what Forbes' improvement consisted. A machine constructed upon that patent possessed every element of the Forbes patent, unless it be the casing journaling the die-carrying ring.

It is not shown that any difficulty existed in the die-carrying ring and shaft in the Heap machine, owing to the inefficiency of the provision therein for counteracting or resisting the effect of lateral rack or torsion incidental to its work, and from an inspection of the model shown us we see nothing, having regard to the nature of the work it is designed for, which indicates with probability that such inefficiency did in fact exist. But, if any defect of that kind existed, it would seem that any skilled mechanic trained in the art of such mechanism ought promptly to have seen the manifest ways for providing a remedy; that is, by making the shaft longer, by making it larger, or providing a rest or bearing for the other end of the shaft or of the integral member of which it formed a part, and, if a bearing, that it should be circumferential, in order to meet the indicated requirements. It is elementary in the law upon this subject that this is not invention. He simply enlarged the shaft, which, of course, enlarged the "casing" or "bearing," by whatever name called, and lengthened the casing so as to take in the whole, instead of a part, of the shaft member. That which in the patent is called a "die-carrying ring" is that, and more

At one end is the ring, which occupies a part only of its length. The other part is essentially a shaft, and performs the same office as the shaft in the earlier patents. This was merely an enlargement and extension of the means already provided for accomplishing the same functions. It matters not that the means might have been so feeble or inadequate as to only imperfectly perform their duty; the mere extension of those means in size or number, or change of form, would not, in the absence of special circumstances, make the improvement produced thereby patentable. "It is a mere difference in degree; a carrying forward of an old idea; a result perhaps more perfect than had heretofore been attained, but not rising to the dignity of invention,"—to use the language of Mr. Justice Brown, in *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1.

To apply another test: Suppose the Heap patent had succeeded that of Forbes, and the question were whether a machine constructed under it infringed the latter. The other elements being present, the controversy would turn upon the inquiry whether the stripping away of the cylindrical bearing from the head of the die-ring member of the combination, while retaining it upon the shaft which is part of that member, relieved it from the charge of infringement. We do not doubt that the plaintiff in such a controversy would urge that such a difference was an evasion; that what the defendant had done was merely to weaken and cut down the bearing of the die-carrying member, leaving it efficient enough for light work, but still operating in the combination to perform the same function as the cylindrical bearing in the Forbes patent extended along the whole of that member; and it would seem to us that such a contention would rest on stronger reasons than those which are here urged to support the identity of the other members of the combination, upon the question of infringement, hereafter to be considered. If the charge of infringement could be sustained in the case we have supposed, it shows that the Heap machine was an anticipation of the Forbes patent. *Peters v. Manufacturing Co.*, 129 U. S. 530, 9 Sup. Ct. 389; *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81; *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310. For these reasons it seems to us doubtful whether the Forbes die-stock patent can be sustained.

But, if the patent is sustainable, we should think the Wells machine is not an infringement of it. It is obvious that the former would stand on narrow grounds, and involve the specific devices which make up the elements of the combination. It is contended that Forbes' was a primary invention. But it follows from what we have said that we are of opinion that there is no ground for any such contention. The professed object of the patentee was to make an improvement on existing machines employed for the same purpose, and the only advance upon existing machines was, at most, adding an element of doubtful originality. In view of prior inventions in this kind of mechanism, Forbes cannot be deemed "a pioneer in the art," and therefore cannot invoke the doctrine of equivalents, as the courts apply that doctrine to primary inventions, so as to include all forms of devices which operate to perform the same

functions or accomplish the same result. *Miller v. Manufacturing Co.*, 151 U. S. 186, 207, 14 Sup. Ct. 310.

The small pinion of the Forbes patent, elongated to mesh with the teeth on the periphery of the die-carrying ring throughout its travel, is not found in the Wells machine, and it is clear that neither the worm gear nor the small pinion which has been added to the Wells machine to actuate the stationary ring (having reference to the longitudinal movement of the latter) can be regarded as its equivalent, within the rule applicable to patents not representing primary inventions. Having described the elongated pinion, and claimed it according to the description as an element in his combination, neither he nor his assignee can now claim that the description is immaterial, and that any kind of pinion is embraced in his claim (*Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1); although, as was said in respect to a similar contention in that case, it might be different if the patent had been a primary one. This the appellees substantially admit. But they claim that the small pinion and the grooves in the periphery of the die ring, which provide for movement on the line of its axis in the Wells machine, make up an equivalent for the elongated pinion in the Forbes patent. The facts compel the appellees to take that position. It is obvious, however, that it cannot be maintained. The respective elements do not operate in the two machines in the same way. To admit the equivalency of the single device in the one element in one machine with the compound device found partly in one element and partly in another of the other machine would be to extend the doctrine beyond its recognized limits in this class of inventions. But there is also a marked difference in the construction and operation of the die-carrying rings. In the Wells machine the ring which is actuated in its rotary movement by the teeth of the pinion remains fixed at one station, and does not advance during the operation. The die-carrying ring is located within it, and slides on the tongues of the outer ring, forward to the work. The tooth gear, as before remarked, does not advance with it. It is true that the die-carrying ring is actuated by the outer one, but so is every part of the machine by the initial force. The most that can be said is that the die carrier and its attachments in the Wells machine are similar in some respects, but not in all, to that in the Forbes patent. But it is not the ring described in the latter, and operates in a different way.

In the case of *Wright v. Yuengling*, above cited, the patent on which the bill was founded was for an improvement in frames for steam engines, and one of the claims was for the combination of a steam cylinder head, a guiding cylinder for the crosshead, and a semicircular connecting piece between the first two elements. The connecting piece was open at the top like a trough, and afforded access to the stuffing box of the cylinder. The defendant's device contained the first two elements, but his connecting piece consisted of a prolongation of the guiding cylinder, oval openings being provided in the sides of the prolonged part. It was contended that this prolongation of the guiding cylinder was an equivalent of the connecting piece of the first patent. But it was held that while the

defendant's construction afforded a facility of access to the working parts, not, however, equal with that of the complainant's, yet that the latter, having made his connecting piece as described by him an essential element of his combination, was not at liberty to say that a device which dispensed with it was an infringement, even if it accomplished the same purpose in an equally effective manner. And this was so held, notwithstanding that in place of the dispensed connecting piece there was substituted the prolongation of the guiding cylinder. In the case of *Fastener Co. v. Kraetzer*, 150 U. S. 111, 14 Sup. Ct. 48, above cited, one of the combination claims included as an element a socket having an elastic mouth which received the knob of the other part of the fastening, and held it. The defendant's structure, which it was claimed infringed it, consisted of a socket which performed the same function of receiving and holding the knob; but, instead of having its mouth elastic, had a split ring located in a circular cavity just within the lips of the socket, which ring, being elastic, received and held the knob, but was itself supported and held in place by the circular cavity built in the mouth of the socket. But it was held that this was a different construction from that of the one first mentioned, operating in a different manner, and so was not an infringement. On such a question, and in similar circumstances, it was said by Judge Acheson in *Johnson Co. v. Steel Works*, 50 Fed. 90, 95: "The scope of the claim must, on well-settled principles, be limited to the specific forms of construction shown and described by the patentee." And since all the elements are treated as old, it matters not in which one of them the variation exists, if the difference is not merely colorable, which, as we have shown, is not the case here. Indeed, we think there is quite as much difference between the defendant's machine, in either form, and that of Forbes, as there is between the latter and previous constructions, and quite as much of an approach towards what might be called invention.

This is not the case of an integral thing made in parts, and then combined so as to constitute but one integer, operating in the same way as if constructed as a unit. In this connection it is necessary to observe the wide distinction which prevails between inventions of specific devices and inventions of combinations. In the former a much wider range of equivalents is recognized. In the latter the range is limited, and an element is not an equivalent unless it is substantially the same thing as the patentee has described, operating in the same way. 1 Rob. Pat. § 254, and cases there cited. We do not say what the result might be if the patentee makes his description of the elements of his combination broad enough to include in each or any of them any kind of mechanism adapted to produce the same result as a step in the operation. In *Caster Co. v. Spiegel*, 133 U. S. 360, 368, 10 Sup. Ct. 409, it was said by Mr. Justice Blatchford of the Martin combination patent for furniture casters:

"In view of the state of the art, as shown by the various patents put in evidence, the words, 'the rocker-formed collar bearing, or its mechanical equivalent,' in the claims of the Martin patent, cannot embrace all modes of af-

fording vertical support between the floor-wheel housing and the furniture plate, whereby lateral oscillation of such housing is permitted; and those words must be restricted to such a bearing, resting on a collar beneath the floor-wheel housing, as is shown in the Martin patent."

But such a question is not before us, and we take the claim as we find it.

The ratchet-wrench patent, No. 277,256: The answer denies that Forbes was the original inventor of his alleged improvements in ratchet wrenches, and sets out that they were anticipated by the Gates patent, No. 198,291, of five years' earlier date. In the course of introducing testimony, the defendant introduced a patent to one Gallagher, No. 137,432, dated April 1, 1873, against the complainants' objection that it was not pleaded by the answer; but, as the Gates patent included substantially the features of the Gallagher patent which are relevant here, it is not material to consider the latter. The state of the art was such at the date of Forbes' invention that, as shown by his expert, Mr. Smith, his claim must be narrowed so as to cover only the feature of a pawl constructed of such width relatively to the distance between the cogs of the ratchet wheel that it cannot be turned without being first withdrawn from engagement with the wheel. In the Gates patent there was a reversible pawl beveled on the rear of its edge used for the same purpose, which, like the pawl in the Forbes patent, trailed back over the teeth when the lever was reversed to take a new hold, but the expert says it was free to turn without disengagement from the wheel. And he testifies that "the advantage of the Forbes construction is that there can be no accidental reversal of the pawl, and this is not true of Gates'." And the sum of the matter is that, if the supposed improvement was required in consequence of the defect suggested, it consists of widening the pawl so that its heel will rest upon the tooth behind it, and, as the tooth is straight across the periphery of the wheel, the pawl would be prevented from turning. This was a mere change in the form of a part of the combination adopted for the purpose of correcting its occasionally defective action,—a modification so obvious to a person skilled in that subject as not to have required anything more than the ingenuity which such a person might be expected to possess. We think it would be a misnomer to call this "invention," and that the patent therefor cannot be sustained. For the reasons stated, we are of opinion that the decree of the court below should be reversed, and the case remanded, with directions to dismiss the bill.

DOZE v. SMITH.

(Circuit Court, S. D. Iowa, C. D. December 12, 1893.)

1. PATENTS—NOVELTY—WATERING TROUGHS.

The Campbell patent (No. 221,031) for an improved watering trough for stock, consisting, in claim 4, in the combination of a trough and drinking cap with a valve-feed mechanism, an open-bottom chamber, and a horizontal partition between the drinking cap and chamber, whereby air is prevented from entering the bottom of the latter, is valid, as showing patentable novelty.

2. SAME—INFRINGEMENT.

The Campbell patent (No. 221,031) for an improved watering trough for stock, having a horizontal partition set into the trough between the drinking space and an open-bottom chamber, so that when the water rises above this partition it forms a "water seal," protecting the chamber from atmospheric influences, is not infringed by a trough merely covered, as a box, between the drinking space and chamber, making the water seal impossible, except at a mathematical level.

3. SAME—LIMITATION OF CLAIM—EQUIVALENTS.

The specific claim of the horizontal partition for effecting the water seal being a renunciation of claim to other devices for performing the same functions, the use of projecting side walls of the open-bottom chamber of defendant's trough, for the same purpose, does not constitute an infringement.

Bill in equity by J. E. Doze against Alpheus Smith for infringement of a patent for a watering trough for stock.

Cummins & Wright and Hart & Poston, for complainant.
Steele & Livingston and Read & Read, for defendant.

WOOLSON, District Judge. Complainant is the assignee, for certain counties in the state of Iowa, by virtue of various assignments, of letters patent No. 221,031, for "improvement in devices for watering stock," granted October 28, 1879, to John S. Campbell. The infringement complained of consists in the use by respondent, upon his farm, of a hydrant for watering stock. It is not alleged that respondent is infringing by manufacturing or selling. The letters patent contain five claims. But the bill expressly excludes the first and fifth claims, and, upon the hearing, counsel for complainant waived all except the fourth claim of patent (in this hearing), and announced to the court that complainant would rely only on the fourth claim, as stated in the letters patent.

The specifications of the letters patent substantially describe the "improvements in devices for watering stock" as consisting in a watering trough having an automatic valve mechanism, a central chamber so placed above this valve mechanism as that, by removing the cover of this chamber, which has an open bottom, the valve may be easily manipulated, and the float which operates the valve mechanism thereby permitted to move in a higher or lower plane, thus controlling the inflow of water to a lesser or greater height in the trough, as desired. The trough has at either end, and at such distance from the central chamber as may be desired, a top opening, on and around which a "drinking cap" is fitted. Between these caps and the central chamber a "horizontal partition," as the patent terms it, is set into the top of the trough, and extends from the drinking cap to the central chamber, on each side of the chamber, so that, as the water is taken from the drinking cap by stock drinking thereat, the water from the central chamber moves towards the cap, and the cap is refilled; thus keeping the caps constantly supplied with water, which rises above the horizontal partition. This partition is shown by the figures and specifications to have its surface on a level with the top of the watering trough. An outer curb may be used, surrounding the trough; and incline

partitions extend transversely from side of cap nearest chamber to the top of the chamber, so that between these partition inclines and the central chamber, and also between the trough (except at the drinking caps) and the outside curb, packing may be placed, for the purpose of protecting the water in the trough from extremes of temperature. The fourth claim in said letters patent is as follows:

(4) In a device for watering stock, the combination, with a trough having a drinking cap fitted on its top, of valve-feed mechanism, and an open-bottom chamber located over the latter, together with a horizontal partition fitted in the top of the trough, between said drinking cap and chamber, whereby air is prevented from entering the bottom of the latter, substantially as set forth.

Upon the hearing, counsel for complainant concisely stated the principle involved in this claim as being the water seal caused by this horizontal partition between the drinking cap and chamber, whereby there was openly exposed to the air only the small space or surface of water within the drinking cap, and thereby the air was prevented from reaching the water within the central chamber, and, as this chamber and the trough were surrounded with packing, the water in the chamber was kept at a temperature above freezing, so that, according to the recognized laws pertaining thereto, as the water at the surface of the drinking cap became chilled by contact with the air this chilled surface water would descend, and the water from the central chamber be drawn towards and into the cap; thus producing a current or movement in the water, and thereby preventing or lessening possibility of freezing.

The answer sets forth a number of grounds of defense. But, on the hearing, counsel for respondent announced that they would rely upon but two defenses, viz. (1) want of novelty; and (2) that the device used by respondent—his hydrant for watering stock—did not infringe upon complainant's patented invention.

As to the defense of the want of novelty, I find against respondent. It would serve no useful purpose to attempt to state in detail the grounds for this finding. A portion of the evidence submitted as to want of novelty was received subject to complainant's well-grounded objections, as without basis therefor laid in the pleadings. And as to the evidence, for whose introduction the answer furnishes the required foundation, I find that it does not sustain the allegation of want of novelty. The hydrant, or "device for watering stock," made and used by the respondent was introduced in evidence, by two models thereof,—one furnished by complainant, and the other by respondent. I do not find any substantial difference between these models, when considered with relation to the letters patent. These models show that respondent's hydrant has a central chamber, with open bottom, placed over a rude valve mechanism; that this chamber rests upon a drinking trough, into which the ends of the chamber (reaching from side to side, and completely across the trough) project perhaps a half, or slightly more, of the depth of the trough. This trough contains no "horizontal partition" set into it. Instead, this trough, from

chamber to drinking space, is covered over, upon its surface, as a side of a box would be covered. Neither has this trough "drinking caps fitted on its top." Instead, there is placed about the drinking space, on three of its sides (the fourth side—towards stock, when drinking—being open), a board or partial curb, whose only purpose or office seems to be to prevent the packing which surrounds the trough from falling or being pushed in the water in the drinking space. An outer curb is used with the trough, very similar in construction and manner of use to the outer curb with complainant's hydrant, and which serves here, as there, to confine the packing around the trough, and additionally, perhaps, to serve as a wind-break.

Manifestly, respondent has not used the exact counterpart of the hydrant described in this claim of complainant's patent. Is his hydrant the equivalent therefor? Since this fourth claim is for a combination, it becomes material to inquire whether, in any essential particulars wherein it differs from the patented invention, respondent's hydrant contains the equivalent, so as to become an infringement. This fourth claim of the patent includes a combination of the following particulars: (1) A trough (2) having a drinking cap fitted on its top; (3) valve-feed mechanism; (4) open-bottom chamber located over this mechanism; together with (5) a horizontal partition fitted on top of trough, between drinking cap and chamber. Respondent's hydrant contains the first, third, and fourth of these particulars. It does not contain the second and fifth. It does not have a "drinking cap fitted on the top" of the trough. As illustrated in the model presented in evidence, and as described in his letters patent, the drinking cap, in the patented invention, is a curb completely surrounding the drinking space, and tightly fitted on top of the trough, and so fitted thereon as that, when the hydrant is in complete working order, the water rises into, and remains within, this curb or cap, and at the same level, or height above the bottom or under surface of the horizontal partition, as the water stands in the central chamber. But in respondent's hydrant the drinking cap, if such it may be called, has a curb only upon its three sides, leaving the fourth side without curb, and this curb will not retain water within its sides. But, instead, whenever the water rises to the under surface of the cover of the trough, instead of being confined within the drinking cap, it escapes through or over the uncurbed side of the trough or drinking space. Again, respondent's hydrant contains no horizontal partition. Instead, this trough is simply covered over, and on its surface, at the place where complainant inserts into the trough his horizontal partition. That this cover is not the equivalent of this partition is plainly seen when the action of the hydrant is examined. By the insertion of this partition the height or depth of the trough, where partition is inserted, is decreased to the extent of the thickness of the partition, so that there is always between the drinking cap and central chamber a body of water completely filling the trough for this entire distance, whereas it is practically impossible thus to fill the trough, under the cover, in

respondent's hydrant; for, as soon as the trough is filled with water,—that is, even though the trough is set to an exact level,—any further water run into the trough cannot be retained, but will discharge through the uncurbed sides of the drinking space. And unless the trough is set at a mathematically exact level the water will never fill the trough,—can never fill the trough to the bottom side or surface of the cover. In practice, it is safe to say the trough will never thus be filled, and the liability and probability of the water beginning to discharge from the trough before the trough is thus filled is very great. And thus what is the perfect water seal in complainant's hydrant is practically impossible in respondent's hydrant.

But complainant contends that by the projection of the ends of the central chamber, in respondent's hydrant, into the trough, the function of complainant's invention is performed, and in substantially the same manner as in the patented invention, and that, therefore, these projected ends serve as, and are an equivalent for, the horizontal partition. To this contention, defendant responds that these projected ends in his hydrant do not fit accurately to the sides of the trough, having from a half-inch to a quarter-inch space between them and the sides of the trough, whereby the air has free passage from the drinking places into the central chamber. The evidence shows that these spaces do exist as claimed. But the evidence further shows that these spaces are owing to the defective material used, and were not so intended; that the lumber used was warped, so that, in making the hydrant, respondent was not able to draw the sides of the trough up to these projecting ends. It will not be seriously claimed that these unintentional deviations, resulting merely from the defective material or workmanship used, would remove this hydrant out of the line of infringement, if infringement would otherwise exist. Fig. 1, attached to letters patent, shows this horizontal partition to have a lug or projection on its lower surface, and across each end. No statement of this fact appears in the specifications, nor does the same appear in the claim, as stated in the letters. So that these projecting chamber ends cannot be said to be an infringement in that respect. If now we examine the operation of the patented hydrant, we will find that these ends are not the equivalent of the horizontal partition. In the patented hydrant, when in complete operation, the water rises in the drinking caps above this horizontal partition, to such a height therein as to be on a level with the water in the central chamber. But this level is always above the bottom of this horizontal partition. Thus, as heretofore stated, a perfect water seal is formed, from drinking caps to central chamber, and completely filling the trough, and excluding the air, from cap to chamber. Thereby is interposed between the chilled water, at the exposed surface in the drinking caps, and the central chamber, this body of water, protected by outer packing of trough, and extending along and to the full depth of the trough, under this horizontal partition. And thus the function of this hydrant—protecting water in central chamber by water seal—is accomplished, the

water seal being the body of water described. In defendant's hydrant, when in complete working order, this water seal is impossible. The entire surface of the drinking space is exposed to the air. Besides, from drinking space to central chamber the water is directly exposed to the air, at its surface, along the entire distance and position where, in the patented invention, is situated the water seal. The water in the drinking space in respondent's hydrant can never rise above the bottom of the cover of trough, while the water in drinking cap of patented invention rises above, and remains above, bottom of horizontal partition. The evidence shows that the water in the patented hydrant, as would naturally be expected, under the circumstances, rarely freezes, while the liability of the water in respondent's hydrant to freeze, even in moderately cold weather, is very great. Therefore, as above stated, this water seal is impossible, in respondent's hydrant, and no equivalent therein appears for the horizontal partition, which is one of the essential elements or particulars entering into the combination claimed in complainant's letters patent. It follows from the foregoing that respondent's hydrant does not infringe on the patented invention. Let decree be entered dismissing the bill, at complainant's costs.

On Rehearing.

(June 18, 1894.)

WOOLSON, District Judge. The court herein having found for defendant, plaintiff applied for a rehearing, and the case has been reargued by counsel for plaintiff and for defendant. In the light of this reargument, I must modify so much of the opinion rendered on former hearing as treats of the drinking cap of the patented invention. In the former opinion, filed herein, this cap is considered as being so connected with or fastened to the body of the trough as to be water-tight, so that the water would rise in this cap to a level higher than the top of the horizontal partition. Plaintiff has exhibited, in working operation, a model of his patented "stock hydrant" or drinking trough. This demonstrates the incorrectness of the former decision on this point. The phrase used in the letters patent is unfortunate, so far as expressing the use of this cap is concerned. In fact, what is called in the letters patent a "drinking cap" is not a cap at all. The sides which form what is miscalled a cap are used solely to prevent the material which is used as packing about the trough from falling into the water in the trough. So that the letters patent should have spoken of these places as drinking spaces or places, rather than drinking caps. Without an inspection of the patented invention in operation, a person reading the letters patent, and applying the specifications and claims to the illustrations therein given, would naturally, if not necessarily, regard these caps as intended to contain water.

The point yet remains, as decided in the former decision, as to the horizontal partition, which, in the letters patent, constitutes an

essential feature of the combination and claim therein described. Plaintiff insists that this horizontal partition finds its mechanical equivalent in the side walls of the central chamber of defendant's drinking trough, and that, therefore, defendant has infringed on the letters patent held by plaintiff. After carefully considering the arguments presented by counsel, and the cases cited by him, I am not able to regard this claim as sustained by the evidence. The case of *Stirrat v. Manufacturing Co.*, 10 C. C. A. 216, 61 Fed. 980, decided by the United States circuit court of appeals for the Eighth circuit at its May, 1894, term, while not on all fours with the case at bar, presents some points of useful analogy. In that case the water-heating device consisted of the combination of a hollow, long, center plate of stove, etc., with a supply pipe, etc. The device claimed as infringing consisted of the combination of a solid, long, center plate of stove, etc., fastened to a water box, etc., with a supply pipe, etc. After considering the state of the art at time of issue of the letters patent, and distinguishing between a pioneer invention in a certain line, and one which merely improves on devices or mechanisms which have been in use (a reasoning which might be largely and well applied in case at bar), Judge Sanborn, voicing the opinion of the court, says:

The claim for a specific combination or device in a patent is a renunciation of every claim to any other combinations or devices for performing the same functions that are apparent from the face of the patent, and are not colorable evasions of the combination or device claimed. The statute requires the invention to "particularly point out and distinctly claim the part, improvement or combination which he claims as his discovery." Rev. St. § 4887. When, under this statute, the inventor has done this, he has thereby disclaimed, and dedicated to the public, all other improvements and combinations apparent from his specifications and claims, that are not evasions of the device and combination he claims as his own. The claims of his patent limit his exclusive privileges, and his specifications may be referred to to explain and to restrict, but never to expand, them.

And the opinion thereupon proceeds with its clear and forcible reasoning, as applied to the evidence introduced in the case, and the status of the patent with regard to the state of the art at date of its issuance, and closes with the declaration that:

When [the patentee] made his invention, there was no patentable novelty in a combination of a water box bolted to the long center with the supply and eduction pipes used by appellee; and this fact, and the specific limitation he imposed upon himself in his claims, have forced us to the conclusion that his patent was properly restricted by the court below to the special feature of construction he described and claimed, viz. the hollow, long, center through which the water was caused to pass, in combination with the connecting pipes.

The reasoning of the case cited is specially applicable to the case at bar, especially to the horizontal partition, which "specific limitations the patentee had imposed upon himself in his claims." Because of the press of other matters requiring present attention, I am unable to present at length the reasons impelling me to this conclusion, but must content myself with the reference to the case just cited, and with adhering to the former decision reached, and that decree be herein entered dismissing the bill. To all of which,

at the time, plaintiff duly excepted. And plaintiff is given 60 days from this date in which to have signed and filed bill of exceptions, and such certificate of evidence as plaintiff may be advised.

DASHIELL v. GROSVENOR et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 110.

1. PATENTS FOR INVENTIONS — RIGHT OF GOVERNMENT TO USE PATENTED DEVICE.

The consent of the owner of a patented device is not positively necessary in order to enable the United States to use the invention described in the letters patent, particularly in cases where it relates to the mode of construction of implements of warfare required by the government.

2. SAME—SUIT TO RESTRAIN INFRINGEMENT.

The patentee of an improvement in breech-loading cannon brought suit against an officer of the United States navy, connected with the bureau of ordnance and having charge of the manufacture of cannon at a navy yard, for an alleged infringement of his patent, praying, not only for an accounting and damages, but for an injunction restraining defendant and all persons acting under his authority from making the cannon alleged to infringe complainant's patent. *Held*, that the suit was, in substance, one to prevent the making of breech-loading cannon of a certain character at the navy yard, and that public policy and the rights of the government would not permit such a suit to be maintained. 62 Fed. 584, reversed.

3. EQUITY—BILL CHARGING FRAUD—DECREE ON OTHER GROUNDS.

A court of equity will not grant a decree on another ground, where the bill charges actual fraud as the ground for relief, and the fraud is not proven. 62 Fed. 584, reversed.

Appeal from the Circuit Court of the United States for the District of Maryland.

The court stated the case as follows:

This is an appeal from a decree rendered in the circuit court of the United States for the district of Maryland in the chancery cause of James B. M. Grosvenor and others against Robert B. Dashiell, by which it was adjudged that letters patent No. 425,584, granted to Samuel Seabury, dated April 15, 1890, for improvement in breech-loading cannon, are valid, and that the same have been infringed by Robert B. Dashiell; also, that said Seabury and his assigns recover from said defendant certain profits and damages, and that a perpetual injunction be issued. 62 Fed. 584.

It is claimed in the bill, which was filed on the 25th July, 1892, that Seabury was the inventor and patentee, and that he assigned certain interests in the letters patent to his co-complainants, who with him then owned the entire right and title to the invention; that the defendant, well knowing the premises, has wrongfully, unlawfully, and injuriously, with intent to derive profits therefrom, and to deprive complainants of the royalties to which they were entitled, conspired, combined, and confederated with William M. Folger and other persons, and infringed upon the rights of the owners of said patent, by making and using, and causing and authorizing others to make and use, a large number of breech-loading cannon, embodying the inventions described and claimed in and secured by said letters patent, without any authority from said owners so to do, whereby defendant has realized large profits, to the loss and injury of the patentee and his assignees; that at the time of the infringement charged the defendant was an officer of the United States navy, holding the rank of ensign, and was connected with the bureau of ordnance of the navy department, of which Commodore William M. Folger was then and still is in charge, having control and supervision of the manufacture thereof, un-

der the direction of said bureau, of cannon for the use of the navy of the United States, particularly at the United States navy yard at Washington, in the District of Columbia; that, shortly after said letters patent were issued to Seabury, he exhibited a model of the invention, together with drawings relating to the same, to said Commodore Folger, at his office in the navy department at Washington, his purpose being to procure a trial of the device mentioned, and, in case it proved successful, its adoption by the navy department, and that the said Folger requested him to furnish his said bureau with working drawings by which the department would be able to construct a breech-loading cannon embodying such invention, which Seabury proceeded to do, and delivered the same to Folger; that afterwards the defendant, making use of the information and drawings so provided, which it is charged were given him by Folger for that express purpose, undertook to construct and devise a design substantially the same as that so invented by Seabury, changing the form of certain parts so as to evade the charge of infringement; that defendant, in pursuance of this purpose, did contrive a design, and make drawings of the same, which he furnished to Folger, who thereupon, with the consent, co-operation, and aid of defendant, proceeded to construct and make trial of a breech-loading cannon in conformity with the design of defendant, embodying substantially the Seabury invention, with immaterial changes in the detail thereof, purposely designed to evade the charge of infringement, and intended to defraud Seabury and his assigns of their rights under the said letters patent; that, a test of the same proving successful by reason of the great merit of the Seabury invention embodied therein, a large number of breech-loading cannon were constructed at said Washington navy yard, according to such design, under the procurement of defendant, and with his consent, as the pretended inventor of the design, as well as in pursuance of the conspiracy, combination, and confederacy of said Folger with the defendant; that a large number of such cannon are now in process of construction at said navy yard, under such consent and authority, and in pursuance of such conspiracy and confederacy; that such infringement was conducted by defendant and Folger in a secret manner, and was intentionally kept from the knowledge of complainants until it reached such dimensions that concealment was no longer possible; that such acts worked a great fraud on Seabury and his assigns, as they were intended to do; and that defendant will continue to make and use, and cause others to make and use, breech-loading cannon under the invention secured by said letters patent, and thereby cause irreparable injury to plaintiffs, unless restrained by writ of injunction.

The prayer of the bill is that defendant may be compelled to account for and pay to plaintiffs the income and profits so unlawfully obtained, together with damages and costs, and that he be perpetually enjoined and restrained, as also his clerks, servants, employés, agents, attorneys, and all persons acting under his authority, from making and using, or causing to be made and used, breech-loading cannon embodying the Seabury invention, and for such further relief as may in the premises be just and proper.

The defendant answered, denying all the charges of fraud, and particularly the allegations as to the conspiracy and confederation with the chief of the bureau of ordnance of the navy department. He also denied that Seabury was the true, original, and first inventor of the improvement set forth in his letters patent. The answer admits that the defendant is a naval officer, connected with the bureau of ordnance, and that Commodore Folger is the chief of said bureau; that the defendant has been under the orders of such chief while he was engaged in the manufacture of the cannon alluded to in the bill; that in December, 1889, the defendant told Folger that he was designing a rapid-fire gun, and that he completed his plans and drawings for a model of the same in April, 1890; that in September, 1890, he was placed in charge of the "proving grounds," at Indian Head, in Maryland, where he has since been, but that he has had nothing to do with the manufacture or sale of the cannon alluded to, except to test them as to structural weakness, facility of operation, rapidity and precision of fire, and their efficiency and safety; that in August, 1890, he exhibited a model of his invention to Commodore Folger, who asked him to prepare working drawings for a four-inch rapid-fire gun, which he did, sending them to the bureau in September, 1890; that breech-loading cannon

have been constructed at the navy yard at Washington, embodying an invention patented to him on the 9th day of February, 1892, but that they were manufactured under the orders, supervision, and authority of Commodore Folger and the officers of said navy yard. Other matters are set forth in the answer, but will not be referred to, as, from our view of the case, they are immaterial.

A great number of witnesses were examined relative to the patents in controversy, to the state of the art to which they belong, and to the manufacturing of breech-loading cannon at the Washington navy yard, the contract relating to the use of defendant's invention, and the royalty to be paid him by the navy department for the right to use the same.

The case came on to be heard, and on the 19th day of July, 1894, a decree was entered in the court below (62 Fed. 584) adjudging the Seabury patent to be valid in law; that the defendant had infringed upon the same; that complainants recover of him the profits made by him on account of such infringement; that an account be stated, showing the number of breech-loading cannon made and caused by defendant to be made, embodying the invention described in the Seabury patent, and the gains and profits defendant had received from his infringement of the same, together with the damages complainants have sustained thereby; and that a perpetual injunction be issued against the defendant, restraining him, his agents, clerks, servants, and all persons claiming or holding under him, from making, using, or selling, or in any manner disposing of, or authorizing others to make, use, and sell, breech-loading cannon embracing the invention or improvements described in the Seabury patent. From this decree an appeal was prayed for and allowed, the petition for the appeal and the assignments of error being filed and prosecuted by counsel acting under an order of appointment and instructions from the attorney general of the United States, as well as by counsel for defendant below.

S. F. Phillips (of Phillips & McKenney), Special Asst. U. S. Atty., William H. Stayton, and F. D. McKenney, for appellant.

William A. Jenner and William G. Wilson, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge (after stating the facts as above). We think that the pleadings and proofs of this cause clearly demonstrate that this is, in substance, if not in form, a proceeding, the object of which is to prevent the making of breech-loading cannon of a certain character, and by a particular device, at the navy yard of the United States in the city of Washington, District of Columbia, by those officially in charge thereof, representing the government of the United States; and, also, it is clearly shown that the injunction granted by the court below will in effect prohibit the officers so in charge of said navy yard from manufacturing such cannon for use on the vessels of war of the United States, as provided for under the provisions of existing legislation, the reason for such prohibition being that, in so making breech-loading cannon, said officers are infringing on the rights granted to Samuel Seabury by letters patent No. 425,584, dated April 15, 1890.

Should a suit instituted under such circumstances and with such intention be sustained? Do not public policy and the rights of the government in its sovereign capacity require that parties feeling themselves aggrieved on account of matters relating to such transactions as we have alluded to—to such circumstances as are set forth by the evidence taken and filed in this case—should be compelled to seek relief and compensation, if so entitled, by proceeding

in another manner, and before another tribunal, and that the courts should not use their writs of injunction so as to retard and embarrass the government in the prosecution of work, the product of which is absolutely essential to the public welfare and the national defense? We think that the consent of the owner of a patented device, while it is desirable, and should be obtained, if it conveniently and reasonably can, is not positively necessary in order to enable the United States to use the invention described in the letters patent, particularly in cases where it relates to the mode of construction of implements of warfare required by the government, and indispensable to the armament of its vessels of war. Such right to take and use the property of the citizen for government purposes is indisputable,—an inborn element of sovereign power essential to the independence and perpetuity of the nation.

The constitution of the United States provides that congress shall have the power to raise and support armies, and to provide and maintain a navy. By virtue thereof the congress has appropriated and caused to be expended large sums of money for such purposes, and for the manufacture of arms, the construction of ships of war, and the establishment of navy yards, including the one at Washington where the breech-loading cannon mentioned in complainants' bill have been and are now being manufactured. Under recent acts of congress, millions of dollars have been expended, through the navy department, in the purchase and manufacture of the armor plate and armament required for the ships of war lately constructed and now in process of building, and in the procurement and installation of the improved machinery for use in the breech-mechanism shop at said Washington navy yard for the purpose of constructing cannon of the character referred to in the bill. It is evident from the legislation by congress on this subject, and the action of the officials of the government thereunder, that it was and is the intention of the United States to cause to be manufactured, for national purposes, breech-loading cannon of the most approved and scientific design, utilizing such plans and inventions as would best secure the result desired, and making, in those cases where the right to use a patented device had not been secured, just compensation to the owner thereof, in the manner usual under such circumstances. After careful investigation, involving the examination of many designs, drawings, and innovations, with the aid of models and experiments, the chief of the bureau of ordnance formulated his plans, selected and adopted the devices and inventions he deemed best, and commenced the making of the breech-loading cannon, as he was authorized and directed by the congress to do, employing in connection with such work the defendant in this case. If the invention claimed by complainants is being used and infringed by those so representing the United States, then the owners of the same can recover just compensation for such use and infringement from the government by suit in the court of claims, or by means of an appropriation for that purpose made by congress, on application made to that body.

The fifth amendment to the constitution of the United States contains the provision that private property shall not be taken for public use without just compensation, and this we must consider as an implied assertion that on making such compensation it may be so taken. It will be noted that this is not a restriction of the power to take private property for public use, but that it is a requirement that when such property is so taken just compensation shall be made therefor to the owner. That incident of sovereignty—the right to take—belonging to every independent government is not disturbed, nor is the manner in which such right is to be exercised, or the mode by which the proper compensation is to be ascertained and paid, set forth. And because congress has provided by statutes a procedure for the condemnation of private property required for public purposes in certain instances, and not in others, we are not therefore to infer that the power to take does not exist as to the other matters; nor should we construe such legislation as a limitation of that power relative to other cases of like character not embraced in such enactments. In other words, the nonuser of a power is not to be used to disprove its existence.

The title the individual citizen has to his property is good as against all other citizens, but it must yield to the necessity of the government, and submit to the social requirements and rights of the general public; and this right of the government to protect itself and defend its own is not to be controlled by any other power, nor is it to depend on the consent of any person, company, or corporation. The only restriction, as we have already remarked, is the constitutional requirement that just compensation shall be made to the owner for property so taken. The proper mode of proceeding in order to secure compensation for private property taken for public use without the consent of the owner, and in the absence of legal action for condemnation, has received judicial consideration, the supreme court of the United States having at different times plainly indicated the same, particularly in cases where the government has used an invention without the permission of the owner of the letters patent protecting the same. *Kohl v. U. S.*, 91 U. S. 367, 374; *James v. Campbell*, 104 U. S. 356; *U. S. v. Great Falls Manuf'g Co.*, 112 U. S. 645, 656, 5 Sup. Ct. 306; *Hollister v. Benedict & B. Manuf'g Co.*, 113 U. S. 59, 5 Sup. Ct. 717; *U. S. v. Palmer*, 128 U. S. 262, 9 Sup. Ct. 104; also, the following cases in the court of claims: *Schilling's Case*, 24 Ct. Cl. 278, 298; *Gill's Case*, 25 Ct. Cl. 415; *Berdan's Case*, 26 Ct. Cl. 48.

We do not think that contending patentees, striving between themselves and those interested with them as to the validity of their respective letters patent, should be permitted to close the arsenals, ordnance shops, and navy yards of the United States by injunctions issuing out of their litigation, thereby frustrating the designs of the government, rendering inoperative the legislation of congress germane thereto, and causing great loss of the public funds appropriated by congress in execution of the same. It is true that the United States is not made a party to this action, but it is also

true that it is disclosed by the pleadings and evidence that the cannon, the further making of which it is the object of this suit to enjoin, are now being manufactured at the navy yard of the United States at Washington, by the employés of that establishment, under the direction of the chief of ordnance of the navy department; and it is apparent that such an observance of the injunction granted by the court below as should be shown by those to whom it is directed, and as must necessarily be required by the courts while it is of force and effect, will close said navy yard, so far at least as the manufacture of breech-loading cannon is concerned, and thereby prevent the enforcement of certain laws of the United States, the consummation of which is of national importance.

Independent of the questions we have been considering, there is another reason why, on the case as made in the record before us, the plaintiffs below are not entitled to a decree in their favor. Their bill of complaint, as drawn, rests upon the allegations of fraud contained therein, and it must stand or fall as the testimony establishes or fails to sustain such charges. The positive assertion of fraud permeates the entire bill,—it is the warp and woof of its structure,—depending on the combination, conspiracy, and confederation of the defendant and William M. Folger, as chief of the bureau of ordnance, to use the invention of Seabury, and deprive the patentee and his assignees of the benefits and royalties claimed to be secured to them by the letters patent referred to. A court of equity will not grant a decree on another ground, where the bill charges actual fraud as the ground of relief, and the fraud is not proven. We find that there is an utter failure to sustain the allegations of fraudulent conspiracy and confederation charged in the bill. It is shown that Commodore Folger, in his endeavor to secure the most useful and scientific plans and devices by which to construct the breech-loading cannon directed by the congress to be made, the manufacture of which was committed to him, did advise with the plaintiff Seabury, and did request of him his plans and drawings, and, also, that he did the same with the defendant, as well as with others; and, also, it is shown that Folger believed that the plans of the defendant were best adapted to the object desired to be secured by the government, and that he agreed to pay a certain sum for the use of the same, under the impression that the defendant was the inventor and patentee of the design so selected. But there was no intention to deprive the true owner of his right to demand and recover just compensation for the said taking and using, and it would not have availed had such intent existed, for the legal owner could have recovered, even though another had by mistake or fraud been paid.

The charges of fraud have been made either under an entire misconception of the facts or with a recklessness that, at least, is not commendable, and should not be encouraged by an endeavor on the part of this court to relieve the complainants of the embarrassment caused thereby by holding that they are entitled to a decree founded on some general ground of equity jurisdiction, not specially pleaded, but supposed to be included in the prayer for gen-

eral relief. While equity will always relieve those who suffer from acts of fraud, it has also always required that those who seek its jurisdiction on that account shall, after having carefully scrutinized the cause of complaint, most clearly formulate the allegations of the same, and then that they shall fully prove that which they have so alleged. We do not deem it essential to discuss this matter, elementary as it is in character, but we refer to the following cases, in which the subject is fully considered: *Montesquieu v. Sandys*, 18 Ves. 302; *Price v. Berrington*, 7 Eng. Law & Eq. 260, in which case Lord Truro says:

"When the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts, quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated."

Wilde v. Gibson, 1 H. L. Cas. 620; *Glasscott v. Lang*, 2 Phil. Ch. 310; *Curson v. Belworthy*, 22 Eng. Law & Eq. 1; *Tillinghast v. Champlin*, 4 R. I. 173, in which case the court uses the following language:

"In almost all these cases it will be found that the objection to relief was not that the bill did not contain allegations sufficient to afford a basis for the inferior or secondary relief upon which the plaintiff wished to fall back, but that, having mingled with those allegations imputations of personal corruption or actual fraud, he had pointed his bill only to relief upon this higher ground, and must therefore succeed upon that ground, or not at all."

Fisher v. Boody, 1 Curt. 206, Fed. Cas. No. 4,814; *Eyre v. Potter*, 15 How. 42, in which the supreme court of the United States cite with approval the case of *Price v. Berrington*, supra.

The decree complained of will be reversed, and the case will be remanded, with instructions to dismiss the bill.

THE ETHEL.

MOORE v. KIMBALL.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1895.)

No. 242.

1. ADMIRALTY—JOINDER OF PROCEEDINGS IN REM AND IN PERSONAM -- LIBEL FOR WAGES.

Proceedings in rem and in personam cannot be joined in the same libel, except as provided in the admiralty rules; and as rule 13, regulating such joinder in suits for mariners' wages, does not authorize a joinder of a vessel and her owner, a libel which attempts it should be dismissed.

2. SAME—JURISDICTION IN PERSONAM.

Where a libel, though joining both the res and its owner, contains no prayer for monition and personal judgment, and there is in fact no service of monition or attachment of property to bring the owner in, his mere appearance by attorney to answer the libel in rem, and defend the res, gives the court no jurisdiction to enter a personal judgment against him.

3. SAME—COSTS.

An appellant, in fault for delays in proceedings before the circuit court on appeal, held chargeable with the costs in the circuit court of appeals, though successful in obtaining a reversal.

Appeal from the Circuit Court of the United States for the Western District of Texas.

Libel for mariner's wages.

Gregory L. Smith and H. F. Smith, for appellant.
John C. Scott, for appellee.

Before McCORMICK, Circuit Judge, and BRUCE and TOULMIN, District Judges

TOULMIN, District Judge. This suit was commenced by a libel in rem filed on November 19, 1883, against the steam tug Ethel, by Samuel R. Kimball, the appellee's intestate, to recover wages alleged to be due him for services as mariner on said tug. On November 21, 1883, Charles H. Elwell, the agent of Rittenhouse Moore, the appellant, intervened for the interest of said Moore, as the owner of the tug, and made the claim affidavit usual in such cases. On June 10, 1884, a writ of seizure was placed in the hands of the marshal, who, on June 16, 1884, executed the same by levying on the tug and taking her into possession. A few days thereafter she was released to Moore's agents upon their giving the required release bond. On November 29, 1884, an amended libel in rem against the tug, and in personam against said Rittenhouse Moore, as the owner of the tug, was filed, to stand for and in place of the original libel. The amended libel contained no prayer for a personal judgment, nor for process in personam, against Moore. No process was ever served on him, and no process of any kind was had in the cause except by seizure of the tug under the writ issued on June 10, 1884. That writ recites that a libel both in rem and in personam had been filed on the 29th day of December, 1883. It appears from the record that the amended libel—the libel in rem and in personam—was filed on November 29, 1884, but it also appears from the record to be a substituted paper for one lost; and it may be that the date of the filing, shown by the record, is an error, and that it is in fact the date of the substitution. However this may be, the record shows no prayer for process in personam, and no service of monition or process of any kind on Moore. But he appeared by his attorney to defend against the libel in rem, and filed exceptions and an answer thereto. On July 13, 1885, the cause coming on to be heard, the district court denied all relief in rem against the tug, but gave judgment in personam against Moore for the sum sued for, to which Moore excepted, and thereupon moved the court to arrest the judgment. The court overruled the motion, and Moore appealed the cause to the circuit court. After various delays in filing the transcript and in bringing the cause to a hearing, on June 28, 1893, the judgment of the district court was pro forma affirmed by the circuit court, and a decree in personam rendered against Moore and his surety on the appeal bond. At the same time the court ordered that an appeal be allowed from that decree to this court. The errors assigned by the appellant are that the circuit court erred in not dismissing

the libel, and in rendering a personal decree against him and the sureties on his appeal bond.

Admiralty Rule 13 provides that "in all suits for mariners' wages the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or master alone in personam." The amendment to the original libel, by introducing the owner of the tug as a party defendant, was in violation of this rule; and it is well settled that proceedings in rem and in personam cannot be joined in the same libel, except in the cases specified in the admiralty rules. *The Monte A.*, 12 Fed. 331; *The Alida*, Id. 343; *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949. This case being one where, under the admiralty rules, both remedies could not be joined, the libel should have been dismissed.

The court also erred in rendering a personal decree against Moore. There is in the libel no prayer for a monition and personal judgment against him. There was no service of a monition on him, no attachment made of his property for the purpose of bringing him into court, and no voluntary appearance to answer to the proceedings in personam. The fact that he appeared by his attorney to answer to the libel in rem, and to defend the res seized, did not give the court jurisdiction to render a personal judgment against him. *The Monte A.*, supra. As the cause must be reversed and dismissed for the reasons mentioned, it is unnecessary for us to consider the question whether, under the facts of the case, a judgment should have been rendered against the appellant. There were some irregularities in the proceedings of the case in the district court, and various delays in bringing the cause to a hearing on appeal in the circuit court, for which the appellant is not without fault. We think he should, at least, be taxed with the costs of the appeal to this court. The decree of the court below is reversed, and the libel dismissed, at the appellee's costs, except the costs of this appeal, with which the appellant is taxed. Reversed and dismissed.

FRANKLIN SUGAR-REFINING CO. v. FUNCH et al.

(District Court, E. D. Pennsylvania. March 15, 1895.)

No. 130.

1. ADMIRALTY PRACTICE—SECURITY ON CROSS LIBEL—RULE 53.

A demand for security on a cross libel, under admiralty rule 53, under pain of staying proceedings on the original libel, should not be granted when made several months after filing the cross libel, and after the original libellants have taken their testimony.

2. SAME.

Quaere, whether rule 53 applies to a case in which the original libel was in personam, and in which, consequently, no security is required of the original respondent.

This was an application under the cross libel of the Franklin Sugar-Refining Company against Funch, Edye & Co. for an order

requiring respondents to give security for damages, according to admiralty rule 53, which reads as follows:

"Whenever a cross libel is filed upon any counterclaim, arising out of the same cause of action for which the original libel was filed, the respondents in the cross libel shall give security in the usual amount and form, to respond in damages, as claimed in said cross libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given."

Horace L. Cheyney and John F. Lewis, for libelant.

Edward F. Pugh and Henry Flanders, for respondents.

BUTLER, District Judge. The original libel, (of Funch, Edye & Co. v. "The Franklin Sugar-Refining Co.,") was filed December 7, 1894, and the answer thereto and cross libel were filed December 26, 1894, whereupon Funch, Edye & Co. proceeded to take their testimony and have now completed their proofs.

On the 12th day of March, 1895, "the Franklin Sugar-Refining Company" applied for an order under rule 53 in admiralty, requiring Funch, Edye & Co., to give security for such damages as may be recovered against them on cross libel, and for a stay of proceedings on the original libel till security be entered.

I do not think this order should be allowed. It seems to me doubtful whether rule 53 contemplates a case where the original libel is in personam and where, consequently, no security is required of the respondent in the original cause; its terms do not seem applicable to such a case. It calls for "security in the usual amount and form," etc.

Where the original libel is in personam there is no such "usual amount and form of security" to which security from the respondent in the cross libel may be made to conform, as the rule seems to call for.

The rule has not been understood, in this district, to apply to such cases, and has never been so applied; nevertheless as it is not necessary to decide this question at present, I will not decide it.

Granting the rule to be applicable, I do not think the demand for security and stay of proceedings should be allowed under the circumstances shown. It was not asked for promptly, as it might and should have been, nor until the original libelants had taken their testimony and incurred the expenses of doing so. To stay proceedings after this lapse of time and under these circumstances would seem to be unjust. Of course the cross libelant may have a citation as prayed for; the effect of taking it will be a matter for future consideration.

SMITH v. LEE.

(Circuit Court of Appeals, First Circuit. January 18, 1895.)

No. 103.

1. BILL OF LADING—INTERPRETATION AS TO PLACE OF DELIVERY.

A bill of lading whereby the ship contracts to deliver a cargo of coal at a designated port to the consignee, "or his assigns," is not to be construed as an express undertaking to deliver at the particular coal wharf owned by the consignee, and where he carries on his coal business.

2. SAME—DUTIES OF MASTER AND CONSIGNEE—TOWAGE.

A cargo of coal was shipped from Philadelphia to a consignee owning a coal wharf above bridge 8, Cambridgeport, Mass. By the bill of lading he was to pay freight at the rate of 75 cents per ton, "and 3 cents per ton per bridge for 7 bridges, and towing up and down from 7 bridges." *Held*, that this did not require the consignee to take charge of the vessel and tow her up from bridge 7, but merely bound him to pay expenses of such towage, leaving the same to be done under control and direction of the master, both as to time and manner of towing; and that any delay resulting from the tug's fault, and not from the dangerous or inaccessible situation of the wharf, was imputable to the master, and not to the consignee.

3. SAME—DEMURRAGE—NOTICE OF ARRIVAL.

The provision in a bill of lading that 24 hours after arrival in port, and notice thereof to the consignee, there shall be allowed a fixed rate of unloading per day, and that the consignee shall pay demurrage for any excess of time required, casts upon the consignee any loss of time resulting from delay in pointing out the place of discharge, but imposes on the master the duty of bringing his vessel to the berth indicated, and for any delay in so doing, not arising from the unsuitableness of the berth or its approaches, or fault of the consignee, the master is responsible, and must bear the loss.

Appeal from the District Court of the United States for the District of Massachusetts.

This was a libel in personam by Lewis S. Lee, master of the schooner *Ada Bailey*, against George M. Smith to recover demurrage. The district court rendered a decree for libellant, and respondent appealed.

Charles T. Russell, Jr., William E. Russell, and Arthur H. Russell, for appellant.

Eugene P. Carver and Edward E. Blodgett, for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

WEBB, District Judge. This is a libel for demurrage for ——— days of the schooner *Ada Bailey*, under the following bill of lading:

Shipped by the Philadelphia & Reading Coal and Iron Company, in good order, on board the schooner called "*Ada Bailey*," of ———, for account of Percy Heilner & Son, whereof the undersigned is master for the present voyage, and now lying at the port of Philadelphia, and bound for Cambridgeport, Mass., eight hundred & twenty-eight tons, of 2240 lbs., Schuylkill coal (as per margin), which I promise to deliver at the aforesaid port of Cambridgeport in like good order (the dangers of the sea only excepted), unto G. M. Smith, or his assigns, he or they paying freight for the same at the rate of seventy-five cents per ton, & discharge, & 3c per ton per bridge for 7 bridges, & towing up & down from 7 bridge. And 24 hours after the arrival at the above-named

port, and notice thereof to the consignee named, there shall be allowed for receiving said cargo at the rate of one day (Sundays and legal holidays excepted) for every one hundred and fifty tons thereof; after which, the cargo, consignee, and assignee shall pay demurrage at the rate of six cents per ton a day (Sundays and legal holidays not excepted), upon the full amount of cargo, as per this bill of lading, for each and every day's detention, and pro rata for parts and portions of a day beyond the days above specified, until the cargo is fully discharged; which freight and demurrage shall constitute a lien upon said cargo. * * * In witness whereof, etc.

Dated at Philadelphia, this 19th day of July, 1892.

Smith, the consignee named in this document, was a large dealer in coal, and carried on his business at his wharf, above bridge 8, in Cambridgeport. Between the river channel and that wharf a channel nearly a half mile long had been dredged, and access to the wharf for vessels could be only through that channel. When the *Ada Bailey* had passed through seven bridges, and anchored in the port of Cambridgeport, her master gave notice of his arrival, and was without delay directed by the consignee, Smith, to proceed to his wharf above referred to for discharge of cargo. The master of the schooner not knowing where to secure the services of a tugboat to tow the schooner and cargo through bridge 8, and to the wharf pointed out for the discharge of the cargo, the consignee offered, "if it would be any accommodation, to step into the office of the Commercial Towboat Company and ask them to send a tug up to get him in." He said it would. Thereupon the consignee went to the towboat company's office, and they sent a boat the same day. This was on the Monday following the report of arrival on Wednesday. In the meantime the evidence does not show that anything had been done to get to the wharf, and of this omission we have no explanation. When the towboat reached the schooner, and took hold of her, bridge 8 was passed without trouble; but in attempting to reach the place of discharge, through the dredged channel, the schooner got aground, and was not able to reach the wharf. The tug pulled the schooner off, and towed her back to the place between bridges 7 and 8, where she had first anchored, and there left her, and did not return.

The appellants contend that, in view of the fact that the consignee, Smith, owned and carried on his business on a coal wharf in the designated port of delivery, the contract must be construed to be the same as if it had contained an express undertaking to deliver at that wharf. We cannot so construe it. The delivery, by the bill of lading, was to be made to Smith or his assignees. It was therefore in the power of Smith, by indorsement of the bill of lading, to transfer the cargo to another, who would then have the right to select a proper place of discharge, within the designated port. Upon assignment of the bill of lading, the master would not have been sustained in refusing to comply with the order of the assignee, and insisting, against his will, to discharge at the wharf of Smith. Under this bill of lading an assignee would have the same right of directing where the cargo should be unladen as if mentioned in it by name. In signing it, the master would rightly understand that

the special place of discharge at his port of destination was undetermined, and would depend on the choice of whosoever might have control of the cargo on its arrival.

The libellant and appellee argues that, by the proper construction of the contract, the consignee or his assigns were bound, after the schooner had proceeded above bridge 7, and reported, to take charge of her, and to tow her to her discharging berth. This, in the opinion of the court, is a mistaken view of the contract. The consignee was to pay a fixed amount per ton for carriage from Philadelphia and through each of seven bridges, and all the expense of towing above the seven bridges, let it be more or less. The towing above the seven bridges, like that through them, was to be directed, controlled, and superintended by the master, who should employ his tug, direct the time of towing, and generally manage his vessel as might be prudent; but the expense of the towing was to be reimbursed to him by the consignee. The consignee had no duty in regard to this towing, except to pay its costs; and what he did in leaving a request that a towboat should be sent to do the work made no difference.

It then was the duty of the consignee to select and designate a safe and proper place for the discharge of this cargo; not only a place safe for the vessel to lie after it was reached, but one which could be safely approached. This we think he did. The dredged channel was nearly straight, and was at least 50 feet wide. It was well marked by buoys. The district judge in his opinion says that several of the buoys had been carried away. He evidently overlooked the proof that at the time of these transactions none of the buoys were missing, and that the removal testified to occurred much later. As to the depth of that channel, the proof is not as direct as might have been, but we think it sufficiently shows it enough for the safe passage of this schooner, drawing, when loaded, 14 feet and 3 inches. The channel was dredged under a contract for 16 feet at average tides. No examination or soundings appear ever to have been made for the purpose of ascertaining how faithfully this work was executed. But it is shown that the rise and fall of tides at this place varied from 8 to 11½ feet, and Smith testifies, without contradiction, that he has sounded out that channel and found from 8 to 9 feet of water at mean low water. We are clear that the grounding of the schooner was not due to unsuitableness of the channel, but to the fault of the towboat. There is no complaint of want of water at the wharf. Evidence of conversation at Philadelphia regarding the depth of water, not referred to in the bill of lading, was properly excluded; but if that evidence were admitted there is nothing in the case to show the statements were not true. If, however, that evidence were admissible, it would show that the captain of the schooner was content with a guaranty of 15 feet of water, and regarded it as enough for his vessel, drawing 14 feet 3 inches. The 24-hours clause of the bill of lading, while it requires the consignee to be ready to receive the cargo at the expiration of that time, after notice, and casts upon him any

loss of time arising from delay in pointing out the place of discharge, after the notice, does not relieve the vessel from herself being ready to deliver at the selected berth, provided it is safe, and can be safely reached. Notice imposes on the master the duty to bring his vessel to the berth given her, and for any delay in so doing, not arising from the unsuitableness of the berth or its approaches, or fault of the consignee, he is responsible, and must bear the loss. As the place of discharge was a proper one, and was at once named by the consignee on receiving notice, his only obligation was to receive the cargo at the end of 24 hours at the rate stipulated in the bill of lading. Demurrage is claimed only for time taken by the schooner in getting to her berth. For that the master alone was responsible, and the decree of the district court must be reversed, with costs. The case is remanded to the district court, with direction to dismiss the libel, with costs of the district court and of this court.

THE OSCODA.

(District Court, N. D. New York. February 16, 1895.)

1. ADMIRALTY JURISDICTION—BREACH OF TOWAGE CONTRACT.

A propeller which, after agreeing to tow a barge on the Great Lakes during an entire season, abandons her before the end thereof, is liable in rem for breach of the contract, and such liability is a matter of admiralty jurisdiction.

2. ADMIRALTY PLEADING—ALLEGATION OF DAMAGES.

A libel against a tug to recover damages for the abandonment of a contract to tow a barge during an entire season should point out the manner in which the alleged damages arose, and a mere statement of a gross sum is subject to exception.

This was a libel by Henry A. Pierce, master and owner of the barge Harvey Bissell, against the propeller Oscoda (George Ryan, master), to recover damages for breach of a towage contract. The part of the libel which sets out the contract, the breach thereof, and the claim for damages, is as follows:

"The said propeller Oscoda did make and enter into a certain contract with this libellant wherein and whereby the said Ryan, as master, agreed to take and receive the said barge Harvey Bissell as a part of the tow of the said Oscoda for the whole season of navigation of 1894 upon the Great Lakes and waters adjacent and connected thereto and connecting the same, together with the barges of C. G. King and Ida Corning as consorts, to furnish the said Bissell with cargo and loads during said season, and to pay all commissions and towage for a valuable consideration then and there agreed upon. That said parties entered upon the execution of said contract as therein provided. That on or about the 1st day of September, 1894, and without the consent of the libellant, said propeller Oscoda deserted the said Harvey Bissell at the port of Buffalo, N. Y., against the wish of this libellant, and contrary to the terms of said contract, and failed and neglected to tow the said Bissell, or to furnish the said Bissell with any cargo, or to pay said commissions or towage, and at all times since said 1st day of September, 1894, has failed and neglected to keep or perform any part of the said contract or agreement. That your libellant has performed all the conditions of the said contract on his part. That by reason of the premises afore-

said your libelant has suffered loss and damage to the amount of (\$1,000) one thousand dollars. That the libelant relied upon the credit of said vessel, as well as upon that of the owner and master thereof, and the libelant would not so as aforesaid have entered upon the said contract except upon the credit of said vessel. That there is due to the libelant, by reason of the premises, the sum of one thousand dollars and interest thereon from the beginning of this action, over and above all payments, set-offs, and discounts, for which sum the libelant claims he has a lien upon said propeller Oscoda, her boats, tackle, apparel, and furniture."

Perkins & Welch, for libelant.

Harvey L. Brown, for respondent.

COXE, District Judge. The libelant seeks to enforce a lien upon the propeller Oscoda for damages occasioned by the breach of a partly executed contract of towage. The exceptions dispute the jurisdiction of the court. I am of the opinion that the propeller, having entered upon the agreement to tow the libelant's barge during the entire season of 1894, is answerable in rem for the breach of the agreement by the abandonment of the barge in September. The *G. L. Rosenthal*, 57 Fed. 254; *The Oregon*, 5 C. C. A. 229, 55 Fed. 666, 677. The libel is also excepted to because the allegations of damage are indefinite and uncertain. In view of the somewhat unusual character of the agreement it is thought that the libel should point out the manner in which the alleged damages arose with sufficient distinctness to enable the respondent to meet the claim at the trial. The fourth exception is sustained. The others are overruled. The libelant may amend within 20 days.

THE POTOMAC.

(District Court, N. D. New York. March 8, 1895.)

SEAMEN'S WAGES—EXTRA COMPENSATION.

A claim for extra wages for work performed by seamen, in port, in assisting stevedores to unload and reload the vessel, at the request of the master and upon his promise to pay at the same rate the stevedores were receiving, will be enforced against the vessel, especially when the owner has recognized the justice of the demand by paying part of the mariners rendering such work. These circumstances take the case out of the established rule that seamen must not expect extra compensation for services rendered in their capacity as such.

This was a libel by seamen against the Potomac to recover extra wages.

Urban C. Bell, for libelants.

Vernon Cole, for respondent.

COXE, District Judge. If I thought that a decree for the libelants involved a departure from the old and salutary rule that seamen must not expect extra compensation for services rendered in their capacity as seamen, no matter how arduous or meritorious they may be, I should dismiss the libel. It would lead to gross insubordina-

tion and increase the difficulties and dangers of navigation immeasurably if the court should sanction the idea that a seaman may refuse to obey the master's orders on the ground that the work he is directed to perform is "extra" and entitles him to additional compensation. The facts in this case, however, take it out of the general rule and preclude the possibility of its ever being used as a precedent for a departure from or relaxation of the rule. The Potomac was in port at the time in question. The work was partly on the vessel and partly on shore and consisted in unloading and reloading a part of her cargo. There were from 40 to 50 stevedores engaged in this business and the master promised the libelants and other members of the crew that if they went to work they should receive the same pay as the stevedores. The master admits the agreement and recognizes its fairness. The claimant also has conceded the justice of the claim by paying all of the mariners, pursuant to the agreement, except these libelants. The record discloses no reason for this apparently unfair discrimination. The libelants are entitled to a decree for \$21, interest and costs.

THE CYGNET.

(District Court, N. D. New York. March 7, 1895.)

SHIPPING—TITLE TO VESSEL—NINETY-NINE YEARS' LEASE.

The lessor in a 99 years' lease of a pleasure yacht, which document the lessees have accepted in lieu of a bill of sale after paying full value, has no interest or title which the court can recognize.

This was a libel against the pleasure yacht Cygnet for mariner's wages.

Harvey L. Brown, for libelant.
Clinton & Clark, for claimant.

COXE, District Judge. This cause, for a comparatively unimportant one, abounds in unusual complications. The libelant has failed to prove the cause of action and the claimant has not proved a defense. This may seem paradoxical, but it is, nevertheless, true that the proof fails to sustain the cause of action alleged in the libel and does establish the fact that the claimant has no title to the libeled vessel. The Cygnet is a Canadian pleasure yacht. In the spring of 1894 she was lying at the port of Buffalo and was owned by Buffalo parties. The libelant alleges that he was employed by one Ewing to act as sailing master of the yacht at \$50 per month. The proof shows that Ewing was neither owner of the yacht nor agent for the owners to make such a bargain. The testimony, documentary and oral, proves that at all the times in controversy the owners were Louis E. Levi and Alfred Schoelkopf. There is nothing to contradict this positive proof but rumor, hearsay and unfounded declarations. At the time of the alleged em-

ployment of the libelant as sailing master one of the owners of the yacht was in Europe and the other, from personal considerations, had no inclination to use her. In short, neither owner had any intention of sailing the *Cygnets* during the season of 1894; both were anxious to sell her. She had never had a sailing master, at least while Levi and Schoelkopf owned her, and she had absolutely no occasion for one in the spring and summer of 1894. The oaths of Ewing and the two owners that the libelant was never employed as sailing master are thus corroborated by the fact that there was no occasion for such employment. It is not pretended that either of the owners employed the libelant, and, even if Ewing made the alleged contract, it is clear that he had no authority to make it and could not bind the yacht. On the other hand it is shown that Thomas McGraw, of Toronto, who claims to be "the true and bona fide owner of said yacht," has no interest in her whatever; at least the proofs fail to disclose any interest. His only claim of title is as lessor under a 99 years' lease; the lessees, Levi and Schoelkopf, having paid full value for the yacht and having accepted this lease in lieu of a bill of sale. It is hardly necessary to consider the nature of McGraw's interest in the *Cygnets* in August, 1892. The court will take judicial knowledge of the fact that long before the lease falls in the yacht will have fallen apart and the claimant will have taken his last boat ride with *Charon* as "sailing master." Although the testimony does not establish the cause of action as alleged it does show that the owners authorized the employment of the libelant at \$2 per day to clean the yacht and put her in order so that she could be shown to intending purchasers and sold to advantage. The libelant says that it took him about 10 days to clean the yacht, but it is thought that the testimony of Ewing warrants the conclusion that libelant was employed in the above capacity and as keeper for at least 2 weeks. He was paid \$6. This would leave a balance due him of \$22. The evidence of all interested parties is before the court, and it is thought that the most equitable disposition that can be made of the controversy is to give the libelant a decree for this amount, interest and costs. Should further proceedings be contemplated the owners should have leave to intervene and answer and the libelant should be permitted to amend if he is so advised.

THE J. H. DE GRAFF.

(District Court, N. D. New York. March 8, 1895.)

1. TOWAGE—NEGLIGENCE OF TUG—PASSING NEAR OBSTRUCTIONS.

It is negligence in a tug, towing a large barge against a current so swift that the tug, with a hawser of 250 feet, jumps and dodges about in the eddies, to go so near a pier (15 to 40 feet) as to render an accident to the barge possible, if not probable; and, where the barge is heading outward, it is further negligence to signal her to keep closer in, behind the tug.

2. SAME—NEGLIGENCE OF TOW—OBEYING ORDERS MANIFESTLY DANGEROUS.

Where a barge is being towed against a swift and treacherous current, it is negligence in the master, knowing that he is being towed so carelessly that he must pass within a few feet of a dangerous projection, to obey a signal from the tug to head closer in, and follow in her wake.

3. SAME—SIGNALS FROM TUG—PRESUMPTION OF AUTHORITY.

Persons on a barge in tow of a tug on a long hawser have a right to assume that any signal from the tug is made by authority, and it is therefore immaterial whether a given signal is made by the master or the fireman of the tug.

This was a libel against the tug J. H. De Graff to recover damages for negligent towage.

George S. Potter, for libelants.

George Clinton, for respondents.

COXE, District Judge. The libelants, as owners of the barge *Fostoria*, seek to recover damages for injuries to the barge alleged to be due to the negligence of the steam tug J. H. De Graff. On the 28th of August, 1890, the barge, while being towed by the tug up the Niagara river, struck the Inlet pier, which projects from the Bird Island pier from six to eight feet into the swift current of the river, at a point about opposite the Buffalo waterworks crib. That the *Fostoria* sustained injury by reason of this collision is admitted. The question to be determined is whether the tug or the barge is responsible for the injury, or are both responsible? The *Fostoria* was owned in Saginaw, Mich. She had no motive power of her own. It was manifestly her duty to obey the tug whose master was supposed to know all the dangers and obstacles to be encountered. *The Lady Pike*, 21 Wall. 1; *The M. J. Cummings*, 18 Fed. 178, and cases cited; *The S. S. Wilhelm*, 8 C. C. A. 72, 59 Fed. 169, 170.

The impression produced after reading the testimony is that the accident was occasioned by the negligence of both the tug and barge. I do not think that the fault of either alone could have produced it. The tug was at fault in two respects: First, in towing so near the Bird Island pier; and, second, in signaling the barge to keep still closer to the pier. That the current at the point of the accident is swift, treacherous and full of eddies, is conceded. It runs between eight and nine miles an hour and is known as "The Rapids." The *Fostoria* is about 130 feet long and 26 feet beam. On the day in question she was without a load and drew about 5 feet aft and 4

feet forward. The tug was a small river tug about 45 feet long and 12 feet beam. The hawser between them was about 250 feet in length. The exact distance which the tug kept from Bird Island pier it is impossible to determine from the contradictory testimony returned. The distance varies from 15 to 50 feet, although one of respondents' witnesses testified that it was not unusual to keep within 15 feet of the shore. He says:

"We have towed barges up there, and we would hug the shore right along, keep right along there all the time. Keep within 15 or 20 feet of the shore. Some men can hold their boat right along and when they come to the pier shoot out around it, and then again I have gone up there with barges when they held them way out into the middle of the river."

That the barge was too near the pier would seem to follow as a fair inference from the fact that she was injured. The *Sarah J. Weed*, 40 Fed. 844. If the estimate of the libelants is correct the barge, with her greater beam, was only allowed a space of about 10 feet in which to pass the Inlet pier. It was bad seamanship to tow a light barge at the end of a long hawser up a current so swift that even the tug jumped and dodged about in the eddies upon a course so near a dangerous projection that accident was possible if not probable. It was also error on the part of the tug to signal the barge to point nearer to the Bird Island pier. The libelants testify that this signal was given by the master of the tug. It appears from the testimony of the respondents, on the contrary, that it was given by the fireman. It is not material which version is correct for the reason that those on the barge had a right to assume that any signal from the tug was made with authority. Even upon the testimony of the respondents the signal was given after the tug and tow had left Ferry street, and were towing in the swift water along Bird Island pier. At this time the barge was not following directly after the tug but was headed a little out,—upon the tug's starboard quarter. Had she continued in this position no accident could have happened. It is reasonably clear that the change was made because of the signal from the tug and it was negligence to give such a signal in such a dangerous channel and in such close proximity to the projecting Inlet pier. On the other hand, it is thought that the accident might have been avoided if the rules of good seamanship had been observed upon the barge. The testimony for the libelants indicates that the signal from the tug was given when the tug was opposite the Inlet pier. The pier was at that time visible from the barge and she must have known that it was a most hazardous maneuver to starboard. If libelants' witnesses are correct in saying that the tug passed but 15 feet from the pier a collision was almost certain to occur from such a maneuver, but even if the distance were 40 feet it was still a dangerous proceeding. The master of the barge, after testifying that the tug passed within about 16 or 18 feet of the Inlet pier and that it was imprudent to pass so near, testified as follows:

"The barge was from 200 to 225 feet below this inlet. I went upon the quarter and aft of the wheel; the man at the wheel, Bolcom, told me that they

had motioned to him from the tug, twice, and I told him to keep her in behind the tug. The vessel was at that time headed on the starboard quarter of the tug. By the time he had the vessel steadied up behind the tug, we were up within about 60 to 70 feet below this inlet. We appeared to be then headed to about 12 to 15 feet outside the Inlet pier, somewhere that way, and she kept sagging towards the wall; the current kept setting her in, and I gave the man at the wheel orders to keep his wheel a-port, and keep her out; and that did not seem to clear her, and in order to keep her stern out, I told him to starboard the wheel which he did. Then she struck the lower corner of the Inlet pier."

In other words, the master of the barge, knowing that the tug was towing his vessel so carelessly that she must pass within a few feet of a projection which extended out into a swift and treacherous current, gave an order when only 200 feet distant which threw the head of his vessel directly towards the impending danger. If it were negligent in the tug to give such an order it was negligent in the barge, with the danger so manifest and so near, to obey it. The master of the barge cannot shield himself, therefore, upon the theory that he was called upon under all circumstances to obey the orders from the tug. The danger was so imminent that common sense and common prudence admonished him to postpone obeying the order at least until after the Inlet pier was passed. As one of the witnesses expresses it, "A man has got no business doing such a thing, when he sees himself getting into danger he should use his own judgment and keep out of there." Starboarding, porting and starboarding again in quick succession in such circumstances was clearly bad seamanship and undoubtedly contributed to produce the accident. *The Margaret*, 2 Fed. 255. The situation is somewhat similar to that of *The Nettie*, 35 Fed. 615. The libelants are entitled to a decree for half damages and costs and a reference to compute the amount.

THE GEORGE DUMOIS.

GULF CITY COAL & WOOD CO. v. THE GEORGE DUMOIS.

(District Court, S. D. Alabama. January 26, 1895.)

MARITIME LIENS—SUPPLIES FURNISHED ON CHARTERER'S ORDER.

Where coal is furnished, even in a foreign port, not being a port of distress, on the personal order of the president of a corporation known to be a charterer only, without any mention of the ship by either party, or any inquiry of or dealing with the master, the presumption is that credit was given to the charterer, and the ship is not bound.

This was a libel by the Gulf City Coal & Wood Company against the steamship *George Dumois* to recover the price of coal supplied to the ship.

L. H. Faith, for libellant.

G. L. Smith and H. T. Smith, for claimant.

TOULMIN, District Judge. I find the facts in this case to be that the coal was furnished to the ship in Mobile, Ala., on the personal
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order of one Dick, the president of the Columbian International Colonization & Improvement Company of New Orleans, La., who were the charterers of the ship for the term of one year; that the ship was a foreign vessel; that libelant knew that the Columbian International Colonization & Improvement Company were the charterers; that the ship was not in a port of distress; that she was running in a regular line between the port of Mobile and foreign ports; that in the negotiation for the coal no reference was made to the vessel as a source of credit, and there was no inquiry made of or dealing with the master or any agent of the ship. I further find that the charterers had, by the terms of the charter party, agreed to pay for such supplies, but that the libelant had no actual knowledge of this provision of the charter party. In short, the Columbian International Colonization & Improvement Company were the known owners of the ship, and Charles I. Dick was the president and representative of the company. The coal was obtained on the personal order of Dick in a foreign port, where he was at the time of giving the order. The dealing, then, was presumptively on the said owner's personal credit only, and I am not satisfied from the circumstances of the transaction, as shown by the proof, that there was a common understanding or intention to bind the ship. On the contrary, I think that the circumstances indicated to the libelant that the purchase of the coal was on the charterer's credit only, and that in furnishing it without objection or any reference to the ship, or inquiry of the master, the libelant must be held to have trusted to the charterers only, and that the ship is not bound.

My opinion in this case is sustained by the following authorities: *The Stroma*, 41 Fed. 599; *Id.*, 3 C. C. A. 530, 53 Fed. 281; *Stephenson v. The Frances*, 21 Fed. 715; *Neill v. The Frances*, *Id.*, 921; *Herreschoff Manuf'g Co. v. The Now Then*, 50 Fed. 944; *Id.*, 5 C. C. A. 206, 55 Fed. 523; *The Kong Frode*, 6 C. C. A. 313, 57 Fed. 224. The substance of these decisions is that, in dealing with a known charterer, even in a foreign port, for mere ordinary supplies, the dealings are prima facie upon his personal credit only, and no lien will be implied unless the libelant satisfies the court, from the negotiations or the circumstances, that there was a common understanding or intention to bind the ship.

The libel in this case must therefore be dismissed, and it is so ordered.

THE RAMBLER.

PRICE v. THE RAMBLER.

(District Court, S. D. New York. January 21, 1895.)

TUG AND TOW—ICE—TOWAGE AT NIGHT—NEGLIGENT LOOKOUT.

An ordinary engagement of towage in the North river does not authorize the tug to take the tow in the nighttime, when thick running ice makes towing dangerous; and the R., having taken the tow alongside after dark, with its bow projecting 40 feet ahead of the tug, thus exposing the tow to the chief danger of being cut by ice, without maintaining any good lookout on the bow of the tow to avoid injurious cakes of ice, and running at such a rate that holes were cut through the bow of the tow, causing her to sink, the tug was *held* liable for the consequent loss: *Held*, also, that the duty to maintain a lookout on the bow of the tow was a part of the tug's duty in navigation, and that the boatman on the tow in acting to some extent as a lookout, at the tug's request, acted as the agent of the latter and at her risk.

This was a suit in rem by William A. Price against the steam-tug Rambler to recover for damages occasioned by alleged negligent towing.

Hyland & Zabriskie and Mr. Hough, for libellant.
Stewart & Macklin, for respondent.

BROWN, District Judge. There is no sufficient evidence on the part of the respondent to discredit the testimony in the libellant's favor, showing that the canal boat McMahon, though old, was in good condition, sound in her planks and timbers, and reasonably fit for navigation. She was taken in tow by the Rambler alongside after dark, with her bows projecting 40 feet ahead of the tug, and in that manner towed through ice in the North river, during which a hole was cut through two planks in her bow, which caused her to sink speedily. The manner of towing, in effect, placed most of the liability to damage from ice and the danger from cutting through any cakes that were met, upon the canal boat; whereas the tug was much better designed for this work, and could do it much more safely. The tug also did not take the straightest course across the water, but headed four points down river, which still further relieved the tug at the expense of the tow. It does not appear that the tug had orders to tow the boat through ice; I must assume that the orders were the usual orders for towage, and were no justification for towing in such ice as made towage dangerous, or towing in the nighttime, when dangerous cakes could not be distinguished far enough ahead to avoid injury from them. The man on the barge testifies that he objected to starting after dark, and asked the tug to wait till morning.

If towing alongside in ice, and in the nighttime, could be justified, with the bow of the tug placed so far ahead, it was the duty of the tug to maintain a careful and competent lookout on the bow of the canal boat, and to proceed with great caution in order to stop in time to prevent any rapid crashing into the larger

cakes. This was a duty strictly belonging to the tug's navigation. Such a watch and lookout were not at all the duty of the man on the canal boat. So far as the latter endeavored to keep a lookout at the pilot's request, he was acting as the tug's agent, and at the tug's risk, and not on the responsibility of the libelant. The boatman's evidence shows that the pilot of the tug treated him with small consideration. It is evident that the pilot made no attempt to establish and keep up a competent and efficient lookout from the bow of the canal boat; but only told the boatman to look out for ice. I infer that at the time when the chief crash and shivering of the boat referred to by the boatman took place, he was absent from the bows and was either below, or aft; and that no person was on the lookout to avoid those cakes. They could not be seen in time from the pilot house; and there was no fixed lookout at the bow of the tug.

I must find, therefore, that the damage arose from the fault of the tug in taking the tow through ice in the nighttime without a due regard to the safety of the tow on such a trip, and without maintaining such care and attention as was reasonably necessary to avoid injury to the tow by crashing into the cakes of ice in her path. The tug's witnesses say no shivering was felt upon the tug; but this seems to me of little weight; since it was the canal boat, and not the tug, that was principally exposed.

Decree for libelant, with costs.

THE ERNEST M. MUNN.

O'CALLAGHAN v. LOWNDES et al.

(Circuit Court of Appeals, Second Circuit. February 11, 1895.)

SALVAGE—DURESS—RESCISSION OF CONTRACT.

L.'s oyster steamer picked up a barge adrift and derelict, and towed it into port. The owner of the barge shortly after offered to settle L.'s claim for salvage for \$500, which was refused. A few days later the owner came to the harbor where the barge was lying, and by threats and a display of force induced L. to agree to settle for \$600, which was paid and accepted, and the barge removed by the owner. Immediately afterwards L. libeled the barge for salvage, but without mentioning in his libel the negotiations for settlement, or the receipt of the \$600, or returning or offering to return the money. *Held*, that L., having failed to restore the other party to the same position in which he was before the contract, could not treat such contract as void for duress, and was entitled to no further recovery for salvage. 61 Fed. 694, reversed.

Appeal from the District Court of the United States for the District of Connecticut.

This was a libel by Stanley H. Lowndes and others against the barge Ernest M. Munn for salvage. The district court entered a decree in libelants' favor for \$700 over and above \$600 already received by him. 61 Fed. 694. The claimant, Walter O'Callaghan, appeals.

L. R. S. Gore, for appellant.

Howard H. Knapp, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. About 7:30 a. m. of November 28, 1893, the libelants' oyster steamer picked up the barge, which was then adrift and derelict, in Long Island Sound, with a cargo of coal, about a mile and a quarter from the east end of Copp Island. The total value of the property saved was about \$3,200. The Munn was towed to libelants' home at Five Mile River, and tied up to the dock. On the second day thereafter the claimant came to Five Mile River, and offered to give the salvors \$500, and such additional sum as could be obtained from the insurance companies. They refused to settle for less than \$800. On the following Sunday the claimant returned early in the morning with a tugboat and a gang of men, with the express purpose, as the district judge finds, of obtaining possession of the barge, and a settlement of the claims for salvage, by threats and intimidation, provided he could not effect his object by other means. A long and angry altercation ensued, accompanied by a display of force on the part of the claimant and his party. Finally, fearing an affray in which some one might get hurt, the salvors agreed to receive \$600, and to give a receipt for all claims. The money was thereupon paid, and the barge taken by the claimant, and towed to Wilson's Point. The libelants immediately after libeled her for salvage, and brought her back to Five Mile River. The libel is wholly silent as to the transactions on the Sunday, and as to the payment of the \$600.

There can be no doubt upon the proof that there was an agreement between the parties to accept \$600 in settlement of the claim for salvage, and that such sum was thereupon paid and received. Many of the authorities cited in the opinion and upon the brief of counsel for libelants do not touch the point raised upon this appeal. They were suits brought by salvors to enforce agreements to pay them specified sums made during the existence of the sea peril. The courts uniformly hold that, while such agreements, made in the presence of danger, may limit the salvor, they have little or no binding effect upon the other party. The agreement in the case at bar, however, was one entered into on land, subsequent to the termination of the sea perils which are essential to a salvage service, and it must therefore be disposed of as are other similar agreements. The facts found by the district court—and the evidence sustains his finding—make out a case where the assent of one party to the agreement was enforced by the intimidation of the other. While the decisions are not uniform, there is abundant and excellent authority for the proposition that contracts procured by threats of battery to the person or destruction of property may be avoided on the ground of duress. *Brown v. Pierce*, 7 Wall. 205; *Foshay v. Ferguson*, 5 Hill, 158. One who has been induced by fraud or by duress to enter into a contract may rescind it, but when the contract

has been executed by a delivery of property in accordance with its terms he can rescind only upon putting or offering to put the opposite party in as good a situation as he was before. "A party cannot rescind a contract, and yet retain any portion of the consideration. * * * [He] cannot derive any benefit from it, and yet rescind the contract. It must be nullified in toto, or not at all. It cannot be enforced in part and rescinded in part." *Perley v. Balch*, 23 Pick. 286. See, also, *Shepherd v. Temple*, 3 N. H. 457; *Norton v. Young*, 3 Greenl. 30; and 8 Am. & Eng. Enc. Law, p. 806. This is the difficulty with libelants' claim. The contract to settle it for \$600 was not void. So long as it stood, it was a bar to any further claim for salvage. It was voidable, if he elected to avail of his right to rescind it on the ground that he entered into it under duress. But, if he did so elect, it was a condition precedent to rescission that he should restore or offer to restore the money he received under it. Libelant, however, made no such offer. He retained the \$600. It is immaterial that he did not distribute it among his fellow salvors. He kept it in his own bank, subject to his own order. Had the court found that the salvage services were worth but \$500, the claimant would have been put to another action to recover the balance, with but doubtful chances of success, since *he* had no right to rescind the contract under which he paid the \$600. Having failed to restore the money, or even to pay it into the court for final disposition, libelant could not, while retaining it, insist that the contract under which he received it should be treated as void; and, while that contract remained in force, he was entitled to no further recovery for the salvage service; all claims therefor had been adjusted. The decree of the district court is reversed, and the cause remitted, with instructions to dismiss the libel, with costs of both courts.

THE BALCARRES BROOK.

BALCARRES BROOK STEAMSHIP CO., Limited, v. GRACE et al.

(District Court, S. D. New York. February 4, 1895.)

CHARTER PARTY—CONSTRUCTION—GUARANTY OF CAPACITY.

By the charter of an absent vessel for a lump sum for the voyage, the owners guarantied "that steamer will carry under deck at least 3,000 measurement tons of 40 cubic feet, failing which cargo capacity, charterers shall be allowed a concession of 30 shillings sterling for every ton short carried of said stipulated minimum capacity." There was no other specification of the cargo than that it should be "lawful merchandise." The charterers loaded a miscellaneous cargo, which being well stowed was 607 tons short of 3,000 tons, according to estimates of the measurements of the cargo; and they claimed an abatement for the alleged shortage. *Held*, following English decisions, that such a guaranty was a guaranty of the ship's cargo capacity only; i. e. of available cargo space, reckoning 40 cubic feet of space to the ton,—in this case, 120,000 cubic feet,—and was not a guaranty of the amount of such particular cargo as the charterer might elect to put on board.

This was a libel by the Balcarres Brook Steamship Company, Limited, against William R. Grace and others, for freight alleged to be due.

Convers & Kirlin, for libelant.

William L. Turner, for respondents.

BROWN, District Judge. The libelant steamship company, owner of the steamer Balcarres Brook, claims an unpaid balance of \$4,417.42 alleged to be due for the hire of the steamer under a charter dated May 26, 1892.

The charter was for a voyage to carry lawful merchandise from New York to port or ports on the west coast of South America not north of Callao, and the respondents agreed to pay therefor:

"A lump sum of £4,500 sterling; owners guaranty that steamer will carry under deck at least three thousand (3,000) measurement tons of forty (40) cubic feet, failing which cargo capacity charterers shall be allowed a concession of thirty shillings (30) sterling for each and every ton short carried of said stipulated minimum capacity."

The kind of cargo was not referred to in the charter except that it was to be "lawful merchandise." A miscellaneous cargo of lawful merchandise, well stowed, was put on board, which, as partly measured and partly estimated, amounted to only 2,393 tons. The difference between the estimated space and the actual space required by different kinds of cargo sometimes amounts, according to the evidence, to as much as 35 per cent. The respondents claimed a deduction of 30 shillings per ton on the short stowage of 607 tons, contending that the guaranty clause of the charter meant, that the ship should be able to stow 3,000 tons of actual cargo; and they refused to pay for more than was loaded. The libel was filed to recover the unpaid balance of the £4,500.

Clauses in charter parties, similar to the one in question, have been repeatedly discussed in the English courts, and the construction uniformly given to them has been, that they guaranty cargo capacity only, and not that the vessel shall load a specified amount of such particular kind or condition of cargo, as the charterer may elect to put on board. The reason is that the opposite construction would put the owner at the mercy of the charterer; since different kinds of cargo, even within the range of estimated "measurement," differ as much as 35 per cent. in compactness of stowage; and that would make the owner's compensation for the use of his ship wholly uncertain, and dependent on the kind or condition of cargo afterwards selected by the charterer at his option. Such a construction is deemed unreasonable, and presumably contrary to the intent of the parties. *Mackill v. Wright*, 14 App. Cas. 106; *Pust v. Dowie*, 5 Best & S. 20; *Carnegie v. Conner*, 24 Q. B. Div. 45.

The agreement here in effect is, not that the ship shall stow 3,000 measured tons of cargo; but only that she carries a cargo capacity of 3,000 measurement tons, reckoning 40 feet of space to a ton.

The use of the word "carry" does not change this construction, for it is "cargo capacity" only that the ship is warranted to carry. The case last cited of *Carnegie v. Conner*, is stronger than the present against the respondent; since there not only was the same word "carry" employed, but the general nature of the cargo to be carried was specified. Here there was no agreement, or understanding, as to the kind or nature of the cargo to be carried. As no American authorities are cited to the contrary of the English cases, and as those cases seem to be based on reasonable grounds, and to be compatible with the language of the present charter, they will be followed here.

The telegrams throw no new light on the intent of the charter clause. Defendants' counsel, in his argument, inverts the order of the two telegrams of the 26th, as shown in the stenographer's notes. The London agent always struck out the word "cargo," showing that he intended cargo space, or capacity, as the charter itself reads.

The cesser clause is not a defense, for the reasons stated in the recent case of *Burrill v. Crossman*, 65 Fed. 104.

The intent of the warranty, as I therefore find, was to guaranty a certain cubic space under deck to be available for cargo, i. e. for 3,000 measurement tons, reckoning 40 cubic feet of space to the ton.

The libellant contends that this amount of space was furnished; but I find the evidence on that point so unsatisfactory and inconclusive, that that question must be referred to a commissioner to take further proof and report thereon. Mr. Hall, for the defendant, had no memorandum of his measurements in cubic feet. The master's cross-examination throws doubt on his testimony as to the available cargo space, through inconsistent statements; while the only other witness that gives legal testimony on the subject, Mr. Roberts, does not state whether he did or did not deduct the space of about 300 tons which was used for fuel. The defendant is entitled to a deduction at the rate specified for the deficiency, if any, of available cargo space, below 120,000 cubic feet.

An order of reference may be taken to ascertain the available space, if not agreed upon.

THE EL RIO.

THE MUTUAL.

BARNEY DUMPING-BOAT CO. v. THE EL RIO and THE MUTUAL.

(District Court, S. D. New York. February 5, 1895.)

COLLISION—INSUFFICIENT LOOKOUT—TOW—LONG HAWSER.

The steamer *El Rio* soon after getting out of her slip on the New York shore of the North river, was obliged to reverse, whereby she narrowly escaped collision with a tug coming down near the wharves with a tow. After that danger was escaped, she started up full speed, without observing the libellant's boat, which was second in tow of the tug *Mutual*, going up the North river about 800 feet further out, and collision

with the libellant's boat ensued. *Held* (1) that the steamer was alone in fault for an insufficient lookout, which was not legally excused by preoccupation with the danger to the nearer tow. (2) That in the absence of regulations, hawsers of 360 and 180 feet respectively for tows in line behind the tug in the daytime in the North river were not unusual or culpable.

This was a libel by the Barney Dumping-Boat Company against the steamship El Rio and the tug Mutual to recover for damages resulting from a collision.

Carpenter & Park, for libellant.

Benedict & Benedict, for the El Rio.

Stewart & Macklin, for the Mutual.

BROWN, District Judge. In the afternoon of January 27, 1894, just after the steamship El Rio had left her slip, pier 25, North river, she came in collision with the libellant's dumper, No. 10, which was going up the North river in tow of the tug Mutual upon a hawser, inflicting damages for which the above libel was filed. The Mutual was brought in under the fifty-ninth rule.

The Mutual contends that the collision took place nearly in mid river; but I find it was much nearer the New York shore. The collision was nearly at right angles. The El Rio was a large steamer, 406 feet long. She had advanced hardly more than her length out of the slip in the ebb tide, when she was obliged to reverse her engines in order to avoid a collision with the tug Missisquoi, which was coming down river near the wharves, with a tow alongside, and which very narrowly escaped by going ahead of the steamer. When the Missisquoi had passed, the Mutual was a little above the El Rio in the river, and probably not more than 700 or 800 feet further out than the stem of the El Rio was at that time; that is, about 1,600 feet from the ends of the dock. Behind the Mutual was dumper No. 3, upon a hawser about 360 feet long. Behind No. 3 was the libellant's dumper No. 10, attached to No. 3 by a hawser of about 180 feet. After the Missisquoi had passed in front of the steamer, the latter went ahead under a full-speed jingle bell, the Mutual being observed, but the tow behind her not being at first noticed. Soon afterwards the dumpers in tow of the Mutual were observed by the mate, who called the captain's attention to them, whereupon the steamer's engine was immediately reversed at full speed. The steamer passed a little astern of the first dumper, and about midway between the two; but before she could be sufficiently backed, No. 10 came up and struck her about 40 feet from the stem. The Mutual had slackened her speed, so that No. 10 cast off her hawser before the collision.

There can be no doubt upon the evidence that at the time when the Missisquoi went clear from the steamer the latter was going at very moderate speed, and that she easily could have been stopped much before reaching the dumpers in tow of the Mutual, had they been perceived at that time. The failure to perceive them is ascribed by counsel for the defense to the excitement attending the

narrow escape of the Missisquoi, and the preoccupation of mind, and the attention of the officers to the jeopardy of the persons on board of her. However natural this may have been, I think it is impossible to accept it as a legal excuse for the lack of a proper lookout ahead before starting up full speed, so as to throw upon the dumpers the burden of the loss that would have been avoided by a proper watch on the El Rio. I am, therefore, constrained to find the El Rio in fault, without reference to the further question whether the narrow escape from collision with the Missisquoi was not also brought about by the fault of the El Rio in starting out under a signal of two whistles, when she had the Missisquoi on her starboard hand and so near to her, and thus leaving the slip at a time when immediate collision was threatened.

I do not think any legal fault in the Mutual is established. Before the collision occurred, the Mutual slackened her speed sufficiently to allow No. 10 to throw off the hawser; and the circumstances do not show that the Mutual had notice, or could have supposed that any earlier slackening of her speed was necessary. She could not foresee that the El Rio, being at a sufficient distance to avoid the boats in tow, would not keep clear of them, as it was her duty to do.

Objection is made to the length of the hawsers; but there is no established regulation upon this subject, and the evidence does not show any established custom to tow with hawsers of less length during the daytime, when the movement of the tow is in plain sight. The whole length of the tug and tow could not have been over 700 or 800 feet, which is much less than many tows continually going up and down the river.

Decree for the libellant against the El Rio, and dismissing the libel and petition as against the Mutual, with costs.

SLYFIELD et al. v. PENFOLD.

(Circuit Court of Appeals, Sixth Circuit. February 11, 1895.)

No. 205.

TUGS AND TOWS—WANTONLY OBSTRUCTING RIVAL TUG—PROXIMATE CAUSE OF INJURY.

A schooner, coming into harbor, signaled for a tug. Rival tugs, the H. and the C., started on a race to secure the job. There was some wind, and the sea was rough, but navigation was not perilous or difficult. The services of the H. were accepted, and she made three unsuccessful attempts to throw her heaving line to the schooner, occupying 20 minutes, during which the schooner was drifting on a lee shore. To prevent grounding, the schooner's captain ordered the H. off; and called on the C. The C. responded, but the H. backed up in her way, obliging her to stop and reverse to avoid a collision. The C. again tried to approach, when the H. a second time backed into her course. At the third attempt the C. got the towing line aboard the schooner, secured it to her bow, and attempted to back out. Meantime the schooner had grounded. The tow-line was about 100 feet in length; too short for the C. to turn about with.

In backing, the C., on reaching the end of the towline, was brought up suddenly, and was thrown to port and grounded by the motion of her screw. *Held*, that the C. was justified in continuing her attempts to reach the schooner, notwithstanding the obstruction of the H., and that the proximate cause of the damage to the C. was the wanton conduct of the H., and not the voluntarily going into a perilous situation, and that the H. was therefore liable for the damage sustained by the C. 55 Fed. 1010, affirmed.

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan.

The appellants are the owners of the tug E. D. Holton, of Frankfort, Mich., which together with the tug Alice M. Campbell, of the same place, was libeled by A. E. Banks, the owner of the schooner Annie O. Hanson, for the negligent grounding of that vessel in the early morning of May 15, 1891, at the entrance to the harbor of Frankfort. The owners of the E. D. Holton and the Hanson came to a settlement of the claim against the Holton. Penfold, the appellee, owner of the Alice M. Campbell, answered the original libel, and filed a cross libel against both the Hanson and the E. D. Holton for the damages suffered by the grounding of the Campbell, which was coincident with that of the schooner, and was occasioned, as charged in the cross libel, by the faults of both vessels proceeded against. The district court, upon full hearing, dismissed the original libel against the Campbell, and also the cross libel against the Hanson, and held the E. D. Holton solely in fault for the damages suffered by the Campbell, with the usual order of reference to a master to ascertain and report the damages of Penfold, the cross libellant. On the master's report a final decree for the sum of \$2,150.38 was awarded to the cross libellant, and from that decree this appeal was taken. 55 Fed. 1010.

The facts relative to the grounding and damage of the Campbell, which are the basis of the decree appealed from, are as follows: About 3 o'clock a. m. of May 15, 1891, while the tugs E. D. Holton and Alice M. Campbell were lying in the harbor of Frankfort, with steam up, and keeping watch for incoming vessels, a torchlight was seen in the offing about a mile westerly from the piers at the entrance of the harbor. Both tugs started immediately in response to the signal. The Holton, passing out of the piers into Lake Michigan a short distance ahead of the Campbell, maintained her lead, and first proffered her services to the Hanson. The Campbell, seeing that her rival could not be overtaken, stopped when within 600 or 700 feet of the schooner. The schooner shortened sail preparatory to giving her line to the Holton, which rounded to and made a futile attempt to get the schooner's towline. A second and third attempt to get the line failed through the negligence or incompetency of the Holton's crew, who spent 20 minutes in their efforts. While these efforts were being made the schooner was drifting before a westerly wind inshore, in the direction of three sandbars which lie a short distance from the beach. Seeing the peril of his vessel, and the necessity of prompt action to avoid the shoals, and angered by the unskillful handling of the Holton, the master of the Hanson ordered her off, and hailed the Campbell to take the schooner in tow. The Campbell at once started for the Hanson, but, before she got close enough to take her line, the Holton backed across the Campbell's bow, compelling the latter to stop and reverse to avert collision. The Campbell a second time essayed to take the vessel's line, and again the Holton defeated her effort by throwing herself across the Campbell's course, despite the warning hail from the master of the Hanson to keep out of the way, and again the Campbell was obliged to stop. The Campbell made a third attempt to reach the schooner, which barely succeeded, though nearly frustrated by the persistent efforts of the Holton to defeat the maneuver. Without delay the Hanson's line was made fast to the Campbell's bow, and the tug at once backed, in the hope of keeping the schooner off the bars, which were then so near that no other method of averting the stranding was possible. The movement was too late to be effectual. Before the Campbell could get the schooner under headway, the latter grounded on the middle bar, after drifting safely over the other bar. The Campbell, by the sudden stoppage of

the schooner, was thrown broadside on the beach, where she lay for two weeks before she could be released. Both the Hanson and the Campbell were greatly damaged by the grounding.

A. H. Dunlap and A. J. Dovell, for appellants.

Thomas Smurthwaite and Frank L. Fowler, for appellee.

Before TAFT and LURTON, Circuit Judges, and SWAN, District Judge.

SWAN, District Judge (after stating the facts as above). The record leaves no doubt that, but for the willful obstruction of the Alice M. Campbell by the E. D. Holton, the stranding of the Hanson, and necessarily upon the facts stated the stranding and consequent damage of the Campbell, would not have occurred. The argument of the appellants, while formally denying the Holton's misconduct, rests their appeal mainly upon two grounds: (1) That the Hanson was aground before the Campbell made fast to her, and in the attempt to release her the Campbell voluntarily assumed the risk of injury, stimulated by the hope of salvage compensation; and (2) that the Holton's action was not the proximate and responsible cause of the injury.

1. The first proposition is conclusively negated by the facts. At the time the Campbell, in compliance with the hail of the master of the Hanson, started to take the latter's line the schooner was drifting to leeward, and without the aid of a tug would eventually have stranded, but the danger was not immediate. Ordinary care and skill, such as the law exacts from the tugboat and as the position of the vessel obviously demanded, would have sufficed to take her safely into the harbor, and the proofs are conclusive that until the repeated interference of the Holton there was no suggestion of similitude to salvage service in the undertaking of the Campbell to tow the vessel. There is not a scintilla of evidence to support this theory of appellants' case. There was no danger in the Campbell's efforts to aid the vessel until the Holton created it, after the Campbell had entered upon the performance of the towage service at the request of the master of the Hanson.

2. The second proposition raises the oft-vexed question of what constitutes the proximate cause of an injury. This is generally a question of fact, to be determined, in each case, by the circumstances attending the injury and conditions in which it happened. In *Railway Co. v. Kellogg*, 94 U. S. 469, it is said:

"The primary cause may be the proximate cause of a disaster, though it may operate through successive instrumentalities. * * * The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * The inquiry, therefore, must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

The district judge determined as a fact the relation of the wrongful act of the Holton to the disaster to the Campbell. What would

have been the province of the jury in the trial of a common-law cause was, by the usage and procedure of the court of admiralty, devolved upon the judge, who necessarily found an unbroken connection between the original wrong and its consummation,—the damage to the vessels,—and that there was no independent, self-operating cause to which the disaster could be referred. The record abundantly justifies the finding of the district court upon this point. It is true that the conditions of the locality were subsidiary to the result, but their co-operation was induced and given efficacy for harm by the original wrong. The tendency of the westerly wind and sea was to carry the schooner towards and upon the bar upon which she brought up, and on which the tug was also cast, because of the sudden stoppage of the schooner which she had in tow. Another incidental influence which conspired against the tug was perhaps the shortness of the schooner's line, the effect of which was, because of the proximity of the shoal, to throw the Campbell broadside onto the bar, when her sternway was instantly arrested by the stranding of the schooner. It is manifest, however, that neither the shoal, the elements, nor the insufficiency of the towline, singly or together, occasioned the disaster. They were merely conditions, until the wrongful act of the Holton brought them into combination and made them efficient for injury. *Salisbury v. Hershenroder*, 106 Mass. 458; *Woodward v. Aborn*, 35 Me. 271; *Dickinson v. Boyle*, 17 Pick. 78; *Palmer v. Andover*, 2 Cush. 600; *Metallic Comp. Cast Co. v. Fitchburg R. Co.*, 109 Mass. 277.

The consequence of the like acts of interference, if committed in the open lake, where there was no danger of grounding either tug or tow, might have been limited to the loss of time they occasioned, but they would obviously be the direct cause of such loss. The fact that their consequences in the locality, and under the conditions existing in the case at bar, were more serious, does not change the relation of the wrongful act to its results. The delay caused by the Holton's obstruction of the Campbell was the responsible cause which gave the conditions their capacity for harm. It was the primary cause of the stranding, and a continuous factor in the result, its connection with which was never broken. It is not a defense that natural forces and local conditions were the agencies by which the material or physical injury was inflicted. It is unquestionable, upon the proofs, that had the Campbell been permitted to take the line upon the first approach to the schooner, there would have been no difficulty whatever in towing the vessel safely into the harbor. Whether or not the Campbell's second attempt to take the schooner in tow would have been as successful is less clear, yet the reckless character of the Holton's navigation would resolve doubt upon that question in favor of the Campbell, in view of the fact that the third attempt was so nearly successful, notwithstanding the time lost in the second. The third effort of the Campbell is not to be condemned because it resulted disastrously. At most, it was an error of judgment in an emergency which left but two courses open to the master of the Campbell, and

upon which he was called upon to act without a moment's delay. He had either to abandon the schooner, then helpless to aid herself, and in water too shoal for the Holton, but navigable for the Campbell, which was of lighter draught, or to take a chance of rescuing her. He chose the latter, and his judgment is not to be condemned because the event demonstrated its error (*The Star of Hope*, 9 Wall. 231); nor because, in the heat of his laudable effort to rescue the schooner, he failed to perceive the increasing dangers of the situation. Much less, under such circumstances, should the wrongdoer who produced the peril be permitted to condemn the management of the injured vessel, and shield himself from the consequences of the disaster behind irresponsible causes. The principle of the familiar rule applies, that "when one ship has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame, if she has done something wrong, and has not been maneuvered with perfect skill and presence of mind." *The Bywell Castle*, 4 Prob. Div. 219; *The Elizabeth Jones*, 112 U. S. 514, 526, 5 Sup. Ct. 468; *The Maggie J. Smith*, 123 U. S. 349, 355, 8 Sup. Ct. 159. These considerations and the statement of facts are decisive of all the points raised by the appeal. We find no error in the record, and the decree of the district court is affirmed, with costs.

THE AMOS C. BARSTOW.

McCALDIN et al. v. PROVIDENCE & S. STEAMSHIP CO.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

COLLISION IN EAST RIVER—VIOLATION OF STATE STATUTE—LOOKOUTS.

A propeller, having come around the Battery in New York harbor, was proceeding up the East river against the tide at a speed of six knots, on a course parallel with, and about 400 feet from, the ends of the piers. When a little below pier 3, she saw a tug, which had just got under full speed on a trip across to Brooklyn from the end of pier 4. She was observed at the same time by the tug, which immediately signaled that it would cross her bows. The propeller assented, and immediately reversed, while the tug gave no more attention to her, and was allowed to fall off with the tide, until collision occurred. *Held*, that both were in fault,—the propeller for keeping so near the piers, in violation of the state statute, which required her to go as near mid-river as possible, and for failure to keep a vigilant lookout; and the tug for failing to observe the propeller seasonably, and for not keeping her head to the tide while crossing the other's bows. 50 Fed. 620, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by James McCaldin and Joseph McCaldin against the propeller *Amos C. Barstow*, the *Providence & Stonington Steamship Company*, claimants, to recover damages for a collision between the said propeller and libelants' tug *James A. Garfield*; also a libel by *Henry Robin* against both the *Garfield* and the *Barstow* to recover for personal injuries and for property lost or damaged. The

owners of the tug also filed a petition for limitation of liability. There were decrees below holding both vessels in fault, awarding damages against them in favor of libellant Robin, and limiting liability in respect to the tug. 50 Fed. 620. Appeals were taken by the claimants of the tug as against the Barstow and her owners, and by said Robin as against the tug and her claimants.

Carpenter & Park, for owners of the Garfield.

Miller, Peckham & Dixon, for claimants.

Goodrich, Deady & Goodrich, for Henry Robin.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The collision which is the subject of this controversy took place in broad daylight, off pier 4, New York City, in the East river, between the tug Garfield and the propeller Barstow. There was an ebb tide, running at the time between three and four knots an hour. The Barstow had come around the Battery from the North river, intending to make pier 11, and was proceeding up the East river at a speed of about six knots against the tide, on a course parallel with, and about 400 feet from, the ends of the piers. She had gradually overtaken the tug Atlas, which had also come round the Battery, and was bound for pier 4, on a course between the Barstow and the piers. The Garfield had been lying outside some other boats at the end of pier 4, and had just started on a trip across the river to Brooklyn, heading somewhat against the tide. Neither the Garfield nor the Barstow observed one another until the Barstow had reached a point a little below and off pier 3, and the Garfield had got under full speed,—about seven knots an hour. The Atlas was then lying nearly stationary, about 100 feet away from, and a little below, the end of pier 3. As soon as the Garfield observed the Barstow, she concluded to cross her bows, and gave the Barstow a signal of two whistles. The Barstow immediately answered with a similar signal, reversed her engines at full speed, and hard-starboarded her helm. When the signals were exchanged, the Garfield was within a couple of hundred feet of the intersecting point in the courses of the two vessels, and the Barstow was not much further distant. The master of the Garfield assumed that the Barstow would alter her course to port, and assist the Garfield in crossing her bows, and he paid no attention to the movements of the Barstow after the signals were exchanged. Instead of keeping the Garfield's head to the tide, he allowed her to fall off her course, and swing with the tide towards the bows of the Barstow. The Barstow did not have time to alter her course to port materially before the collision, and, although she was brought almost to a standstill, the Garfield's starboard side came in contact with her stem, and the Garfield rolled over and capsized.

Upon these facts we think both vessels should be condemned for contributory fault. The Barstow was proceeding in violation of a state statute which makes it the duty of steam vessels, when navigating the East river between the Battery and Blackwell's Island,

to be kept as near as possible in the center of the river, except when going into or out of their usual berths. This statute was doubtless enacted in view of the fact that at that part of the East river a large number of vessels are constantly entering and leaving their berths, and those leaving frequently have little opportunity for the observation of vessels passing up or down the river near the ends of the piers. Proceeding where she had no right to be as against vessels leaving their berths, it was especially incumbent upon the Barstow to maintain such vigilant observation and moderate speed as would enable her to take all necessary precautions, not only to avoid collision, but also not to embarrass such other vessels. If she had not been remiss, she could have seen the Garfield as the latter started from her pier, and could then have moderated her speed in season to give the Garfield ample room to proceed safely. As it was, she did not discover the Garfield until the Garfield's signal to her, and her own conduct demonstrates that danger of collision was then imminent. As she was being navigated in violation of a statutory regulation intended to prevent collision, the presumption is that her conduct was a contributory cause of the collision; and, although it is possible, and perhaps probable, that the collision would not have taken place if the Garfield had kept headed sufficiently against the tide, that circumstance does not absolve the Barstow. The evidence is not decisive that her fault could not have contributed to the disaster. The Garfield was in fault because she failed seasonably to observe the Barstow, and also because she neglected to keep her head to the tide while crossing the Barstow's bows. The situation, after the vessels discovered one another, was one where she could not well have gone under the stern of the Barstow. But, notwithstanding the presence of the Atlas may have intercepted her view of the Barstow until she got fairly under way, if she had maintained vigilant observation after starting and before she got under full speed, she could have seen the Barstow in time to reverse and stop her headway before reaching the point of intersection in the courses of the two vessels. It is probable, also, that if, when she first saw the Barstow, she had altered her course sharply to port, and held it there, she would have cleared the Barstow's bows. There was but little difference in the distance of either vessel from the point of intersection in their courses, and both were going at about the same speed; but, as the tide would materially deflect the course of the Garfield while passing the intervening distance, it was imperative for the safety of her maneuver that she should keep her head well against it, and maintain a course sufficiently to port to counteract the influence of the current. She failed to do this, apparently because of her master's reliance upon the ability and inclination of the Barstow to cooperate by going to port. He probably miscalculated the Barstow's speed. But that circumstance does not excuse his previous neglect of observation, or his subsequent inattention to the navigation of his vessel. The decree of the district court should be affirmed, with interest, and costs of this court.

GARNER v. SECOND NAT. BANK OF PROVIDENCE et al.

(Circuit Court, S. D. New York. March 12, 1895.)

1. REMOVAL OF CAUSES—APPEARANCE.

An appearance in a state court, specially, for the purpose of removal to a federal court, the removal itself, and the filing of the record of the cause in the federal court do not constitute a general appearance in the action, nor cut off the defendant from contending that the service of process gave the state court no jurisdiction, and that an attachment issued in the action was without authority. *Construction Co. v. Simon*, 53 Fed. 1, disapproved.

2. SAME—REMOVAL BY ONE OF SEVERAL DEFENDANTS.

Where an action is brought in a state court by a citizen of one state against several defendants, all citizens of another state, any one of such defendants, without the others, may remove the cause to a federal court, though it contains but a single controversy. *Insurance Co. v. Champlin*, 21 Fed. 85, followed.

3. JURISDICTION—SERVICE OF PROCESS—ATTACHMENT AGAINST NATIONAL BANK.

Where an action is commenced in a state court, by a citizen of the state, against a national bank located in another state, and service is made only by attachment of the property of such bank, and by publication of the summons or service thereof out of the state, the attachment, being prohibited by Rev. St. § 5242, should be vacated, and the service set aside and declared void.

J. Langdon Ward, for the motion.

T. M. Tyng, opposed.

LACOMBE, Circuit Judge. The plaintiff, a resident of New York, brought her action in the state court against defendant national bank and two individuals, all residents of Rhode Island. A warrant of attachment was taken out against the property of all three defendants, and certain moneys of the defendant bank were attached in the hands of the Fourth National Bank of this city. The usual order of publication was made, and all three defendants were personally served with the summons (November 7th and 8th) in the state of Rhode Island. On January 7, 1895, apparently within the time to answer allowed by the New York Code of Civil Procedure, defendant filed its petition and bond for removal, indorsed in the name of its attorneys, "appearing specially for the purposes of this application only." On January 16th a duly-certified record was filed in this court. Thereafter the defendant bank made this motion, under an order to show cause. The relief asked is that the attachment against the bank be vacated and set aside, and the service of summons on said defendant be set aside and declared void. Pending the motion, an order was made ex parte, on plaintiff's motion, discontinuing the action, the court at the time supposing there had been no appearance whatever by the defendant bank. As plaintiff now concedes that, in view of the statement of the court to that effect made upon the argument, it is proper that the order of discontinuance should be vacated, this motion may be considered as if such a vacatur were already entered.

The appearance in the state court specially for the purpose of removal, the removal proceedings themselves, and filing of the

record in this court do not constitute a general appearance in the action, nor cut off defendant from contending that the service of process gave the state court no jurisdiction, and that the attachment was issued without authority. The case cited from the Sixth circuit (*Construction Co. v. Simon*, 53 Fed. 1) is not followed in this nor in several of the other circuits. See, in this circuit, *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. 635; *Golden v. Morning News*, 42 Fed. 112; *Bentlif v. Finance Corp.*, 44 Fed. 667; *Clews v. Iron Co. Id.* 31; *Wooden-Ware Co. v. Stem*, 63 Fed. 676; *Vermilya v. Brown*, 65 Fed. 149; in the First circuit, *Perkins v. Hendryx*, 40 Fed. 657; in the Sixth circuit, *Brooks v. Dun*, 51 Fed. 140; in the Seventh circuit, *Atchison v. Morris*, 11 Fed. 582; *Ahlhauser v. Butler*, 50 Fed. 706. And see, also, *Goldey v. Morning News* (decided yesterday in United States supreme court) 15 Sup. Ct. 559.

It is objected by plaintiff that the case was not properly removed, since all the defendants did not join in the petition. The two individual defendants who were impleaded with the bank are residents of Rhode Island. So far as appears, they have no property in this state upon which the attachment might be levied. Without such levy, service by publication or personal service upon them without the state conferred no jurisdiction on the state court. It is quite natural, therefore, that they did not concern themselves about removing a cause, all proceedings in which, so far as they were concerned, would be wholly void. Does their failure to unite in the petition of removal, however, deprive the defendant bank, also a resident of Rhode Island, of the right to remove? The second clause of section 2 of the act of 1887 provides that:

"Any other suit [other than such as involve a federal question] of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section [e. g. a suit in which there shall be a controversy between citizens of different states], * * * may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being non-residents of the state."

It has been held that a petition by all the defendants is essential to a removal under this clause. The third clause of the same section reads as follows:

"When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit," etc.

This clause is identical with the second clause of the second section of the act of 1875, except that the words "plaintiffs or" have been omitted. The act of 1875 was carefully and fully considered by Judge Brown, sitting in this court, in *Insurance Co. v. Champlin*, 21 Fed. 85, and the conclusion reached that, under the specified conditions, the cause might be removed by one of several defendants, even though the suit contained but a single controversy. A different conclusion has been reached in other circuits (*Thompson v. Railway Co.*, 60 Fed. 773); but, in the absence of controlling authority, the former decision of this court should be followed here. Undoubtedly, there are many decisions of the supreme court which

on a first reading would seem to imply that this last-quoted clause (whether in the act of 1875 or 1887) applied only where the suit contains more than one controversy. But, when these cases are examined, it will be found that in each and all of them there was, at least, one defendant a citizen of the same state as one or more of the plaintiffs; and, of course, in such suits this clause could be availed of only when, besides the controversy between citizens of the same state, there was also a separable controversy between citizens of different states. Besides the supreme court decisions cited by Judge Brown in his opinion, the following, subsequently decided, may be consulted: *Corbin v. Van Brunt*, 105 U. S. 576; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171; *Winchester v. Loud*, 108 U. S. 130, 2 Sup. Ct. 311; *Shainwald v. Lewis*, 108 U. S. 158, 2 Sup. Ct. 385; *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90; *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735; *Railway Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161; *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154; *Safe-Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733; *Plymouth Con. Gold Min. Co. v. Amador & S. Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32; *Brooks v. Clark*, 119 U. S. 502, 7 Sup. Ct. 301; *Laidly v. Huntington*, 121 U. S. 179, 7 Sup. Ct. 855; *Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265; *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308; *Bellaire v. Railroad Co.*, 146 U. S. 117, 13 Sup. Ct. 16; *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259.

The case being properly removed, it only remains to determine the motion to vacate the attachment and service of summons. The statutes of the United States expressly prohibit the issuing of an attachment against a national bank or its property before final judgment in any suit, action, or proceeding in any state court. *Rev. St. U. S. § 5242*; *Bank v. Mixter*, 124 U. S. 721, 8 Sup. Ct. 718. The attachment was therefore improperly issued, and should be vacated; and, inasmuch as the summons was personally served outside of the limits of the state, such service should be set aside and declared void. Motion granted.

SNEAD v. SELLERS et al.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1894.)

No. 256.

1. JURISDICTION OF FEDERAL COURTS — DIVERSE CITIZENSHIP — RESIDENT OF TERRITORY.

A citizen of the Indian Territory cannot sue a citizen of a state in the federal courts.

2. SAME—DUTY OF APPELLATE COURT.

It is the duty of an appellate court to direct the dismissal of the case, where the complaint shows that the requisite diverse citizenship does not exist.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action by John S. Snead against A. F. Sellers and others to try title to real estate. The circuit court rendered judgment, on the verdict of a jury, establishing a boundary line. Plaintiff brings error.

S. H. Lumpkins, for plaintiff in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. The action in this case, trespass to try title, was brought in the circuit court under the following jurisdictional averment:

"Your petitioner, John S. Snead, a nonresident of the state of Texas, now residing and domiciled in the town of Purcell, in Pontotoc county, Chickasaw Nation, Indian Territory, as a licensed trader, and a citizen of the United States, now comes and complains of A. F. Sellers and William Connally, resident citizens of Hamilton county, Texas, and J. I. Musick, N. C. Russell, Solomon Starr, Oliver Newton, and Sarah A. Tandy, all of whom reside in Bosque county, and in said Northern district of Texas, except Mrs. Sarah A. Tandy, who resides in Lavaca county, Texas, and with respect shows to the court that heretofore, to wit," etc.

The record contains no other averment tending to show diverse citizenship of the parties to the suit, and the inference to be drawn from the averment given is that John S. Snead is a citizen of the Indian Territory. It has been uniformly held since *New Orleans v. Winter*, 1 Wheat. 91, that a citizen of a territory cannot sue a citizen of a state in the courts of the United States. See *Barney v. Baltimore City*, 6 Wall. 280-287; *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510. The last cited case, in addition to recognizing the correctness of the decision in *New Orleans v. Winter*, also declares the duty of the appellate court in cases where it does not appear upon the record that the circuit court has jurisdiction. The judgment of the circuit court should be reversed, and the case remanded, with instructions to dismiss the action, with costs; and it is so ordered.

THEBO v. CHOCTAW TRIBE OF INDIANS et al.

(Circuit Court of Appeals, Eighth Circuit. January 2, 1895.)

No. 453.

COURTS—JURISDICTION—CHOCTAW NATION.

The United States court in the Indian Territory has no jurisdiction of an action against the Choctaw Nation, or the chief executive officers thereof, when sued in their capacity as such, for an alleged debt or liability of the Nation, and when the judgment will operate against the Nation.

In Error to the Circuit Court of the United States in the Indian Territory.

Wm. H. H. Clayton, James Brizzolara, and J. B. Forrester, for plaintiff in error.

S. W. Peel (G. G. Randell, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This was an action brought in the United States court in the Indian Territory by the plaintiff in error, George S. Thebo, a white man, and citizen of the United States, against the defendants in error, the Choctaw Nation, Wilson N. Jones, as principal chief of the Nation, and Green McCurtain, as its treasurer, to recover the sum of \$110,349.37 for attorney's fees alleged to be due the plaintiff for professional services rendered the Nation. The defendants demurred to the complaint upon two grounds, one of which—and the only one we find it necessary to consider—is that the court had no jurisdiction of the persons of the defendants or the subject-matter of the action. The lower court sustained the demurrer, and rendered final judgment for the defendants, and the plaintiff sued out this writ of error.

The act establishing the United States court in the Indian Territory (section 6, act approved March 1, 1889; 25 Stat. 783) defined its jurisdiction as follows:

"That the court hereby established shall have jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States or of any state or territory therein, and any citizen of or person or persons residing or found in the Indian Territory, and when the value of the thing in controversy, or damages or money claimed shall amount to one hundred dollars or more."

By act of congress approved May 2, 1890 (26 Stat. 93), its jurisdiction was defined as follows:

"That the court established by said act [act of March 1, 1889] shall, in addition to the jurisdiction conferred thereon by said act, have and exercise within the limits of the Indian Territory jurisdiction in all civil cases in the Indian Territory, except cases over which the tribal courts have exclusive jurisdiction; and in all cases on contracts entered into by citizens of any tribe or nations with citizens of the United States in good faith and for valuable consideration, and in accordance with the laws of such tribe or nation, and such contract shall be deemed valid and enforced by such courts."

It is clear that neither of these acts conferred on that court jurisdiction of an action against the Choctaw Nation, or the chief executive officers of the Nation, when sued in their capacity as such, for an alleged debt or liability of the Nation, and when the judgment will operate against the Nation. It may be conceded that it would be competent for congress to authorize suit to be brought against the Choctaw Nation upon any and all the causes of action in any court it might designate. Acts of congress have been passed, specially conferring on the courts therein named jurisdiction over all controversies arising between the railroad companies authorized to construct their roads through the Indian Territory and the Choctaw Nation and the other nations and tribes of Indians owning lands in the territory through which the railroads might be constructed. Other acts have been passed authorizing suits to be brought by or against these Indian Nations in the

Indian Territory to settle controversies between them and the United States and between themselves.¹

The constitutional competency of congress to pass such acts has never been questioned, but no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act of congress expressly conferring the jurisdiction in the particular case. The political departments of the United States government, by treaties, by acts of congress, and by executive action, have always recognized the Choctaw Nation "as a state, and as a distinct political society, separate from others, and capable of managing its own affairs and governing itself"; and the courts are bound by these acts of the political departments of the government. *Cherokee Nation v. Georgia*, 5 Pet. 1. The Cherokee Nation, which is identical in all respects, so far as relates to its independence and form of government, with the Choctaw Nation, has been variously described by the courts as "a domestic, dependent nation" (*Cherokee Nation v. Georgia*, supra); "as a state, in a certain sense, although not a foreign state or a state of the Union" (*Holden v. Joy*, 17 Wall. 211); "as a distinct community, with boundaries accurately described" (*Worcester v. Georgia*, 6 Pet. 515); "an alien, though dependent, power" (*Elk v. Wilkins*, 112 U. S. 103, 5 Sup. Ct. 41); "not a foreign, but a domestic, territory; a territory which originated under our constitution and laws" (*Mackey v. Coxe*, 18 How. 100). By the treaty between the United States and the Choctaw Nation of September 27, 1830 (7 Stat. 333), the United States granted to the Choctaw Nation, in fee simple, "to inure to them while they shall exist as a Nation and live on it," the country now occupied by them; and by the fourth article of this treaty it is provided that "the government and people of the United States are hereby obliged to secure to the said Choctaw Nation of red people the jurisdiction and government of all the persons and property that may be

¹ Among such acts are the following: "An act for the ascertainment of amount due the Choctaw Nation." 21 Stat. 504. Act of July 4, 1884 (23 Stat. 73), granting the right of way through the Indian Territory to the Southern Kansas Railway Company. An act granting right of way through Indian Territory to Kansas & Arkansas Valley Railway Company. 24 Stat. 73. An act granting the right of way to the Denison & Wichita Valley Railway Company through the Indian Territory. Id. 117. An act granting the right of way through the Indian Territory to the Kansas City, Ft. Scott & Gulf Railway Company. Id. 124. An act granting the right of way through Indian Territory to Ft. Worth & Denver City Railway Company. Id. 419. An act granting the right of way through Indian Territory to the Chicago, Kansas & Nebraska Railway Company. Id. 446. An act granting right of way through the Indian Territory to the Choctaw Coal & Railway Company. 25 Stat. 35. An act granting right of way to the Ft. Smith & El Paso Railway Company through the Indian Territory. Id. 162. An act granting the right of way to Kansas City & Pacific Railway Company through the Indian Territory. Id. 140. An act granting the right of way to Paris, Choctaw & Little Rock Railway Company through the Indian Territory. Id. 205. An act granting right of way to Ft. Smith, Paris & Dardanelle Railway Company through Indian Territory. Id. 745. An act to authorize the Kansas & Arkansas Valley Railway Company to construct an additional railroad through the Indian Territory. 26 Stat. 783.

within their limits west, so that no territory or state shall ever have a right to pass laws for the government of the Choctaw Nation of red people and their descendants; and that no part of the land granted them shall ever be embraced in any territory or state; but the United States shall forever secure said Choctaw Nation from and against all laws except such as from time to time may be enacted in their own national councils not inconsistent with the constitution, treaties and laws of the United States." The right of independent self-government guarantied to the Choctaw Nation by this treaty has been fully exercised, and the rights of the Nation in this regard have never been questioned by the United States. The Nation has long had a written constitution, and laws modeled after those of the states of the Union, and differing from them in no essential respect. Vide *Mehlin v. Ice*, 5 C. C. A. 403, 56 Fed. 12.

While the Nation has many of the attributes of the political unit which constitutes the civil and self-governing community called a "State" or a "Nation," it is not a sovereign state, but it is a domestic and dependent state, subject to the jurisdiction and authority of the United States. Being a domestic and dependent state, the United States may authorize suit to be brought against it. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject-matter of the controversy was particularly specified, and was of such a nature that the public interests, as well as the interests of the Nation, seemed to require the exercise of the jurisdiction. It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual. "It is a well-established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state." *Beers v. Arkansas*, 20 How. 527. The United States has waived its privilege in this regard, and allowed suits to be brought against it in a few specified cases. Some of the states of the Union have at times claimed no immunity from suits, but experience soon demonstrated this to be an unwise and extremely injurious policy, and most, if not all, of the states after a brief experience, abandoned it, and refused to submit themselves to the coercive process of judicial tribunals. When the supreme court of the United States in *Chisholm v. Georgia*, 2 Dall. 419, decided that under the constitution that court had original jurisdiction of a suit by a citizen of one state against another state, the eleventh amendment to the constitution was straightway adopted, taking away this jurisdiction. Since the adoption of this amendment, the contract of a state "is substantially without sanction, except that which arises out of the honor and good faith of the state itself; and these are not subject

to coercion." In re Ayers, 123 U. S. 443, 505, 8 Sup. Ct. 164. One claiming to be creditor of a state is remitted to the justice of its legislature. It has been the settled policy of congress not to sanction suits generally against these Indian Nations, or subject them to suits upon contracts or other causes of action at the instance of private parties. In respect to their liability to be sued by individuals, except in the few cases we have mentioned, they have been placed by the United States, substantially, on the plane occupied by the states under the eleventh amendment to the constitution. The civilized Nations in the Indian Territory are probably better guarded against oppression from this source than the states themselves, for the states may consent to be sued, but the United States has never given its permission that these Indian Nations might be sued generally, even with their consent. As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. The intention of congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms. The judgment of the United States court in the Indian Territory is affirmed.

NELSON et al. v. EATON.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1895.)

No. 389.

1. EQUITY PRACTICE—AMENDMENT OF BILL—TIME TO ANSWER.

When a bill is amended in a material matter, the defendant is entitled to time to answer the amended bill, which, unless fixed by agreement or special rule, should be the same length of time allowed for answering the original bill.

2. SAME—DECREE ON DEFECTIVE BILL—OPENING DEFAULT.

One E. brought suit in 1893 to foreclose a mortgage which had been assigned to him by the mortgagee. His bill did not aver that the citizenship of his assignor was such that he could have maintained the suit in a United States court, and, as to the matter in controversy, averred only that it exceeded \$500. A decree pro confesso was entered on this bill. The defendants moved to vacate this decree, and dismiss the bill for want of jurisdiction, or for leave to answer. While the motion was pending, the court allowed E. to amend his bill so as to show jurisdiction, and then denied defendants' motion, and entered a final decree for complainant. *Held* error; that the bill was fatally defective; and, when the defect was called to the court's attention, it was its duty to set aside the default, and, if it gave leave to amend the bill, to allow the defendants time to answer.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This was a suit by C. L. Eaton against Peter B. Nelson and Olufine N. Nelson for the foreclosure of a mortgage. A decree pro confesso was entered. A motion by defendants to open the default was denied, and a final decree entered for complainant. Defendants appeal.

H. C. Brome, A. H. Burnett, and R. A. Jones, for appellants.
R. E. W. Spargur and Allen G. Fisher, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. C. L. Eaton, the appellee, filed a bill in equity in the court below against Peter B. Nelson and Ollufine N. Nelson to foreclose a mortgage on lands executed by the defendants to Rockwell Sayer to secure the payment of a negotiable promissory note, payable to his order, for \$2,240. The bill alleged an assignment of the note and mortgage to the complainant, but did not aver that the citizenship of the assignor was such that he could have maintained the suit in the circuit court if no assignment had been made. The defendants did not answer within the time required by the equity rules, and on the 17th day of April, 1893, a decree pro confesso was entered in the cause. On the 16th day of May, 1893, the defendants filed a motion to set aside the decree pro confesso, supported by affidavits, and tendered an answer to the merits. On the 26th day of May, 1893, the defendants filed a further motion to vacate the decree pro confesso, and dismiss the bill, upon the ground that it did not appear from the bill that the court had jurisdiction of the subject-matter of the action. The jurisdictional averment in the bill as to the amount in controversy was "that the matter in controversy in this suit exceeds the sum or value of five hundred dollars," and there was no averment in the bill that Sayer, the payee and assignor of the note and mortgage, could have maintained a suit thereon if no assignment thereof had been made. While the defendants' motions to vacate the decree pro confesso and dismiss the bill for want of jurisdiction apparent upon the record, or for leave to answer, were pending, the court, on the 31st day of May, 1893, granted the complainant leave to amend his bill "to show citizenship of the assignors of the note and mortgage herein," and an amended bill was filed accordingly on that day. On the 28th of June, 1893, the defendants' motions to vacate the decree pro confesso and for leave to answer were denied, and on the 3d day of July thereafter a final decree was rendered on the bill and amended bill for the complainant. From this decree the defendants appealed to this court, and assigned for error the action of the court in refusing to vacate the decree pro confesso, and denying them leave to answer.

It was irregular to render a decree pro confesso on a bill which did not show the court had jurisdiction of the suit. It did not appear that the assignor of the note and mortgage could have maintained the suit if no assignment thereof had been made, and the jurisdictional averment as to the amount in controversy was also defective. The act of March 3, 1887, prohibits suits in the courts of the United States by assignees of choses in action unless the original assignor was entitled to maintain the suit in all cases except suits on foreign bills of exchange and except suits on obligations made payable to bearer and executed by a corporation. *Plant Inv. Co. v. Jacksonville, T. & K. W. R. Co.*, 152 U. S. 71, 76, 14 Sup. Ct. 483; *New Orleans v. Benjamin*, 153 U. S. 411, 432, 435, 14 Sup.

Ct. 905; *Wilson v. Knox Co.*, 43 Fed. 481; *Newgass v. New Orleans*, 33 Fed. 196; *Rollins v. Chaffee Co.*, 34 Fed. 91. The defect in the bill was a material one. It was one of which the defendants could avail themselves at any stage of the proceedings. Whether a default or decree pro confesso shall be set aside or vacated rests largely in the sound judicial discretion of the trial court, and, ordinarily, its ruling thereon will not be reviewed. But this rule has no application to this case. The appellee was not entitled to a decree pro confesso. He had not, by his bill, made a case of which the court had jurisdiction. His bill was fatally defective in this regard. Until the bill was amended, the default was irregular, and no final decree could be rendered. When the defect was called to the attention of the court, it was its duty to set aside the default; and when the court granted the complainant leave to amend his bill, as it had a right to do, it was the undoubted right of the defendants to have a reasonable time to answer the bill as amended. The court had no discretion to deny them this right. In *Davis v. Davis*, 62 Miss. 818, a case in which the defendant was allowed an hour and three-quarters to file a plea or answer to an amended bill, the court said:

"When the complainant amends his bill in a material matter, as was done in this case, the defendant may plead, answer, or demur to the same as if it were an original bill, no matter what may have been the state of the pleadings before the amendment was made. 1 *Daniell*, Ch. Pl. & Prac. (5th Ed.) p. 409; 1 *Barb. Ch. Prac.* p. 224; *Bancroft v. Wardour*, 2 *Brown*, Ch. 66; *Bosanquet v. Marsham*, 4 *Sim.* 573; *Cresy v. Bevan*, 13 *Sim.* 354; *Dillon v. Davis*, 3 *Tenn.* Ch. 386. The authorities generally concur in the declaration that any amendment of a bill after answer authorizes the defendant, though not required to answer, to put in an answer making an entire new defense, and contradicting his original answer, if he desires to do so. *Id.*, and *Insurance Co. v. Jenkins*, 8 *Paige*, 589; *Richardson v. Richardson*, 5 *Paige*, 58; *Miller v. Whittaker*, 33 *Ill.* 387."

In 1 *Barb. Ch. Prac.* p. 222, it is said that whenever the complainant is permitted to amend his bill, if the answer has not been put in, or a further answer is necessary, the defendant has the same time to answer after such amendment as he originally had. In practice in the United States courts it is usual for the parties, by agreement, or for the court, by special rule, to fix the time within which an amended bill may be answered. In the absence of such agreement or special rule, the defendant has the same time to answer that he originally had. In the case at bar no time whatever was given the defendants to answer the bill after its amendment in a material matter. This was error. The decree of the circuit court is reversed, and the cause remanded, with directions to permit the defendants to answer.

MCLEOD et al. v. CITY OF NEW ALBANY.

(Circuit Court of Appeals, Seventh Circuit. February 23, 1895.)

No. 213.

1 EQUITY PRACTICE—PARTIES—APPEAL.

Where a decree upon an intervening petition reserves certain questions, raised by the petition, for further hearing, and does not determine the

same, the objection that persons, who are concerned only with the questions so reserved, are not made parties to the petition, is not available on appeal from the decree.

2. SAME—INTERVENING PETITION.

The parties to an original bill are, in fact, parties to an intervening petition filed in the suit, and bound to take notice of such petition and the proceedings thereunder, though not made formal parties to the petition.

3. SAME—DUTIES OF RECEIVERS.

Receivers, in respect to the conservation of the property in their hands, represent all parties to the suit in which they are appointed; and cannot, after a full hearing upon the merits of an application to direct them in regard to the disposition of such property, object to the decision, on the ground that parties whom they represent have not been formally notified.

4. SAME—REHEARING—NEWLY-DISCOVERED EVIDENCE.

An application for a rehearing, on the ground of newly-discovered evidence, which shows no diligence to obtain such evidence, and does not set forth the facts to be proved nor the witnesses to be called, but merely asserts that the facts had not come fully to the knowledge of the party at the time of the hearing, without showing any application for time to investigate such facts, cannot be granted.

5. APPEAL—APPLICATION FOR REHEARINGS.

An application for a rehearing is addressed to the sound discretion of the court, and its action thereon is not reviewable on appeal.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit by the Youngstown Bridge Company against the Kentucky & Indiana Bridge Company, in which receivers of the property of the latter company were appointed. The city of New Albany, Ind., intervened. The receivers appeal.

Bennett H. Young, for appellants.

W. H. H. Miller, Ferdinand Winter, John B. Elam, and George H. Hester, for appellee.

Before WOODS and JENKINS, Circuit Judges, and GROSSCUP. District Judge.

JENKINS, Circuit Judge. In a suit brought by the Youngstown Bridge Company in the court below, the appellants on the 17th day of October, 1893, were appointed receivers of the Kentucky & Indiana Bridge Company (hereinafter called the "Bridge Company"), a corporation created and organized under the laws of the state of Indiana, and the owner of a bridge spanning the Ohio river between the city of Louisville, in the state of Kentucky, and the city of New Albany, in the state of Indiana. In that suit the city of New Albany, on the 28th day of January, 1894, by leave of the court, filed its intervening petition, representing that for many years prior to the receivership the bridge company was the owner and in possession of a large amount of real and personal property situated within the limits of the city of New Albany, and subject to assessment for taxation by the city; that during the years 1889 to 1893, both inclusive, certain taxes were lawfully assessed by the city against the property of the bridge company, part of which remained unpaid, and were by law a lien upon the real estate and personal property of the bridge company then in

possession of its receivers, which lien was superior in equity to all other liens and incumbrances. The petitioners ask that such taxes be paid out of any funds in the hands of the receivers in priority of any claims of other creditors of the bridge company. The intervening petition also asserted certain claims for taxes assessed against the New Albany Railway Company, the New Albany Ferry Company, and the New Albany Belt & Terminal Railroad Company, which it was claimed should also be paid by the receivers of the bridge company upon grounds stated in the petition. These claims were not determined, but reserved by the decree complained of, and are not before us on this appeal. The intervening petition was referred to a master to take proofs, and to report the evidence, with findings of fact, to the court. The master reported that he found the amount due for taxes assessed against the property of the bridge company by the city of New Albany to be \$1,171.58; that such taxes were duly and legally assessed; that the receivers took possession of all the property of the bridge company, and have been in receipt of its tolls and revenue; and that the city of New Albany, the intervening petitioner, was entitled to be paid such sum by the receivers. An exception was filed to the report upon the ground that the assessments made against the property of the bridge company were excessive, unjust, and unreasonable, and that the assessment was four times the cost of the property assessed. Subsequently, and before hearing upon the exception, a motion was made in behalf of the receivers, asking for the recommittal of the report for further hearing upon the grounds—First, that final action should not be had upon the report of the master, because the proper parties had not been brought before the court, and had not appeared to set up such defenses as they have to the claim of the said city of New Albany; second, that the assessment was unlawful, because the valuation included property situated in the state of Kentucky, and was excessive. The motion was founded upon and supported by the affidavit of the counsel for the receivers which states that the matter set out in the intervening petition cannot be fully determined without the New Albany Railway Company and the New Albany Belt & Terminal Railroad Company being parties to this suit, and being called upon to make defense. The affidavit further stated Alexander Dowling, J. H. Statsenberg, trustee, Theodore Harris, trustee, the Louisville Trust Company, and the Columbia Trust Company, trustees, were all interested in the matter set up in the intervening petition; that they were defendants to the suit, and were entitled to notice of the filing of the intervening petition, and of the time and place of the hearing, and that they had no notice of either the filing of the petition or the sitting of the master. The affidavit further asserts, with respect to the application for a rehearing based upon the ground of newly-discovered evidence, that the valuation of the property of the Kentucky & Indiana Bridge Company as assessed for taxation was excessive, and was unlawful, and that the affiant believed that the receivers can show "that in said valuation was included property not situate in the state of

Indiana, but situate in the state of Kentucky, and that the sum was so excessive as to shock the sense of fairness of any reasonable man, and that by said excessive, unreasonable, and unlawful valuation the taxes claimed by the said city of New Albany are greatly increased, and are greatly in excess of that which is either just or reasonable; * * * that said facts have only fully come to their (the receivers') knowledge since the filing of the report of the special commissioner, and that they would have been set up before said Harrison (special commissioner) if then fully known." The court on the 27th day of September, 1894, overruled the exception, confirmed the report, and ordered the receivers to pay the amount found due.

It is alleged in error that the court erred in overruling the exceptions to the report, and in refusing to recommit the cause for further hearing. The objection for defect of proper parties may be taken advantage of either by demurrer, plea, answer, or at the hearing. If the defect be apparent upon the face of the bill, it should be called to the attention of the court by demurrer; otherwise by plea or answer. Such an objection is not usually available for the first time at the hearing, unless there is wanting an indispensable party, without whose presence a determination of the controversy cannot be had. The suggestion that the New Albany Railway Company and the New Albany Belt & Terminal Railroad Company are indispensable parties to the intervening petition cannot avail upon this appeal, for the reason that, if otherwise they are necessary parties to the petition, the claims of the respondent with respect to taxes laid upon their property were not determined by the decree now under review, but were reserved for further hearing. The other parties, whose presence is suggested as essential, are parties to the original bill, as holding incumbrances upon the property subordinate to the lien of the complainant. They were in court in the suit in which the receivers were appointed, and were bound to take notice of the intervening petition of the city filed in that suit, and of the proceedings thereunder. It was not necessary that they should be made formal parties to the petition. Being parties to the suit, they were in fact parties to the intervening petition. The receivers, in respect to the conservation of this property, represent all parties to the original bill. It was their duty to preserve the estate, and thereto to pay the taxes thereon. If the taxes were illegally laid, it was their duty, representing all in interest, to contest payment. If parties to the original bill desired to take active part in such contest, they had the right to be heard, and such right, if demanded, would doubtless have been accorded to them. They did not so ask, although, being parties to the suit, they were obligated to take notice of the proceedings. They are not here objecting that they were not well represented by the receivers. The latter cannot for the first time, after full hearing upon the merits before the master, object that those they represented should be formally notified of the petition.

A rehearing for newly-discovered evidence rests in the sound discretion of the court. The application should disclose the new

testimony, the names of the witnesses, and the character of any documentary evidence; that it has come to light since the hearing, and was not known, and could not by reasonable diligence have been ascertained for use at the hearing; that it is not cumulative. *Dexter v. Arnold*, 5 Mason, 303, Fed. Cas. No. 3,856; *Daniel v. Mitchell*, 1 Story, 198, Fed. Cas. No. 3,563. Within these principles, the application was properly denied. It failed in every essential to come within the rule. The record does not contain the evidence before the master, and the application does not show that the proposed new evidence was not cumulative. No diligence to obtain the evidence at the hearing is exhibited. Indeed, so far as the application presents the matter, there is confession of negligence. The most ordinary diligence in the preparation of the case for the hearing would have suggested the ascertainment of the basis of assessment of the property, and, if in such assessment there was included property situate without the limits of the state, it must have been matter easily determined. Neither the facts nor the witnesses by whom the facts are to be proven, are set forth in the application. Nor does it appear that the facts have come to the knowledge of the receivers since the hearing. It is merely asserted that they have only since the hearing fully come to their knowledge. If, without subjection to the imputation of negligence, they were only partially informed of the facts at or before the hearing, it became their duty to apply for a postponement of the hearing until the facts could be fully ascertained. Proceeding with the hearing without objection or request for time to fully ascertain and produce the evidence, they cannot now equitably ask for a rehearing merely because they were not then fully advised of the facts; especially so when neither the facts they expected to prove, nor the extent of their previous knowledge of them, are disclosed to the court. The evidence was not newly discovered, within the meaning of the law. The application is presented upon the mere belief of the affiant, and is wanting in compliance in every particular with the settled rule governing such matters. But, were the case otherwise, such an application is not founded in matter of right, but is addressed to the sound discretion of the court. The exercise of that discretion cannot be assigned for error or reviewed in an appellate court. *Steines v. Franklin Co.*, 14 Wall. 15, 22; *Buffington v. Harvey*, 95 U. S. 99; *Railway Co. v. Heck*, 102 U. S. 120; *Boesch v. Graff*, 133 U. S. 697, 10 Sup. Ct. 378; *Bondholders & Purchasers of Iron R. R. v. Toledo, D. & B. R. Co.*, 18 U. S. App. 479, 10 C. C. A. 319, 62 Fed. 166. Affirmed.

GUNN v. BRINKLEY CAR WORKS & MANUF'G CO.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1895.)

No. 348.

EQUITY—JURISDICTION—ACCOUNT.

G., as surviving partner of the firm of G. & B., filed a bill for an accounting against the B. Manuf'g Co. It appeared that the transactions between the firm and the B. Manuf'g Co. involved a running account of

more than 500 items, extending over more than six years, and further complicated by fraudulent entries and omissions by the deceased partner of the firm, who had been its business manager, and also the manager of the B. Manuf'g Co. *Held*, that an action at law for the balance due, in a federal court having no power to order a reference, would be an inadequate remedy, and that the case was within the jurisdiction of a court of equity.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

This was a bill by John Gunn, surviving partner of the firm of Gunn & Black, against the Brinkley Car Works & Manufacturing Company for an accounting. A demurrer to the bill was interposed and sustained, and the bill dismissed. The complainant appeals.

George Gillham filed brief for appellant.

M. L. Stephenson, Jacob Trieber, John J. Hornor, and E. C. Hornor filed brief for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree dismissing the amended bill of the appellant, John Gunn, for an accounting between himself, as surviving partner of the firm of Gunn & Black, and the Brinkley Car Works & Manufacturing Company, a corporation. According to the allegations of this bill, the appellant and William Black composed the partnership of Gunn & Black from 1881 until 1889, when Black died. During this time Black was the business manager of this firm, and the appellant, who could read but little and from lack of education could not understand bookkeeping, intrusted to him the entire management of the business of the partnership. During all this time Black was also the president and general manager of the Brinkley Car Works & Manufacturing Company, a corporation of the state of Arkansas. He had a much larger pecuniary interest in this corporation than in the partnership, while the appellant, Gunn, had a much larger interest in the partnership than in the corporation. From February 14, 1882, to November, 1888, the partnership and corporation were engaged in business as merchants, and were continually dealing with each other. These dealings were evidenced by a mutual running account, which has never been settled. A copy of the items of this account, as it appears on the account books of Gunn & Black, discloses more than 400 items charged, and more than 100 items credited, by that firm to the corporation, and shows a balance of more than \$20,000 due from the corporation to the partnership. But the corporation denies any indebtedness, and maintains that the partnership is indebted to it. Black, as manager of both the partnership and the corporation, superintended the bookkeeping of both concerns, and perpetrated gross frauds on the partnership by withholding from the account books of the firm proper debits to the corporation, and by placing thereon false and improper credits in favor of the corporation, amounting in the aggregate to many thousand dollars, so that the corporation is justly indebted to the partnership in an amount far in excess of the balance shown

by the books of the latter. Many of the items that should have been, but were not, charged to this corporation on these books are set forth in the bill. The corporation, after repeated demands, refuses to permit the appellant to examine its account books, or to furnish him with any statement of the account between it and the partnership. The prayer of the bill is for a true account between the appellant, as surviving member of this partnership, and the corporation, for the recovery of the balance that shall be found due, and for other relief. To this bill a demurrer was interposed. The court below sustained the demurrer, and dismissed the bill.

In support of this decree counsel for appellee relies upon the legislative declaration of the judiciary act of 1789, that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law" (Rev. St. § 723), and upon such cases as *Hipp v. Babin*, 19 How. 271; *Root v. Railway Co.*, 105 U. S. 189, 212; *Parkersburg v. Brown*, 106 U. S. 487, 500, 1 Sup. Ct. 442; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249; and *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276,—which reiterate and rest upon that well-settled rule. None of these cases, however, involve a complicated mutual running account. In each of them the remedy at law was adequate and complete. But how can the appellant in this case obtain a correct and adequate accounting between this partnership and corporation in an action at law? In such an action for the balance due on this account the national courts have no power to order a reference to take and state the account, but the entire case must be tried to the jury. According to this bill there is here a mutual running account that extends over a period of more than six years; it involves more than 500 items; it has been complicated and confused by the fraudulent entries and omissions of a faithless trustee; and, in our opinion, it would be next to impossible for a jury to carefully examine this account and reach a just result. That can only be done by a reference to a master or a hearing before a chancellor in the method peculiar to a court of equity. In *Kirby v. Railroad Co.*, 120 U. S. 130, 134, 7 Sup. Ct. 430, a case involving an account aggregating about \$350,000, and running for a period of less than 10 months, Mr. Justice Harlan, in delivering the opinion of the supreme court, said:

"The case made by the plaintiff is clearly one of which a court of equity may take cognizance. The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity. It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. 1 Story, Eq. Jur. § 451. Justice could not be done except by employing the methods peculiar to courts of equity."

To deprive a court of equity of jurisdiction, the remedy at law must be plain and adequate,—“as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.” *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 215; *Oelrichs v. Spain*, 15 Wall. 211, 228; *Preteca v. Land-Grant Co.*, 4 U. S. App. 327, 330, 1 C. C.

A. 607, 50 Fed. 674; *Foltz v. Railway Co.*, 8 C. C. A. 635, 641, 60 Fed. 316, 322. An action at law in a federal court does not furnish such an adequate and efficient remedy for the examination of a long, confused, and complicated mutual account like that disclosed in this bill. The decree below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.

PUTNEY et al. v. WHITMIRE et al.

(Circuit Court, D. South Carolina. March 15, 1895.)

1. **CIRCUIT COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—CREDITORS' BILL.**

A creditors' bill cannot be maintained, in the United States circuit court, by several complainants, each holding a separate and independent demand against the debtor less than \$2,000 in amount, though the aggregate of all the complainants' demands exceeds \$2,000.

2. **EQUITY PRACTICE—SUPPLEMENTAL BILL.**

A defective original bill, which affords no ground for proceeding upon it, cannot be sustained by filing a supplemental bill, founded upon matters taking place after the filing of the original bill.

3. **CREDITORS' BILL—NECESSITY OF JUDGMENT.**

One who claims to be a creditor of a defendant, but whose claim has not been reduced to judgment, and who has no lien and claims under no trust, cannot maintain a creditors' bill or a bill to set aside deeds alleged to be fraudulent.

This was a bill in equity by Stephen Putney & Co. and others against Bartow T. Whitmire and others to set aside certain mortgages as fraudulent, and for other relief. Each of the individual claims of the creditors was less than \$2,000, and none of them had been reduced to judgment. A supplemental bill was filed, alleging an assignment by certain of the complainants in the original bill to their co-complainants of all their claims, thus increasing the claim of said complainants to a sum much greater than the jurisdictional amount. The defendants demurred on the ground that the court had no jurisdiction of the original bill; that the filing of the supplemental bill could not affect the jurisdiction, and that the creditors, having failed to obtain judgment on their claims, could not maintain their bill in this court.

Perry & Heyward and Haynsworth & Parker, for complainants.
Cothran, Wells, Ansel & Cothran, for defendants.

SIMONTON, Circuit Judge. This is a creditors' bill, seeking to set aside certain mortgages of a stock of goods executed by the defendant Whitmire to his sister and brother. It is charged that the mortgages themselves are void because intended to delay, hinder, and defeat creditors; and that they are in effect an assignment with preference, and so void under the statute law of South Carolina. The complainants are merchants, each of whom sold and delivered goods to Whitmire, and hold his notes given to them severally, and open accounts due to them severally by him. These are set out in detail. None of the plaintiffs, when the bill was filed,

held in their own right a demand against Whitmire equal to \$2,000; and none of them, either at that time or since then, have reduced their claim to judgment. The prayer of the bill is for an injunction against the enforcement of the mortgages; that they be declared null and void; that a receiver be appointed to take charge of the chattels covered by them; that creditors of Whitmire be enjoined from enforcing their claims except in this suit; and that complainants may have judgment against the defendant Whitmire for their respective demands, as hereinbefore set out; and for general relief. This bill was filed on 16th July, 1894, and on the same day a rule was issued against the defendants to show cause, on 23d July thereafter, why the prayer of the bill as to injunction and receiver be not granted. The defendants made return to the rule on 7th August. On 6th August, complainants filed a supplemental bill, in which it was alleged that Carhart & Bro., complainants in the original bill, had assigned all their claims against the defendant Whitmire to their co-complainants, Stephen Putney & Co., and that in this way and otherwise the claim of said Putney & Co. against said defendant was largely in excess of \$2,000, besides interest and costs. On 6th September the defendants filed a demurrer to the bill maintaining these points: That in the original bill none of the complainants show themselves within the jurisdiction of the court; that they cannot proceed in this court, not having established their several claims at law; that, if the court had no jurisdiction over the original bill, the supplemental bill could not cure this defect. (2) That a bill will not lie in this court to set aside fraudulent deeds in behalf of creditors whose claims have not been established at law.

Have the complainants in the original bill, their several claims being each below \$2,000, a standing in this court? Each complainant is a merchant. Their debtor is also a merchant. Their contracts with him were several contracts, having no connection with or relation to each other. Each claim stands upon its own merits. None of them has any lien upon, and no special property, legal or equitable, in, the property of their debtor. The interest of each is separate, and his contract is separate. Some may succeed, and some may fail, in establishing their debt. The success or failure of one will not affect the other. The first requisite is the establishment of the claim. Under these circumstances, the rule is that each complainant must himself be competent to sue. The best illustration of this is in the case of *Shields v. Thomas*, 17 How. 4. In that case distributees filed a bill against an administrator of an estate exceeding \$2,000 in value. Each distributive share was less than the jurisdictional amount. Their aggregate exceeded it. A motion to dismiss was made and refused. The matter in controversy was the amount of the liability of the administrator. "All the distributees claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the administrator appellant how it was to be shared among them. He had no controversy with either of them on that point, and, if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not

with him." The court in this case differentiate it from *Oliver v. Alexander*, 6 Pet. 143, a suit for seamen's wages. "Although the crew are allowed by law, for the sake of convenience, and to save costs, to join in a suit for wages, yet the right of each seaman is separate and distinct from his associates. His contract is separate, and his recovery does not depend upon the recovery of others, but rests altogether on its own evidence and merits." In *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, a creditors' bill to set aside a fraudulent assignment, it was held that the claims of the creditors could not be united so as to maintain the jurisdiction of the supreme court, for the reason that the decrees in their favor are several, and the amounts to be paid to them, respectively, do not exceed \$5,000.

In the case at bar, if complainants succeed, the decree in favor of each must be several, and the amount paid to each cannot exceed \$2,000. The same principle is laid down in *Rich v. Lambert*, 12 How. 347; *Seaver v. Bigelow*, 5 Wall. 208; *Ex parte Baltimore & O. R. Co.*, 106 U. S. 5, 1 Sup. Ct. 35, with other cases in the same volume; *Schwed v. Smith*, 106 U. S. 188, 1 Sup. Ct. 221; *Trust Co. v. Waterman*, 106 U. S. 265, 1 Sup. Ct. 131; *Adams v. Crittenden*, 106 U. S. 576, 1 Sup. Ct. 92. It must be noted that in this case there is no trust fund, or, indeed, any fund, to be administered. Whitmire holds in his own right a stock of goods. He has given mortgages covering a part of them, but he remains in possession. The case is not within *Handley v. Stutz*, 137 U. S. 369, 11 Sup. Ct. 117. A distinction has been sought between cases in which the jurisdiction of this court is in question and cases in which jurisdiction for the purposes of appeal to the supreme court is sought. But in *Walter v. Railroad Co.*, 147 U. S. 373, 13 Sup. Ct. 348, the rule is made applicable to both instances:

"It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction or on appeal to this court as to those whose claims exceed the jurisdictional amount."

The learned counsel for complainants also maintain that the matter in controversy is the amount fraudulently mortgaged. But as to each complainant the amount in controversy is his own claim. He has no part or lot in the claim of any one else; and the question to be decided is, has he locus standi in this court? See *Stewart v. Dunham*, supra. In *Chapman v. Handley*, 151 U. S. 445, 14 Sup. Ct. 386, a question arose as to the right of certain persons to share in an estate as distributees. The estate was valued at \$25,000. The court refused to unite all the interests claimed by distributees, and so sustain the jurisdiction, saying:

"These claims of distributees are several, and not joint, and a joint application for distribution can only result in judgments in severalty. * * * It is the distinct and separate share of each distributee that is involved in the proceeding; and although, in this instance, if the children of the plural wife had been admitted to share, they would have obtained, and an amount in excess of \$5,000 would have been withdrawn from the other children, the gain on the one side and the diminution on the other would have been proportionate as to each, and not in the aggregate as to all."

It is not possible to resist the result of these authorities. This objection to the jurisdiction must be sustained.

Has it been cured by the supplemental bill? The rule is that if an original bill is defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill founded upon matters which have subsequently taken place. 2 Daniell, Ch. Prac. (Perkins' Ed.) p. 1595, note; *Candler v. Pettit*, 1 Paige, 168; *Bernard v. Toplitz*, 160 Mass. 162, 35 N. E. 673.

The next ground of demurrer is that the complainants are creditors at large, and have no judgment at law. There is no trust set up or existing. None of them have any lien. Each claim is based on a contract suable at law. None of them has an admission of his claim. Each claims to be a creditor. The gist and essence of his case is that he is a creditor. The first step he must take is to establish this fact. A court of equity cannot do this. Under article 7 of the amendments of the constitution of the United States, the defendant Whitmire is entitled to the verdict of a jury on this point. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712. There is an unbroken current of decisions of the supreme court of the United States holding that an open creditor having no lien, and claiming under no trust, cannot obtain the aid of a court of equity in setting aside the deed of his debtor, alleged to be fraudulent, if this fact be brought to the attention of the court. *Adler v. Fenton*, 24 How. 407. Nor can this be effected by a creditors' bill. *Smith v. Railroad Co.*, 99 U. S. 398; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977; *Hollins v. Iron Co.*, 150 U. S. 379, 14 Sup. Ct. 127. So, also, the circuit court of appeals, as in *Atlanta, etc., R. Co. v. Western, etc., Ry. Co.*, 1 C. C. A. 676, 50 Fed. 790, 2 U. S. App. 227. The cases relied upon by complainants can easily be distinguished. *Case v. Beauregard*, 101 U. S. 691, is one of them. This case had been before the court in 99 U. S. 119. The complainant had no judgment at law, but he sought relief by working out in his favor the equity between copartners, his debtors. The court held that as he had no specific lien on the property, and there being no trust which a court of equity can enforce, his bill could not be sustained. He then obtained a judgment at law, and filed a new bill, which came up in 101 U. S. The court held that the first decision was res judicata, and all that is said goes to sustain the jurisdiction in that first case,—a jurisdiction maintained without previous judgment at law, maintained clearly because complainant sought to support a trust which he claimed. So, also, in *Oelrichs v. Spain*, 15 Wall. 228, there was an element of trust. See *Talley v. Curtain*, 4 C. C. A. 177, 54 Fed. 43; *Hollins v. Iron Co.*, supra. The demurrers are sustained, and the bill dismissed for want of jurisdiction, each party to pay his own costs. *Mayor v. Cooper*, 6 Wall. 247.

FENWICK HALL CO. v. TOWN OF OLD SAYBROOK.

(Circuit Court, D. Connecticut. March 12, 1895.)

No. 826.

1. INJUNCTION—DISSOLUTION OF RESTRAINING ORDER—BILL FOR DISCOVERY.

A mere temporary restraining order, granted ex parte, may be dissolved on motion before answer filed, even where the bill is one for discovery or disclosure; and, even if the rule were otherwise, it would not apply, where the motion to dissolve admits the truth of the allegations as to which discovery is asked, and where the matters sought to be disclosed would not be material to the trial.

2. FEDERAL COURTS—ENJOINING PROCEEDINGS IN STATE COURTS.

The statute forbidding federal courts to enjoin proceedings in state courts (Rev. St. § 720) applies to a case in which it is sought to enjoin a town from levying upon and selling property for the purpose of collecting an assessment of benefits for the layout of a highway, which assessment the state court, pursuant to the state statutes, has ordered to be collected in the manner pursued in the collection of the town taxes; and it is immaterial that the town proposes, as alleged, to use the money for an unlawful purpose.

This was a bill by the Fenwick Hall Company against the town of Old Saybrook for injunction and discovery.

Seymour & Knapp, for complainant.

Lewis E. Stanton, for defendant.

TOWNSEND, District Judge. Motion to set aside an order granted ex parte, restraining the defendant from levying on and selling a certain hotel belonging to the orator. The material facts are as follows: William L. Matson and others, having brought an application to the superior court for Middlesex county, in this state, for the layout of a highway, obtained judgment therefor against the orator and defendant herein, and an order for the assessment of benefits, and for the collection of the same, including the sum of \$5,872.10, against the orator herein. Said order directed that said assessments be collected, and said collection be enforced, in the same manner as in the case of collection of town taxes. This is the method of collection provided also by statute in such cases. The defendant claims that this court has no jurisdiction to stay these proceedings, under section 720 of the Revised Statutes of the United States, which is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The orator resists the motion. The preliminary objection made is that courts will refuse to dissolve an injunction, granted on a bill for discovery or disclosure, until after answer. I do not understand that the practice under said alleged rule prevents the court from inquiring into the merits of the action, especially in a case where a mere temporary restraining order has been granted ex parte, and without any such previous opportunity. Such order merely suspends proceedings until the court can have an opportu-

nity to inquire as to whether any injunction should be granted. Where a want of equity appears on the face of the bill, the court will set aside an injunction upon motion, at any time. 1 Fost. Fed. Prac. 385. But even if it be assumed that the rule is as claimed, and that it is applicable to a mere restraining order, it would not apply where the motion to set aside the order admits the truth of the allegations as to which discovery is asked, and where the matters sought to be discovered would not be material at the trial. *White v. Steinwacks*, 19 Ves. 83.

It is next suggested that said statute is not applicable in cases where there can be no clash of authority between the state and federal courts. In this case, however, it appears that the state court has ordered that the work should be done on or before a certain date. It is no answer to say, in this proceeding, that said order was beyond the jurisdiction of said court. The effect of a permanent injunction, if granted, would be to forbid the defendant town doing the act which the state court has expressly ordered it to do, and would bring about the very result which it was the object of the statute to prevent. The chief argument in opposition to the motion is based upon the claim "that under the guise of laying out and constructing a highway, which is of public convenience and necessity, the defendant, the town of Old Saybrook, is in fact endeavoring to collect an assessment of benefits, so called, not for the layout or construction of said highway, but for the purpose of depositing the money thus collected in a savings bank, that the principal and interest may be applied at some future date, not to the construction, but to the repair and maintenance, and possible reconstruction, of this highway. This is, in effect, an argument that this court should enjoin the defendant from obeying the order of the state court, because it proposes, after having obeyed it, to do some illegal act. This is not a matter with which this court is concerned, or over which it has jurisdiction. A consideration of the various matters presented in the brief of counsel for the orator has failed to show that there is any sufficient ground to support a denial of the motion or to authorize the grant of an injunction. The judgment of the court which first acquired jurisdiction of the cause is binding upon this court, and the rights acquired thereunder cannot be affected by proceedings in another suit by one of the parties in the former cause. Such jurisdiction continues until the judgment is satisfied. 1 Fost. Fed. Prac. 347 et seq. In these circumstances, there being no federal question involved, the granting of an injunction would be in direct violation of the prohibition of the statute. The rule in such cases, and the reasons therefor, are fully discussed in the following cases: *Hemsley v. Myers*, 45 Fed. 283, 289; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355; *Bank v. Hazard*, 49 Fed. 293. The motion to set aside the restraining order is granted.

MASON et al. v. PEWABIC MIN. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1894.)

Nos. 167-170 and 182-190.

1. CORPORATIONS — DISSOLUTION — DISPOSITION OF ASSETS — EMPLOYMENT OF COUNSEL.

The charter of the P. Co. expired in 1883. The business of the company was continued for about a year, and a stockholders' meeting was then held, at which an attempt was made to organize a new corporation to continue the business, taking the property of the P. Co. at a valuation of \$50,000, issuing stock to the shareholders of the P. Co., share for share, or paying a proportionate part of \$50,000 to any shareholders who did not accept stock. This plan was agreed to by a large majority of the shareholders, but was rejected by the rest, who brought suit against the old and the new corporations and the directors, who were the same in both, claiming the right to have the property of the P. Co. sold, its debts paid, and the surplus distributed among the shareholders, and claiming also an account from the directors of their receipts and disbursements in conducting the business of the company, after the expiration of the charter. This suit was strenuously defended through a long series of proceedings, but resulted in a decree in favor of the complainants, as prayed in the bill, and a sale of the property of the P. Co. for \$710,000. The counsel engaged in the defense applied for payment out of this fund. *Held*, that the suit involved only a controversy between the stockholders of the P. Co. as to their rights in its assets, and did not involve the corporate interests of the company, and that the directors were not authorized to use the corporate assets or credit in employing counsel to represent the contention of the majority stockholders and further their interests, nor were the counsel so employed entitled to be paid out of the proceeds of the sale, but must look to the interests which they really represented.

2. SAME—COMPENSATION OF OFFICERS.

Held, further, that the president of the P. Co., who, before the dissolution of the company, had received no salary, and who was one of the directors who shared in and promoted the plan of the majority stockholders, was not entitled to any payment for his services as president after the dissolution.

3. SAME—LIABILITY FOR BORROWED MONEY.

Held, further, that the liability of the P. Co. for money borrowed after its dissolution depended upon the existence of a necessity for the loan for the purpose of closing up the business of the company, and that a claim asserted against the fund for money loaned by a company which appeared to have used the property of the P. Co. between its dissolution and the sale, and to have been under the management of the same persons who were in control of the P. Co., could only be allowed after a probing of the accounts of the two companies, and to the extent of the balance due to such company for money actually loaned the P. Co. for necessary and proper purposes.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

This was a suit by Thomas H. Mason and others against the Pewabic Mining Company and its directors to obtain a sale of the property of that company and an accounting. Cahill & Ostrander, C. E. Hellier, F. A. Baker, J. Lewis Stackpole, R. M. Morse, T. H. Talbot, D. L. Demmon, T. H. Perkins, and the Franklin Mining Company all presented claims before the master in the cause, for counsel fees, salaries, and moneys loaned, all of which claims were disallowed by the master. The circuit court entered a decree confirming the master's report. The claimants appeal.

The Pewabic Mining Company was a Michigan corporation, whose corporate life expired in April, 1883. Its capital stock was divided into 40,000 shares, of \$25 each. It owned a large and valuable body of land immediately on the famous Pewabic copper lode, and actively prosecuted the business of copper mining during the period of its charter life, and was still regularly engaged in extensive operations at the time this litigation began (March 31, 1884), notwithstanding the expiration of its charter nearly a year before. At an annual stockholders' meeting in March, 1884, an attempt was made to organize another corporation, called the Pewabic Copper Company, to which a majority of the stockholders resolved that the assets of the old corporation should be transferred, at a fixed valuation of \$50,000. This plan of organization contemplated that the stockholders in the old company should become stockholders in the new for an equivalent amount of the old stock, or, if they did not elect to do this, then they were to receive in cash their proper portion of the assets as of the valuation of \$50,000. Upon the vote of shares this plan was adopted and approved, the vote standing 27,919 in favor of to 6,754 against it, and a transfer of the assets and property of the old company was directed to be made by the officers of the defunct company. The minority were wholly unwilling to agree to this arrangement, as desired by the majority. They were neither willing to continue their capital in the new corporation, nor to accept a pro rata upon a valuation of \$50,000. They insisted and demanded that there should be a public sale of all the property of the corporation; that its debts should be paid; and that the surplus should be distributed pro rata among all the shareholders. Deeming this to be their legal right, three shareholders, to wit, Thomas H. Mason, William Hart Smith, and Sullivan Ballou, filed their bill in this case, making defendants the old corporation, the Pewabic Mining Company, and the new corporation, the Pewabic Copper Company, and the officers and directors of the old as well as the new company, who were the same persons. The object of the bill was to prevent the proposed transfer and sale of the property and assets of the Pewabic Mining Company to the Pewabic Copper Company, and to obtain a public sale of all the property of the Pewabic Mining Company, for payment of debts and ratable distribution among all shareholders. The bill also alleged that the regular business of mining had been carried on by the officers and directors of the old company, notwithstanding the expiration of its corporate life, and prayed that they should be required to account for all receipts and expenditures in carrying on the business of the company after corporate dissolution. Such proceedings were had under the original bill as resulted in a decree in accordance with the contention of the minority complainants.

The circuit court held: (1) That the minority shareholders could not be coerced by a majority into an election between taking shares in the Pewabic Copper Company in lieu of their shares in the Pewabic Mining Company, and receiving in cash a pro rata share of the assets, upon an arbitrary valuation of \$50,000. (2) That court held that, upon the dissolution of the corporation by expiration of its charter life, the shareholders were entitled to have a public sale of all the property of the corporation, and a distribution of the proceeds of such sale, after payment of the corporate debts. (3) That the complainants were not entitled to an accounting with the old board of directors of the Pewabic Mining Company, on account of the continuance of the general corporate business of said company after expiration of its charter. *Mason v. Mining Co.*, 25 Fed. 882. There was an appeal to the supreme court by both the complainants and defendants, the complainants appealing from so much of the decree as denied an accounting with the Pewabic directors. The decree of the circuit court was confirmed in so far as it had been appealed from by the defendants, but was reversed in so far as the complainants had been denied an accounting with the officers and directors. *Mason v. Mining Co.*, 133 U. S. 50, 10 Sup. Ct. 224. The case was remanded to the circuit court, with directions that a special master should be appointed, that an account of the assets and indebtedness of the Pewabic Company should be stated, and that an accounting should be had before said master with the officers and directors of the Pewabic Mining Company as to the business conducted by them after the expiration of the Pewabic charter, and with directions that the property should be sold at public sale, for the purpose of pay-

ing debts and distribution of the surplus assets among the shareholders. In May, 1890, a decree was entered in the circuit court upon the mandate of the supreme court, referring the cause to the Honorable Peter White, as special master, for an account of the debts and assets, and for an accounting with the officers and directors of the Pewabic Mining Company. The special master reported to the court that all of the indebtedness of the Pewabic Mining Company, which was in existence at the time this litigation was begun, in 1884, had been settled and paid. He reported that a number of claims which had arisen pending the litigation, for money borrowed and expended by the defendants, and for professional services claimed to have been rendered to the defendant company in and about the pending litigation, had been filed. He reported that the gross amount of the claims thus filed somewhat exceeded \$80,000. He also reported that the time was exceedingly propitious for a sale of the property, and recommended that a sale should be ordered at once, without waiting to ascertain the amount and validity of the claims thus asserted against the assets. This report was confirmed in so far as provisionally to establish an upset price at the sale which was by the same decree ordered to be made after due and extensive advertisement. Twice thereafter, upon application of the defendants, the sale was postponed. But finally, upon the 24th day of January, 1891, the property was exposed to public sale, for cash, and reported as sold to complainants, Mason and Smith, for the price of \$710,000. Some effort was made to prevent a confirmation of this sale, and to have the biddings reopened. The circuit court, upon consideration of all the circumstances, declined to reopen the bidding, and confirmed the report of the sale. From this decree the defendants again appealed to the supreme court of the United States, where, upon full argument, the decrees of the court ordering and confirming the sale were in all particulars affirmed. *Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887; *Marcus v. Mason, Id.* Subsequently the special master, according to previous direction of the court, made report upon the various claims asserted against the Pewabic Mining Company, or the proceeds of the sale of the property of that company, in the hands of the master. That report was in all respects confirmed, over exceptions interposed by nine different interveners, whose claims were litigated. Each of these alleged creditors of the Pewabic Mining Company assigned error upon the decree of the court, and prayed and was allowed a separate appeal. These nine appeals involve in many respects identical questions, which have been heard and will be decided together. At the same term of the court at which the report of the special master upon these intervening claims was confirmed, four of the interveners filed petitions. These four petitions were interposed, respectively, by J. Lewis Stackpole, Robert M. Morse, Charles E. Hellier, and Cahill & Ostrander, asking an allowance, out of the funds arising from the sale, for the same professional services covered by their claims filed with the special master, and adversely reported. The circuit court, after confirming the master's report, disallowed and dismissed the petitions aforesaid. The petitioners, in addition to their appeal from the decree confirming the master's report, were allowed appeals from the decree dismissing their respective petitions. These four last mentioned appeals were heard along with the appeals from the decree confirming the report of the special master.

Cahill & Ostrander, in pro. per., and Fred. A. Baker, in pro. per., for appellants.

Dickinson, Thurber & Stevenson (Don M. Dickinson and Alfred Russell, of counsel), Thomas H. Talbot, in pro. per., Daniel L. Demmon, in pro. per., and Thomas H. Perkins, in pro. per., for appellees.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge, after stating the facts, delivered the opinion of the court.

The appeals of Thomas H. Talbot, Cahill & Ostrander, Fred. A. Baker, J. Lewis Stackpole, Charles E. Hellier, and Robert M. Morse involve the liability of the Pewabic Mining Company, or of the fund in court arising from a sale of its assets, for professional services rendered to that company or to the fund since this litigation arose. The facts applicable to each appeal are the same, and what we might say as to one would be equally pertinent as to all, except in so far as the services rendered by Mr. Talbot began at an earlier date in the history of this litigation than those of his subsequent associates. The six appellants above mentioned are gentlemen of the legal profession, and have during the pendency of this very protracted litigation rendered valuable professional services in this case to those litigants named in the original bill as defendants. The defendants named therein were the Pewabic Mining Company, a corporation created under the law of Michigan, whose charter life had expired nearly a year before this suit was instituted; the Pewabic Copper Company, a corporation of the state of Michigan, organized in 1884, and being the same corporation to which the officers and directors of the Pewabic Mining Company purposed conveying all the property and effects of that company, in pursuance of the stockholders' resolution heretofore mentioned. The other defendants were Johnson Vivion, Henry Billings, Thomas H. Perkins, A. B. Butterick, and D. L. Demmon, all being officers and directors of both the old and new corporations.

The principal contention of appellants is that their services were rendered upon an express employment by the Pewabic Mining Company, and that these services were rendered in good faith and with diligence, in the proper interests of that corporation and the general body of shareholders. They insist that, notwithstanding the expiration of the charter life of that company, under the statutes of Michigan the corporate life was continued for the purpose of winding up its affairs and disposing of its property; and that the authority thus conferred extended not only during the period of three years mentioned in the statute, but for the entire time that any litigation begun during that time should continue; and that, under the statutory powers conferred by the Michigan act, the officers and directors of the defunct corporation had power to bind and obligate that company for all professional services deemed by them reasonably necessary.

The constitution of Michigan prohibits the granting of any charter to a corporation, of the class to which the Pewabic Mining Company belonged, for a period longer than 30 years. Any legislation authorizing an extension of the original corporate life and corporate powers for a period beyond 30 years would obviously be ineffective, as prohibited by the constitution. *Attorney General v. Perkins*, 73 Mich. 303, 41 N. W. 426. At the common law, when the corporate life was terminated, by limitation, forfeiture, or otherwise, the corporation ceased to exist in legal contemplation for any purpose whatever. No suit could be maintained in its name or against it, and pending suits abated as in the case of the death of a natural person. *Bank v. Colby*, 21 Wall. 615. But this common-law ex-

tinguishment of remedies, and the common-law consequences, such as reverter and escheat, were obviated by courts of equity, which regarded the corporation as a mere trustee, the creditors and stockholders being the cestui que trust. The death of the trustee was not allowed to defeat the trust nor to destroy the rights of the beneficiaries. In business corporations the capital is contributed by the stockholders, and they are justly entitled to be regarded as the equitable owners of the corporate assets, after payment of corporate debts, and their relations inter sese are to be regarded as analogous to the relations of partners. Equity, therefore, by reason of the flexibility of its remedies, was able to obviate the harsh common-law consequences of dissolution, such as reverter and escheat, by administering the assets as a trust. This doctrine, so well known now to students of equity, is elaborately considered in the opinion of Justice Campbell in *Bacon v. Robertson*, 18 How. 480. In most, if not in all, of the states of the Union, statutes of like tenor to that of Michigan have been passed continuing the corporate life *pro hac vice*, for the purpose of enabling the corporation to wind up its affairs and convert its assets into money for payment of debts and distribution of surplus among stockholders. These statutes are embodiments of equitable doctrines, and afford legal remedy where before there was none. *Mor. Pub. Corp.* §§ 1036, 1037. The Michigan statute operated only to continue corporate capacity that suits might be prosecuted by or against it, that its business might be wound up in an orderly way, its corporate property disposed of, and distribution made among the stockholders after payment of debts. That the purpose of the statute was purely administrative is made positive by the express limitation conveyed in the concluding words: "But not for the purpose of continuing the business for which such corporations have been or may be established." 1 How. Ann. St. §§ 4025-4867.

The question now to be adjudged is as to whether the directors thus holding over as trustees, for the purpose of winding up this corporation, were authorized, under the issues involved in this litigation, to charge the assets of the dissolved corporation with the expense of defending the suit instituted and conducted by complainants. It is most obvious, when we read this Michigan statute in the light of the common law, that the powers preserved to the managing officers of this defunct corporation were only such as were reasonably necessary in closing out and winding up the corporate affairs. Did the controversy presented by this litigation involve the corporate interests of the Pewabic Company? A year after the charter of that company had expired by its own limitation, we find the stockholders assembled in due and regular course, on call issued by the directors, of which all proper notice had been given. A large majority of the stockholders wished to continue their capital in a new corporate organization, to which should be conveyed all the property and assets of the defunct company. Their scheme involved the issuance of stock in the new corporation for a like amount of shares in the old, and the assumption by the new entity of the debts of the old. If this scheme had been accept-

able to all of the stockholders, there would have been no legal difficulty in carrying it out. But just here was the difficulty. All were not willing to continue their capital in further prosecution of an enterprise which had been for some years unremunerative and was wholly speculative. To meet this difficulty, the scheme of the majority placed a valuation of \$50,000 upon the entire assets of the old company, and gave to each shareholder the election to take share for share in the old, or to receive a ratable part of \$50,000 in full extinguishment of his interest in the surplus of the assets of the old corporation. The vote in favor of this disposition of the corporate property was carried by a majority exceeding two-thirds. The president and secretary were empowered to make the necessary conveyance to the new organization. Against this action, a minority, holding 5,000 shares, protested, and demanded that the property should be publicly sold, for cash, after full notice, and insisted upon this, as the legal right of any stockholder unwilling to assent to the proposed disposition. The protest was unavailing, and the minority filed this bill for the purpose of preventing the proposed disposition of the corporate property, and to procure a public sale thereof. They also sought to have the directors account for their receipts and expenditures in the continuance of the regular business of the corporation after expiration of charter. Thus was presented a controversy between stockholders, as to the relative rights of the majority over the minority in regard to the disposition of the assets of a dissolved corporation. The defunct company had no concern as a corporation in the question thus presented. It was not a question of the continuity of the old corporate life. That was dead beyond resurrection. The plan of the majority involved a new corporation altogether, and a conveyance of the property of the old to the new. The power which the majority claimed in regard to the disposition of the assets of the old company was unsustainable in law or justice. The demand of the minority was the clear law of the case. This was so ruled by the circuit court, and, upon appeal to the supreme court, was fully sustained. *Mason v. Mining Co.*, 25 Fed. 882; *Id.* 133 U. S. 50, 10 Sup. Ct. 224. These opinions established that, in the absence of an agreement to the contrary, each stockholder had a right to have the corporate property converted into money, by public sale, whether sale was necessary for the payment of debts or not, and that no majority of stockholders, however large, could compel a shareholder in a dissolved corporation to hazard his interest in a new corporation, or accept a valuation arbitrarily fixed by that majority. To this litigation the old corporation was a formal party. It had as a corporation no concern in such a contest between disagreeing stockholders. That it was a litigation between adverse parties of stockholders is clearly stated by Mr. Justice Brewer in delivering the opinion in the second appeal, who said:

"In 1883 the Pewabic Mining Company ceased to exist. Its property then belonged to the different stockholders, as tenants in common. They could not agree among themselves. The minority appealed to the courts, and there the litigation was carried on for years; the minority insisting upon a sale, the

majority upon the transfer of the property to a new corporation. At the end of six years the controversy was finally determined by this court; and in January, 1890, a decree of the circuit court directing a sale was affirmed." *Mining Co. v. Mason*, 145 U. S. 356, 12 Sup. Ct. 887.

It seems most obvious that the other defendants, who were shareholders acting with the majority and officers and directors endeavoring to obtain judicial sanction for the plan of the majority, were not, by the power conferred upon them by the Michigan statute, authorized to use the corporate assets or credit in employing counsel to represent the contention maintained by the majority shareholders. This disposes of so much of Mr. Talbot's claim as rests upon services rendered in this cause prior to the mandate of the supreme court upon the first appeal, and for services in the quo warranto proceedings reported in *Attorney General v. Perkins*, 73 Mich. 303, 41 N. W. 426.

The major part of Mr. Talbot's claim is for services rendered after the first appeal had been decided and a mandate sent down. The entire services of the other appellants, whose claims have been grouped, were rendered in this cause after the mandate on the first appeal. This suit had been begun in March, 1884. The first appeal to the supreme court was decided in January, 1890. The learned judge whose opinion is now under review correctly states that that mandate directed the circuit court "to ascertain the debts of the Pewabic Company, and thereupon make an offer of the plant of the company at a public sale; and if no more should be bid than the aggregate of \$50,000, and the debts thus ascertained, that the sale should be dropped, and the transfer to the new company, which the majority desired to consummate, should be allowed to proceed. If more than such amount should be bidden, it was directed that the public sale be proceeded with." "This court [still quoting from the same opinion] was further directed to definitely ascertain the debts of the corporation, to require an accounting by the directors of their dealings with the company's assets subsequent to the date of the expiration of its chartered existence, and, upon getting together the whole fund, to make proper distribution thereof." But appellants now contend that, after this mandate came down, a different situation was presented, one which demanded that the defunct corporation, as such, should be represented in the ascertainment of the corporate debts and in all the proceedings in advance of the sale. They insist that the directors, as the representatives of the corporation being wound up, were charged with the duty of protecting the assets against unjust debts and against a premature sale; that it was their duty to see that all the proceedings leading up to the sale were regular, and to do all that was possible to induce competitive bidding, and take every step deemed wise and likely to enhance the ultimate results of a sale; that it was the duty of the officers of the old company to defend any suits which might be instituted through intervention by persons claiming to be creditors of the corporation, and that for this purpose they had a right to retain necessary counsel. That it was the duty of the managers of the

Pewabic Company to defend any and all claims unjustly asserted by intervention or otherwise against that company is quite plain, but it has no practical application here. The special master had, before the first appeal, reported that no debts incurred before this litigation began had been filed, and that all such debts had been paid off by the managers of the Pewabic Company. The claims which he provisionally reported, with a view of fixing an upset price, were all liabilities incurred after this bill was filed. These claims were not resisted by the counsel now asserting claims for services. On the contrary, they were confessed by the Pewabic Company, in so far as that company is represented. With unimportant exceptions, the claims filed with the special master, under the decree upon the mandate, are the very claims now involved in the several appeals under consideration. We do not overlook the fact that one of the counsel so employed did interpose formal defense to the claims of his associates, and to the claims of the other appellants, whose cases will hereafter be referred to. The defenses were, however, never pressed by him, and were inconsistent with the validity of his own claim. The real defense against each and every of the controverted claims has been made by counsel for complainants, and but for them it is evident that no obstacle whatever would have stood between the present appellants and the decrees they severally sought. Neither have we overlooked the further fact that the counsel for the complainants sought to have their compensation charged upon the fund, and that appellants, or some of them, actively resisted the claim thus asserted. It is the right of every beneficiary who is interested in the distribution of a common fund to contest each claim demanding participation. Each is interested in cutting down every other claim, that his own share may be thus enlarged. We do not understand that, for every contest thus made, the contestant establishes a charge upon the common fund. Self-interest is the motive of such defenses, and the resulting enlargement of his own share, in case of success, is the anticipated reward.

We quite agree with the circuit court in the opinion that, when the mandate of the supreme court was received, the real and substantial litigation between the contending factions of stockholders should have been regarded as at an end. Yet it was precisely at this stage of the case that a large addition was made to the counsel who had theretofore appeared for the defendants. Messrs. Cahill & Ostrander, Mr. Baker, Mr. Morse, Mr. Stackpole, and Mr. Hellier now appeared as counsel representing the Pewabic Mining Company. Why this remarkable increase in the number of counsel just when all concerned had every reason to believe that the brunt of the litigation was over is not easily explainable. All of these gentlemen claim to have been regularly retained by the officers and directors of the Pewabic Mining Company. Of this we have no doubt. But did these surviving administrative agents have authority thus to employ counsel at the expense of the assets of the defunct corporation to further carry on the litigation between the disagreeing factions of the stockholders? The rights of the

minority to have the property sold at public sale, for cash, had been clearly vindicated. Six years of hotly-contested litigation had resulted in settling this proposition beyond further controversy. That they were entitled to have as speedy a sale as was consistent with the due and orderly conduct of the suit is most obvious. Notwithstanding this, the record shows that just at this period there began a series of dilatory tactics intended to delay a final sale. Before the special master and in the circuit court, every dilatory objection to be found in the armory of skilled practitioners seems to have been resorted to for the purpose of protracting a final sale. It appears from the record that the special master, Mr. Peter White, was a gentleman exceptionally well qualified for his duties, and entirely competent to advise the court concerning the expediency of a sale. In his provisional report, filed September 18, 1890, he said:

"In my opinion, the mining companies owning contiguous property and a combination of stockholders will be the principal competing bidders at the sale, and that all of these are familiar with the property. I am also of the opinion that, if the property could now be brought to sale, it would be run up by responsible bidders to \$500,000 or upward. I find that the present is a more auspicious time for a sale of this property at a good price than has been for years; that inquiries for the day of sale are frequent, and interest in the sale very active; and I am satisfied that the sale should take place at the earliest day on which it can be fixed by the court, so that advantage may be taken of the present condition of the market. I find that the fact that this property is to be sold under the decree in this cause is already widely known among those interested in copper lands, or who are likely to be bidders, in Boston, New York, and Michigan; Boston being the center in this country of copper investments and financial operations."

The exceptions interposed to this provisional report were overruled, and the special master ordered to sell the property, after due advertisement. Twice after it had been advertised, the circuit court, on application of defendants, postponed the sale. At length, on January 24, 1891, a sale was made, at the price of \$710,000. Defendants sought to have this bid rejected and the biddings reopened. One Marcus, of questionable financial character, interposed a further bidding, which was countenanced by defendants. The court declined to reopen the biddings, and confirmed the sale. From this decree a second appeal was taken, in the name of the Pewabic Mining Company and of the other defendants, which resulted in an affirmation of the sale. This is reported in 145 U. S. 349, 12 Sup. Ct. 887, et seq.

In the efforts of appellants to postpone the sale, and in their efforts to reopen the biddings, and in their briefs and arguments before the supreme court, it was contended, as they now here insist, that the complainants, from the beginning to the end, were acting in the interest of the Quincy Mining Company, which owned and operated a mining property adjoining the Pewabic property, and in which company the complainants were interested. Upon the other hand, it has been urged that the defendants, since their failure to bring about a transfer of the property to the Pewabic Copper Company, have been acting solely and wholly in the interest of the Franklin Mining Company, which owned a mining property

adjoining that of the Pewabic Mining Company. It has been urged that the Franklin Company and the Pewabic Company have a common management; that many of the directors of the Pewabic Company are likewise officers and directors of the Franklin Mining Company; and that the defendants, in interposing obstacles to an early sale, and in attempting to open the biddings, had no other object than to secure the property to the Franklin Company on account of their interest therein. The special master, Mr. White, who was intimately acquainted with the entire history of this litigation, reported adversely to each and every of the claims now under consideration, upon the ground, among others, that the "said services were rendered and said expense incurred for and in behalf of interests adverse to the general body of stockholders and creditors of the Pewabic Mining Company," and "were rendered and had in said cause in behalf of the defeated parties in the various branches of the litigation therein, and that all of the said services rendered at other stages of the litigation were adverse to the best interest of the estate of the Pewabic Mining Company, including the postponement of the sale."

An examination of the entire record leads us to concur in the observations of Judge Severens, the judge who presided in this cause in all its stages after the first mandate, who, speaking of this report of the special master, said:

"It was proper for the master to take into account the general nature of the case, and all the facts and circumstances connected with it which had transpired subsequent to his appointment and under his cognizance. He knew that the contending parties were interested in two great rival mining companies, who were struggling to get control of the Pewabic Mine, and he had sufficient reason for believing that the litigants were respectively striving to carry the property into their favored camp. He knew that, as soon as it was determined that a public sale was to be made of the mine except in a contingency which was very certain not to happen, a large number of additional counsel was brought into the defense, and a series of dilatory tactics adopted, which he might reasonably believe were in the interests of other parties than the Pewabic Mining Company. The financial condition of the Franklin Company was not then such as to enable it to meet the sale. It was making efforts to prepare itself. Mr. S. L. Smith, one of its directors, was on the ground in Michigan, professing to act as agent for the Pewabic Company (by what authority does not appear), and co-operating with the counsel in the dilatory proceedings which were being taken. It is said by one of the Michigan counsel that he was employed by two other counsel specially to appear for the Pewabic Company, and defend its interests as distinct from those of the directors, and that said Smith paid him money, and promised he should be further paid for his services. What the need of this was if all the counsel already in the case were employed for that purpose it may have troubled the master to comprehend. And the detail of the proceedings had before him for the purpose of his former report, as well as of those upon which the present report is founded, shows clear indications which might be regarded by him as strengthening the belief that the defense was not conducted primarily in the interest of the Pewabic Mining Company. Among others of this sort, he must have observed that the large claim against the Pewabic Company presented by the Franklin Mining Company was during both his investigations promoted by counsel for the defense. It was on their motion and their appearance for the Franklin Company, and for the convenience of that and other claimants, that the master adjourned his hearing from Marquette to Boston, and a long trip, at considerable expense to the fund, was undertaken. None of the counsel for the defense acted for the Pewabic Company there, but some of them assisted in the presentation of the claims of the Franklin Com-

pany and others. Indeed, from first to last that company has had no other counsel to represent it in the prosecution of the claim. They allege exceptions against the action of the master exonerating the Pewabic Company from the claim of the Franklin Company. It is true that one of them, in the name of that company, filed objections to the allowance of the claims of the Franklin Company and others during the proceedings prior to the sale; those objections consisting of a proposition of law that, the Pewabic Company being extinct, it had no legal capacity to incur the debt,—a proposition which they have always contended is wholly untenable,—and of a denial of liability to the extent claimed. No step was taken by them to maintain either ground. The master may not unreasonably have concluded that the filing of those objections was a part of the action taken to protract the litigation and postpone the sale. It was then strenuously insisted that all the claims should be definitely passed upon before the sale. None of the measures adopted in the name of the Pewabic Company is any more easily referable to its real defense than to the object which all the appearances indicated. If it be said that, after the sale was finally confirmed, the counsel had more liberty of action, the answer would be that there was nothing to show to the master that there had been any change of relation. The point was made on the argument of these exceptions that, whatever the motive of their employers, if those employers stood in such legal relation to the company as authorized them to contract in its name, the counsel were not bound to investigate their private purposes. But I think the master may properly have held that it would be imputed to them that they should have known what was apparent to all others having to do with the case, and that their employment for the purpose intended, at the expense of the Pewabic Company, would be a breach of trust. It ought rather to be implied that they undertook in the name of the corporation, by means which were permissible by the practice of the court, and not injurious to the corporation, to accomplish the objects their employers had in view. It is right to say that the master does not report that the Pewabic Company has suffered any prejudice from what has been done in its name, or that the counsel contemplated any such results; and I feel bound to say in justice to them that no such prejudice has happened, and that there is no ground of imputing to them that they anticipated it was likely to happen; for while, in a legal point of view, the protraction of the litigation for the purpose indicated was not justifiable, the accidents of the situation were such that the real injury happened. The development of the adjacent mines demonstrated the value of the Pewabic, and the contention of the rivals carried the price at the sale up to a figure not thought of in the beginning. These facts are referred to because they were the incidents of the defense from the time when the case first came back from the supreme court to the second confirmation of the court,—a period covering almost the whole of these claims,—for the purpose of demonstrating the conclusion that the services rendered were not to the Pewabic Company, but in the interest of the Franklin Company and those affiliated with it. Under these circumstances, the question recurs whether it is equitable that these complainants should be compelled to help pay for conducting the defense during that period. The master thinks not, and I agree with him."

With respect to the purposes and motives actuating the parties after the first appeal, Mr. Justice Brewer said, in delivering the opinion of the court on the second appeal:

"It is insisted by defendant that the plaintiffs were acting in the interest of the Quincy Mining Company, a corporation owning adjoining and rival mining property; that solely in its interest, and not for the benefit of the stockholders in the Pewabic Mining Company, they carried on this litigation, secured the sale, bought at it, and, in final consummation of the wrong to their co-owners, have, since their purchase, conveyed the property to the Quincy Mining Company. There is a counter charge by the appellees that the majority of the stockholders who sought to convey the property to the new corporation, and who have been practically the adverse party in this litigation, and who may hereafter be considered as described by the defendant, were acting in the interest of the Franklin Mining Company, another corporation,

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also owning property adjacent to the Pewabic Mine. We are inclined to think there is truth in each allegation, and that it is not difficult to read between the lines that the minority of the stockholders were interested in the Quincy and the majority in the Franklin Company, and that these respective corporations were seeking to obtain possession and control of the Pewabic. But there was no wrong or fraud in this, and no deception. Each party evidently knew the interests and relations of the other. In the answer originally filed by the defendant, in 1884, it was charged upon the plaintiffs that they were acting in the interest of a rival mining company." *Mining Co. v. Mason*, 145 U. S. 357, 358, 12 Sup. Ct. 887.

As to the contention of appellants that their services in procuring the two short postponements of sale were advantageous to the interests of the shareholders, and therefore were services for which the directors might contract and obligate the assets of the Pewabic Mining Company, it is sufficient to say that it by no means follows that the price ultimately obtained was a consequence of such postponement. We are entirely satisfied that the enhanced price was one of the accidents of the litigation, and that the efforts of appellants to delay the sale were rendered in the interest of the Franklin Mining Company, which desired delay for its own purposes. Our conclusion is that there is no error in the decree appealed from in so far as it is involved by the six appeals we have been considering. For compensation, appellants must look to the interests they really represented, and cannot rely upon any contract between themselves and the defunct Pewabic Mining Company as a means of reaching the fund in court.

As heretofore stated, four of appellants filed petitions asking an allowance out of the fund for services rendered to the fund by the dilatory proceedings heretofore recounted. It is unnecessary to say more than that the reasons heretofore given with respect to the same claims asserted against the Pewabic Mining Company apply in full force to the claims asserted against the fund.

The next appeal to be considered is that of Thomas H. Perkins, who presented a claim for \$5,000, for his services as president of the Pewabic Mining Company, after its legal dissolution. That company had never paid any salary to its president, and Mr. Perkins had no contract or agreement for such compensation. He was one of the defendants, as a director in both the old and new companies, and was one of the parties responsible for the employment of the additional counsel after the first mandate, and for the dilatory proceedings then instituted. We know of no ground upon which his claim should be sustained.

The appeal of Daniel J. Demmon, who presents a claim for \$14,208.33, for services as secretary and treasurer of the Pewabic Mining Company, must be disallowed. The reasons given by the circuit court are full and satisfactory, and need not be here repeated.

The last appeal to be considered is that of the Franklin Mining Company, which presented a claim aggregating \$42,240.54. The claim is for money loaned the Pewabic Mining Company after this litigation began. The master reported against this claim, and his report was confirmed, though not upon all the grounds stated in the master's report. The directors, after the expiration of the charter life, had no general power to borrow money or execute notes. Cir-

circumstances might be shown which would justify the borrowing of money, and make the loan a charge upon the corporate assets. This money was borrowed by Daniel L. Demmon, secretary and treasurer of the Pewabic Mining Company, by authority of a resolution of the directors. Demmon was also secretary and treasurer of the Franklin Company, and seems to have represented the lender as well as the borrower in the transaction. Under these circumstances, the lending company is fully chargeable with a knowledge of all the facts which operated as a limitation upon the power of the borrower to obligate its assets for a repayment of such a loan. Demmon claims that the money was borrowed to redeem certain Pewabic property from execution sale. His evidence only goes to show that the judgments paid off aggregated less than \$17,000, which was the amount of the first loan. How the rest of the money was applied is most uncertain. The liability of the Pewabic Company for money borrowed after its corporate existence had ceased depends upon the necessity which existed and the object of the loan. This directory had continued the ordinary mining operations of this corporation for a year after all authority to continue business had ceased. For their receipts and expenditures they are liable to an account with complainants, and such an accounting has been ordered. It may be that their business operations thus conducted gave rise to the necessity for borrowing money, and, if so, a question will arise as to the liability of the company for debts contracted while doing such business or its liability for money borrowed to pay debts which were created before expiration of charter, and which should have been paid out of the means expended in carrying on the regular operations of the corporation after all power to do so had ceased. There is much evidence tending to show that the Franklin and Pewabic Companies were under the management and control of the same men, and that the Franklin Company was largely the beneficiary of this management, and liable to an account for its use of Pewabic property, machinery, and labor for its own benefit. These matters appear, but are not offered as a set-off in any regular way. These facts had much effect upon the master and upon the judge who confirmed the master's report, in leading to the conclusion that in justice nothing was due to the Franklin Company. We are not satisfied to reject this claim entirely, upon the showing made on this record. The account with the defendant directors should be stated, that the court may see what was done with the personal assets mentioned in the reports of 1883 and 1884, made by the board to the shareholders. The real state of the finances of the company should be fully shown, and the actual use to which this money was put should be more clearly made to appear. The dealings between the Franklin and Pewabic Companies should be probed, and an account stated between them. Then if it appear that this money was borrowed and used to save the assets of the Pewabic, or to pay its just and legal liabilities, and that there were no funds subject to the control of the directors to meet such liabilities or redeem its assets, it should be paid, or such part of it as may be due on a balancing of accounts. The basis of any recovery

by the Franklin Company must be the true balance upon a full showing that such balance was necessary to preserve the Pewabic property, or pay its just legal liabilities.

The appeal of the Franklin Company is sustained, and the decree as to it reversed. The cause as to the claim of the Franklin Company will be remanded, and the claim be referred to the special master, with proper directions for a report. In all other respects the decree as involved in the other appeals is affirmed.

CLARK et al. v. NATIONAL BANK OF KANSAS CITY.

(Circuit Court of Appeals, Fifth Circuit. February 12, 1895.)

No. 332

MORTGAGE—TIME OF TAKING EFFECT.

A deed of trust or mortgage was executed and placed on record by the mortgagor on July 23d, but neither the trustee nor the beneficiary was informed of its existence or assented to it until July 25th. *Held*, that the deed did not take effect until July 25th.

The appellee, the National Bank of Kansas City, instituted this suit in the circuit court of the United States in and for the Northern district of Texas, on the equity side of the docket, on May 23, 1894, against Dorr Clark, D. C. Plumb, George Ware, John P. Allison, and Albert L. Richardson, to recover of said respondents two tracts of land, to wit: First tract: A survey of 327.68 acres, known as "Survey No. 29," located by virtue of certificate No. 379, issued to the Houston Tap & Brazoria Railway Company, and patented to Joseph R. Anderson by virtue of letters patent No. 460, vol. 12, and located in Clay county, state of Texas. Second tract: Survey No. 30, certificate No. 379, Houston Tap & Brazoria Railway Company, located in Clay county, state of Texas.

Complainant alleges, in substance, as follows: That on the 23d day of July, 1887, E. F. & W. S. Ikard, a firm composed of E. F. Ikard and W. S. Ikard, were the owners of the above-described lands, and at that date said lands were incumbered for the sum of \$853.11, which was paid off December 4, 1890, by respondents, and it is admitted that respondents are entitled to be reimbursed for said payment; that on July 19, 1887, E. F. Ikard executed to W. S. Ikard a power of attorney, authorizing him to sell any land belonging to the firm of E. F. & W. S. Ikard; that on July 23, 1887, E. F. & W. S. Ikard, acting by W. S. Ikard, a member of said firm, executed to M. Ikard, trustee, a deed of trust to secure the National Bank of Kansas City in the payment of \$30,000, which deed of trust was duly acknowledged and recorded July 23, 1887, at 3 o'clock p. m.; that said deed of trust was regularly foreclosed on July 31, 1888, and the complainant was the purchaser; that respondents, on or about September 1, 1887, entered upon and took possession of said land; that the Merchants' National Bank recovered a moneyed judgment in the district court of Tarrant county, Tex., against the firm of E. F. & W. S. Ikard, and E. F. and W. S. Ikard individually; that, at the time of the institution of said suit of the Merchants' National Bank against E. F. & W. S. Ikard et al., the plaintiff caused a writ of attachment to be issued, on July 22, 1887, to Clay county, Tex., against E. F. & W. S. Ikard, which was by the sheriff of Clay county, Tex., levied on the land in controversy at 11 o'clock p. m. on the night of July 23, 1887; that the return on said writ of attachment shows that said levy was made at 2 o'clock p. m. on July 23, 1887, which is not correct, but was really made at 11 o'clock on

July 23, 1887; that defendants claimed said land under and through the regular foreclosure of said attachment lien made on July 31, 1888. There were some other averments tending to show jurisdiction in equity. Respondents answered under oath, and denied that said deed of trust was ever delivered to the National Bank of Kansas City, or any one for it, and they also denied that it was ever delivered to M. Ikard, the trustee. The answer alleged the defendants' grantors purchased said land under the judgment foreclosing said attachment lien, and thereby obtained the title under said levy of said attachment; that they purchased said land innocently and in good faith, believing that said levy was made at 2 o'clock p. m. on July 23, 1887, as is shown by the return on said writ of attachment, and did not know that it was not made at said time, as shown in the return; that the agents of the National Bank of Kansas City knew at or about the time said levy was made that the recital in the levy was not true, and that said levy was made at 11 o'clock p. m. on July 23, 1887, and they knew that other people were liable to purchase same, believing said recital to be true; that said respondents paid off and discharged the lien that was on said land. They also set up that E. F. & W. S. Ikard in January, 1888, conveyed said land to J. H. Campbell, and that these respondents also claim by regular chain of title under said Campbell. They also pleaded the three and five years' limitation, as well as four years' limitation. After replication and evidence taken, this cause was heard on July 11, 1894, before the circuit court at Dallas, and resulted in a decree for complainant for the land, but requiring that it pay into the registry of the court, for the benefit of respondents, the sum of \$853, with interest at 8 per cent. from December 4, 1890, within 90 days, at the hazard of losing the land.

D. T. Bomar, for appellants.

A. K. Swann, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). There are numerous assignments of error, but, under the view we take of the case, only the first, to wit: "Because, as is shown by the record, the deed of trust under which complainant claims was voluntarily made and put on record by W. S. Ikard without the knowledge, consent, or procurement of the complainant bank, or any one acting for it, and that same was not known to complainant at all until July 25, 1887, which was subsequent to the date of the levy of the attachment as actually made,"—need be considered. The record titles were all proved as alleged in the complainant's bill and the defendants' answers. It was admitted that the levy of the attachment in the case of the Merchants' National Bank of Ft. Worth against E. F. & W. S. Ikard et al. on the lands in controversy was made substantially as charged in complainant's bill, to wit, that, while the sheriff of Clay county received the writ at 2 o'clock and 20 minutes p. m. on July 23, 1887, he only indorsed the levy upon the attachment after 6 o'clock p. m. on the 23d day of July, 1887, completing the indorsement at about 11 o'clock of the same day, and that the deed of trust granted by E. F. & W. S. Ikard in favor of the complainant was filed for registration in the clerk's office of the county court of Clay county, Tex., at 3 o'clock p. m., July 23, 1887; the only contested fact being as to when the deed of trust of E. F. & W. S. Ikard to the complainant was accepted by the beneficiary thereof, it being conceded that the trustee in

said deed had no notice thereof until July 25, 1887, two days after the levy of the attachment. The complainant contends that the deed of trust was delivered to its agent, one J. W. T. Gray, and was accepted by him, and by him delivered for record on and before 3 o'clock p. m. July 23d. The defendants contend that the said Gray was not the agent of the complainant, and that he did not accept said deed of trust for and on behalf of the complainant.

The testimony on the subject is given by the president of the National Bank of Kansas City, J. S. Chick, and by J. W. T. Gray. Chick testifies as follows:

"J. W. T. Gray had authority to receive and accept the deed of trust dated on or about July 23, 1887, executed by W. S. Ikard for the firm of E. F. & W. S. Ikard in favor of the plaintiff, to secure an indebtedness of thirty thousand dollars (\$30,000). He had authority to receive and accept said deed of trust for and on account of the National Bank of Kansas City, Missouri, plaintiff in the above-entitled cause. It was through Mr. J. W. T. Gray that the loan to E. F. & W. S. Ikard was made. He came to our bank, and induced us to make the loan. He did the same thing as to some other loans that we made about the same time to some cattle men in and about Henrietta, Texas. It was on the strength of his statement to us that we parted with our money. We knew Mr. Gray, and had much confidence in him; and we fully expected Mr. Gray to look after our matters, and to protect us in case anything happened in the Ikard or other transactions in and about Henrietta, Texas. He was authorized to do this, and he had given us assurances that he would look after any interests we had there, and under this general authority and understanding he took the mortgage or deed of trust in question. Mr. Gray had authority to do anything that was necessary to protect our interests in case of an emergency in the Ikard matter or any other matter. He was on the ground, and was expected by us to take such steps as might be necessary to secure us in case it was required. Under this general authority, as I have stated, he did accept for us the deed of trust in question, and we ratified his action in the matter immediately. XQ. 1. If, in answer to the foregoing direct interrogatories, you have stated that said J. W. T. Gray had authority to receive and accept said deed of trust for the plaintiff bank, then please state whether or not said Gray did accept and receive said deed of trust for said bank, and how you know this. A. As I have stated, Mr. J. W. T. Gray did have authority to receive and accept the deed of trust for said bank, and wired us to that effect immediately upon its acceptance,—that he had accepted it."

In a subsequent deposition, he again testifies:

"At the time this loan was made, J. W. T. Gray came to me, and stated that the Ikards wanted to make the loan. I talked this matter over with Mr. Gray, and told him I would make the loan. Gray was a negotiator between the bank and the Ikards. I do not remember what my information was as to the connection the Ikards had with the bank of which Mr. Gray was cashier. At the time the loan was made, Gray agreed to look after this loan and others that were negotiated at the same time; and the loan of Belcher and Babb, as well as the Ikard loan, he secured at the same time, and, as I have heretofore stated, was fully authorized to protect us in case of an emergency. It was in the National Bank of Kansas City, Jackson county, Missouri, that Mr. Gray agreed to do this for us. At that time we did not anticipate trouble, but the loan was a large one, and made at some distance from this city. Mr. Gray was on the ground, and knew about the transactions, and we thought he could look after it better than anybody else in case an emergency should arise."

Gray's testimony is as follows:

"On the 23d day of July, 1887, I resided at Henrietta, Texas, and was cashier of the Henrietta National Bank. E. F. & W. S. Ikard was a cattle firm

composed of E. F. and W. S. Ikard, and they were each directors of said bank, and W. S. Ikard was vice president of said bank. I sustained no relationship to them beyond that of being an officer in the same bank with them. I sustained no relationship to the National Bank of Kansas City with reference to any notes due by the said E. F. & W. S. Ikard to said National Bank of Kansas City, beyond the fact that I assisted the Ikards in obtaining the loan from said bank. I know nothing with reference to the execution of said trust deed. As to the delivery of it, will say that on the 23d day of July, 1887, W. S. Ikard handed to me a package of trust deeds. Among them was one or more securing the Henrietta National Bank in payment of moneys due by him to said bank, as well as by himself and brother. There were other papers in the package, the contents of which I did not then know, or at least, if I did, I do not now remember. I now understand that the trust deed in question was among the package of papers above referred to. I accepted the trust deed securing the Henrietta National Bank, as its representative, and had the other papers recorded with them at the instance of Mr. Ikard. In having all the papers recorded except those securing the Henrietta National Bank, I acted as the representative of Mr. Ikard, and at his request, in having them recorded."

On cross-examination he testified, further:

"XQ. Is it not a fact that Mr. Chick, president of said National Bank of Kansas City, authorized you to take, receive, and accept any additional security to what they had for said debt prior to the making of the deed of trust mentioned in the 3d direct interrogatory, and that, acting under said instructions, did you not take the said deed of trust, so mentioned, and accept the same for said bank, and did you not place the same in the hands of S. M. Sears, with instructions to take it to the clerk's office, and file on Saturday, July 23, 1887? State fully just what instructions you had with reference to receiving said deed of trust or other security, and from whom did you receive such instructions, and what relations did such persons have with the National Bank of Kansas City. In answering these interrogatories, you will bear in mind that the deed of trust referred to is the only deed of trust which was made by E. F. & W. S. Ikard about the time of the failure of E. F. & W. S. Ikard and of the Henrietta National Bank. A. My recollection now is that on the day the bank closed up, which was the 25th of July, 1887, I received a message from J. S. Chick, president of the National Bank of Kansas City, as well as messages from other banks, asking me to see that their interests did not suffer. At that time I was overwhelmed with the affairs of my own bank, which had closed up on account of the failure of a number of its officers and directors; and while I would have been more than glad to have done anything in my power to protect the National Bank of Kansas City, as well as any other bank or banker, as a matter of courtesy and friendship, I had so much on my hands, in looking after the affairs of our own bank, that I could not undertake the matter of looking after the interests of other banks. And, besides, I was informed by W. S. Ikard that they had already protected all their creditors, which included the National Bank of Kansas City. Hence I did not accept said trust deed securing the National Bank of Kansas City, as a representative of said bank. I handed the package of papers given to me by W. S. Ikard to S. M. Sears, with instructions to take to the clerk's office and file. XQ. Is it not a fact that you had authority from the National Bank of Kansas City to collect the indebtedness it held against said E. F. & W. S. Ikard, or to take such steps as were necessary or proper to secure said indebtedness, and did you not have authority to look after and protect the interests of the said National Bank of Kansas City with reference to its business in Clay county? A. It is not a fact that I had authority from the National Bank of Kansas City, or any other bank, to collect for them, except in the due course of business between banks. This paper was not in our hands for collection, and was not due, as I now remember. My recollection of the instructions, as before stated, is that on the 25th of July, 1887, the National Bank of Kansas City wired me in effect to see that their interests did not suffer; that immediately thereafter, or at least as soon as he could get there, O. H. Dean, their attorney, came to

Henrietta, representing said bank and other banks, and took charge of the matter of looking after the interests of said bank."

We find in the record no circumstances tending to throw further light upon the question, and our conclusion, from the testimony above recited, is that the Kansas City National Bank fails to show that there was an acceptance on its behalf of the deed of trust granted by the Ikards on the 23d day of July, 1887. If it be conceded, against the positive evidence of Gray, that he was, nevertheless, the agent of the National Bank of Kansas City on the 23d of July, 1887, even then it appears that he did not accept the deed of trust for his principal; for, although the deed was handed him by Ikard, he did not know nor was he informed of its contents.

It is well settled in Texas that no lien upon real property is acquired by levy of an attachment under the laws of Texas until the levy is actually indorsed on the writ. *Sanger Bros. v. Trammell*, 66 Tex. 361, 1 S. W. 378, and cases there cited. Therefore, the defendant's title, based on the lien acquired by the levy of the attachment issued in the suit of the Merchants' National Bank against the Ikards, did not attach to the property in controversy until 11 o'clock p. m., July 23, 1887.

The next question is when the trust deed or mortgage from Ikards to the National Bank of Kansas City took effect. It was filed for registration in the proper office at 3 o'clock p. m. of July 23, 1887, but was not assented to by either the beneficiary or the trustee until July 25, 1887. In *Wallis v. Taylor* (decided in February, 1887) 67 Tex. 431, 3 S. W. 321, the supreme court of the state of Texas declared that "no valid mortgage can exist in the absence of the consent of the parties to the contract"; citing authorities from Maine, Iowa, Wisconsin, and Massachusetts. In *Milling Co. v. Eaton*, 86 Tex. 401, 25 S. W. 614, the question is again considered by the supreme court of the state of Texas, and the whole question as to the taking effect of the general assignments, particular assignments, and mortgages with or without the assent of the beneficiaries or trustees is considered upon principle and authority; and the court again decided that "the existence or non-existence of a mortgage contract must depend on principles applicable to other contracts, and to their existence assent of parties is essential." As the question here relates to and affects the transfer of the title to lands in the state of Texas, the decisions of the supreme court of that state as to the necessity of the acceptance by the parties to a mortgage, in order that the mortgage shall take effect, are probably controlling, but our examination of the law of the case brings us to the same conclusion. It follows that in the case in hand, as the mortgage or deed of trust in favor of the National Bank of Kansas City was not accepted by the beneficiary or trustee therein until after the levy of the attachment in the case of the Merchants' National Bank of Ft. Worth against the Ikards, the lien acquired by the attachment must prevail.

The decree of the circuit court is reversed, and the cause is remanded, with instructions to enter a decree dismissing the bill.

HOLTON v. WALLACE et al.

(Circuit Court, W. D. Pennsylvania. February 2, 1895.)

1. EQUITY PLEADING—MULTIFARIOUSNESS.

A bill in equity set up—First, an alleged liability to a corporation of one person as assignee of unpaid stock, and an alleged joint liability with him of five others by reason of collusion with him to defraud creditors of the corporation; and, second, an alleged liability of five of the same defendants for fraudulent conduct in connection with a sale of the railroad belonging to the corporation. *Held*, that the bill was multifarious, the two causes of action being distinct, presenting independent cases for relief, and requiring different proofs and different decrees.

2. CORPORATIONS—SUIT BY STOCKHOLDER ON BEHALF OF CORPORATION.

A suit brought by a stockholder of a corporation to enforce rights existing in the corporation cannot be sustained, where it is not alleged that any attempt has been made to secure redress through the corporation, or through a receiver in charge of its property, and where neither the corporation nor the receiver is made a party to the suit.

3. SAME—RIGHTS OF STOCKHOLDER IN DEFAULT.

It seems that a stockholder of a corporation who is himself in default upon his subscription has no standing in equity to seek to impose a liability upon other subscribers for stock subscriptions.

4. ESTOPPEL—ACTS OF DIRECTORS.

It seems that, where the directors of a corporation had approved the making of a contract, a member of such board, who participated in its action, cannot afterwards, as a stockholder, object to such contract, as a wrong to the corporation.

R. B. McCombs, for complainant.

W. D. Wallace, D. B. Kurtz, L. T. Kurtz, and Dana & Long, for defendants.

ACHESON, Circuit Judge. This bill was brought by Forbes Holton, as a stockholder of the New Castle Northern Railway Company, "on behalf of himself and other stockholders of said company," a corporation of the state of Pennsylvania, against C. S. Wallace and several other individuals, citizens of Pennsylvania, to enforce alleged rights of the corporation. No one has intervened, and the suit stands as when brought. The bill was filed on December 2, 1892. It sets up two causes of action: First. The liability to the corporation of the defendant C. S. Wallace as assignee of certain unpaid shares of capital stock, and the alleged joint liability with him, for the subscription price of said stock, of five other defendants, "by reason of their collusion, and their acquiescence, aiding, and abetting said Wallace in his schemes to cheat and defraud the creditors" of said company; which fraudulent behavior occurred, if at all, in the winter and spring of 1886. Second. The liability to the corporation of five of the same defendants for alleged fraudulent conduct connected with the sale of the company's railroad, etc., made January 12, 1887, by the receiver of the corporation, under an order of this court, and which sale was confirmed April 16, 1887.

The objection that the bill is multifarious seems well taken. The two assigned grounds of action are entirely distinct. Each charge presents an independent case for relief; they require different proofs, and also different decrees, for at least one of the defend-

ants sought to be held is only answerable with respect to one of the two causes of action. The allegations of fraud which pervade the bill do not, I think, so connect the two matters as to avoid the objection of multifariousness.

There is, however, on the face of the bill, a still more serious objection, and a fatal one. Alleged rights existing in the railway company are the subject-matter of the litigation. Therefore, the right to sue is in the corporation. Now, the bill shows no effort whatever on the part of the plaintiff to secure redress through the corporation, either by application to the managing body or to the stockholders as a body, or through the receiver who was appointed by this court and has never been discharged. Whether or not the case is within the letter of the supreme court rule 94, it certainly is governed by principles settled by the court before the promulgation of the rule. *Hawes v. Oakland*, 104 U. S. 450. The allegations in the nineteenth paragraph of the bill do not by any means fulfill the conditions which must coexist in order to enable a stockholder to maintain a suit in equity in his own name founded on a right of action existing in the corporation itself. *Id.* 460, 461. This bill, even upon its alleged facts, cannot be sustained consistently with the rulings there announced. The allegations of the nineteenth paragraph, however, are denied by the answer, and they are not supported by the proofs. Indeed, a contrary state of facts is shown. There was always a corporate organization capable of bringing suit, and it seems to have been controlled much of the time by persons friendly to the plaintiff. Then, too, it was always open to the plaintiff to procure the institution of a suit to enforce the rights of the corporation through the medium of the receiver. Upon the point under consideration, the supreme court of Pennsylvania is in accord with the supreme court of the United States, as appears from the case of *Holton v. Railway Co.*, 138 Pa. St. 111, 20 Atl. 937, where it was held that a bill to enforce the rights of a corporation should be filed by and in the name of the corporation; or, if brought by a stockholder, must contain an averment of a demand upon the corporation to institute the suit, and of a refusal by the corporation to do so. Furthermore, here the corporation is not even made a defendant. Neither is the receiver. The only parties to the suit are *Forbes Holton*, on the one side, and on the other side certain individuals alleged to be under liabilities to the corporation. The corporation itself, whose rights are involved, is not in court. It is quite impossible to sustain the plaintiff's bill. I need not, then, consider the other special defenses, or go into the merits beyond the brief mention of two matters.

One-sixth of the shares of stock, the subscription value of which is involved in this suit, namely, 480 shares, of the par value of \$24,000, were subscribed for by the plaintiff, *Forbes Holton*, but he never paid anything on them. Undoubtedly, he remains liable to the company for the amount of that subscription. *Railroad Co. v. Clarke*, 29 Pa. St. 146. Being thus himself in default, it is rather difficult to see what standing he has in a court of equity, as against the defendants, upon whom he seeks to impose the liability for

stock subscriptions. As George W. Johnson, the purchaser at the receiver's sale, and his associates, had acquired the paramount lien of the contractor, Simpson, by virtue of the assignment to them of the decree of this court in his favor, I see nothing wrong in the contract of January 12, 1887, between Johnson and William W. Reed. Besides, unquestionably, that contract was immediately made known to the board of directors of the New Castle Northern Railway Company, for, on the day of its date, the board, by a unanimous vote (the plaintiff himself, then a director, uniting therein), instructed the company's solicitor to withdraw the appeal which the company had taken from the decree in favor of Simpson; which withdrawal was a fundamental condition of the contract between Johnson and Reed. Accordingly, the appeal was withdrawn by the company, which thus promoted the consummation of the contract now assailed; and without objection on the part either of the company or of the plaintiff, Holton, the sale to Johnson was confirmed by the court.

The bill of complaint must be dismissed, with costs; and a decree to that effect may be prepared by counsel.

COHEN et al. v. SOLOMON et al.

(Circuit Court, D. Kansas, Second Division. March 5, 1895.)

1. FORECLOSURE — DETERMINATION OF ADVERSE CLAIMS TO MORTGAGED PROPERTY.

One S. mortgaged certain lands owned by him, to B. Subsequently the property became delinquent for taxes, and was sold therefor, and a certificate of purchase issued on the sale, and assigned by the purchaser to one W., a brother-in-law of S. While W. held such tax certificate, and the lien evidenced thereby, a suit was commenced, in the federal court, by the executors of B. to foreclose the mortgage made by S.; and, while this foreclosure suit was pending, W. brought suit in a state court to quiet his title to the land under the tax certificate, making service on the mortgagor and mortgagee by publication, and obtaining a decree by default, quieting title in him. The representatives of the mortgagee first learned of the proceedings in the state court after such decree; and they then brought in W. as a party to the foreclosure suit, praying to have the tax title set aside. *Held*, that the court had jurisdiction in the foreclosure suit to determine and enforce all W.'s rights under his tax certificate, as well as the validity of his tax title.

2. COURTS—JURISDICTION—WHEN EXCLUSIVE.

Held, further, that the federal court first obtained jurisdiction of the matter in dispute, to wit, the mortgaged premises and the rights of the parties thereto; and, its jurisdiction being thereafter exclusive, the proceedings in the state court were without jurisdiction, and should be set aside as void.

This was a suit by Josiah Cohen and others, as executors of one Bernd, to foreclose a mortgage given by the defendant Solomon, and to have an alleged tax title to the mortgaged premises in defendant Wallenstein set aside, as well as a mortgage made by Wallenstein to the defendant Alexander. Wallenstein filed a cross bill for the foreclosure of the latter mortgage. The cause was heard on the pleadings and proofs.

Henry Wollman and Harris & Vermilion, for complainants.
W. E. Stanley and T. B. Wall, for defendants.

WILLIAMS, District Judge. In this case, Hardy Solomon, being the owner of the premises in question, with his wife, executed a mortgage upon the property to Bernd, the complainants' testator, which mortgage is by this suit sought to be foreclosed. At the time suit was commenced, the property had become delinquent for taxes for one year, and had been sold, and a certificate of purchase issued upon the tax sale. Subsequently the holder of the tax certificate of purchase brought suit in the state court of Kansas to quiet his title to the premises in controversy, obtained service against the mortgagee and mortgagor by publication under the state statute, and afterwards obtained a decree in the state court by default, quieting title in him, as against the said parties defendant thereto. The complainants herein, becoming apprised of the proceedings in the state court suit for the first time after the said decree was obtained, thereupon filed a supplemental bill of complaint in this suit, making the plaintiff in the said state court suit and his assignee parties defendant, and praying that the said tax title may be set aside. It is herein stipulated and agreed that the said tax deed is voidable under the laws of Kansas, where the lands lie. By the terms of the said mortgage, it is made the duty of the mortgagor to pay all assessments on the property. It is agreed that the assignee of the certificate of purchase, Wallenstein, is the brother-in-law of the mortgagor, Solomon. Wallenstein is the party who brought suit to quiet title in the state court.

The main question is as to the effect of the said suit brought in the Kansas court. At the time this suit was commenced and Solomon and wife made parties defendant thereto, Wallenstein held only the lien or equitable title of a purchaser at a tax sale to the premises in controversy. Having this lien or claim upon the property involved in the litigation, he was charged with constructive notice of the pendency of this suit, and it was incumbent on him to apply and be made a party to this suit, in which he could have enforced any claim he might have to the mortgaged premises.

The supreme court has several times held that a tax title to the mortgaged property may be litigated, enforced, or set aside in the foreclosure suit.

In *Mendenhall v. Hall*, 134 U. S. 559, 10 Sup. Ct. 616, it is held that in a suit to establish a mortgage, and for a sale thereunder, it is competent to unite as defendants both the mortgagor and the party claiming the property adversely to the lien of the mortgage by virtue of proceedings for a sale for taxes had subsequently to its execution. Justice Harlan, speaking for the court, says:

"If the plaintiff was entitled to have the property sold in satisfaction of the debt secured by the mortgage, it was his right to have it sold, freed from any apparent claim thereon wrongly asserted by the holder of the tax title. Such relief could not be had without making the latter a party to the suit."

Again, in *Hefner v. Insurance Co.*, 123 U. S. 747, 8 Sup. Ct. 337, the supreme court, by Justice Gray, examine this question, collect the authorities holding both ways, and decide that:

"Upon principle, it was within the jurisdiction and authority of the court, upon a bill in equity for the foreclosure of the plaintiff's mortgage, to determine the validity or invalidity of Callanan's tax title; and he was a proper, if not a necessary, party to such bill."

This doctrine is so held in the case of a tax title arising, as does the present one, after the date of the mortgage, although recognizing the general rule that:

"As a general rule, a court of equity, in a suit to foreclose a mortgage, will not undertake to determine the validity of a title prior to the mortgage and adverse to both mortgagor and mortgagee, because such a controversy is independent of the controversy between the mortgagor and mortgagee as to the foreclosure or redemption of the mortgage, and to join the two controversies in one bill would make it multifarious."

Wallenstein could have enforced all his rights under the certificate of purchase, and under the tax deed, which he obtained soon after the commencement of this suit, by becoming a party hereto, and appealing to this court for his remedy, if he had any. Not having chosen to do so, the inquiry arises whether it was competent for him to obtain the relief he sought through the action of the state court. The practical effect of the course pursued, if allowed to have full operation, has been to utterly defeat the remedy sued for in this tribunal, nullify its action, and remove from its cognizance the very subject-matter before it. Can this be done consistently with the relative powers of courts of different jurisdictions, the independence allowed to each, and the harmony that should exist among them? No principle is more firmly entrenched in the law than the doctrine that, when one court acquires jurisdiction and power over the res, no other court can interfere with its possession or control. This doctrine has been affirmed and applied by the supreme court in a long line of adjudications, which have established this as one of the cardinal principles governing the proceedings of courts. *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135; *Wiswall v. Sampson*, 14 How. 52; *Peale v. Phipps*, Id. 368; *Hagan v. Lucas*, 10 Pet. 400; *Williams v. Benedict*, 8 How. 107; *Pulliam v. Osborne*, 17 How. 471; *Taylor v. Carryl*, 20 How. 583; *Youley v. Lavender*, 21 Wall. 276; *Bank v. Calhoun*, 102 U. S. 256; *Barton v. Barbour*, 104 U. S. 126; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355. In these cases the general doctrine is laid down that where one court has acquired the custody or possession or control of the subject-matter of the controversy through its receiver or marshal, by writ of attachment or other process, no other court can in any manner interfere with that possession or control. Is the principle therein declared broad enough to embrace the present case? Here suit is brought to foreclose a mortgage, in which the court has power to adjudicate all liens and claims against the res, ascertain their amount, order a sale of the property, confirm the sale, direct a deed of conveyance to the purchaser at the sale, and, by its writ of assistance, remove the occupant, and place the purchaser in absolute possession of the property. Not only so, but the court, moreover, may, at any time when it deems it equitable and right so to do, appoint a receiver of the property pending the suit,

and thereby assume actual legal custody of the same through its officer.

While the question thus presented is probably a new one in some of its aspects, it seems to involve no unreasonable extension of the recognized doctrine. In *Wallace v. McConnell*, 13 Pet. 136, this principle was applied in the case of an ordinary action upon a promissory note, brought in the federal court, where the state court in Alabama had issued a garnishment against the defendant, and thereby sought to apply a portion of the indebtedness due on the note to satisfy the claim attempted to be enforced by attachment proceedings in the state court. Justice Thompson, in delivering the opinion of the court, says:

"The next point presents the question as to the effect of the proceedings under the attachment law of Alabama, as disclosed in the plea. The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the district court of the United States and the right of the plaintiff to prosecute his suit in that court having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice. If the attachment had been conducted to a conclusion, and the money recovered of the defendant before the commencement of the present suit, there can be no doubt that it might have been set up as a payment on the note in question. The attaching creditor would, in such case, acquire a lien upon the debt binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, could not fail to regard. If this doctrine be well founded, priority of suit will determine the right. The rule must be reciprocal. And, where the suit in one court is commenced prior to the institution of proceedings under attachment in another court, such proceedings cannot arrest the suit. And the maxim '*Qui prior est tempore portior est jure*' must govern the case. This is the doctrine of this court in the case of *Renner v. Marshall*, 1 Wheat. 216, and also in the case of *Beaston v. Bank*, 12 Pet. 102, and is in conformity with the rule that prevails in other courts in this country, as well as in the English courts, and is essential to the protection of the rights of the garnishee, and will avoid all collisions in proceedings of different courts, having the same subject-matter before them. *Embree v. Hanna*, 5 Johns. 101; *Bowne v. Joy*, 9 Johns. 221, and cases there cited."

The principle of this case would seem to settle the main controversy in this. Here the subject-matter of the suit in this court is assuredly the mortgaged premises and the rights of the parties thereto. The subject-matter of the suit in the district court of Sedgwick county was the same. No clearer instance could be conceived of a wresting from this court of the very subject-matter before it than would occur in this case if the action of the state court was permitted to stand. A suit commenced for the sole purpose of applying property to the satisfaction of a debt would thus be absolutely defeated and rendered abortive by the action of another court commenced after this suit was instituted. All sense of comity and propriety in the relations of courts is wounded by such proceedings. While it is true that there is no receivership in the present case, and the actual possession of the property in litigation has not been interrupted in fact, still it is also true that a foreclosure suit is, to some extent, in the nature of a proceeding in rem, and the aim and scope of such a suit is to seize the rem, and convey it discharged of all liens and claims. *Brewer, J., in Bradley v. Parkhurst*, 20 Kan. 462.

In *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, the court held that:

"When the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it for the purposes of its jurisdiction."

In that case the court was considering the effect of the attempt in the state court to enforce a mechanic's lien upon property which had been proceeded against as for a forfeiture under the revenue laws in the federal court. Says Justice Matthews, quoting Justice Miller:

"The case becomes in its essential nature a proceeding in rem. While the general rule in regard to jurisdiction in rem requires an actual seizure and possession of the res by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court."

Language could hardly be employed more aptly to describe the attitude of this court towards the mortgaged premises herein involved. Says Matthews, J., continuing:

"This may be by the levy of a writ, or the mere bringing of a suit. * * * The land might be bound without actual service or process upon the owner, in cases where the only object of the proceeding was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court, by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of a suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purpose of the suit."

In *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, 6 Biss. 197, Fed. Cas. No. 14,401, the federal court had dismissed a bill. Afterwards a bill was filed in the state court, and a receiver of the property involved in both suits appointed. Then the dismissal in the federal court was set aside, and a supplemental bill filed, and the federal court, Blodgett and Drummond, JJ., held that:

"The proper application of the rule that the court first taking cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession of and control the res,—the subject-matter of the dispute,—to the exclusion of all interference from other courts of co-ordinate jurisdiction, does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure; for such a rule would only lead to unseemly haste on the part of officers to get the manual possession of the property, and, while the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might, by a seizure of the property, make the first suit wholly unavailing."

In *Gaylord v. Railway Co.*, 6 Biss. 286, Fed. Cas. No. 5,284, Drummond, J., affirms the same doctrine. In that case the bill filed in the federal court was amended, and, between the date of the filing of the bill and the amendment, another creditor instituted a suit in the state court, and had a receiver appointed, who took possession. The court held that the only question that arises is whether the federal court had jurisdiction. If it had, then the principle applies that no other court of concurrent jurisdiction could interfere with the

res, which was the subject-matter of the controversy. Drummond, J., says:

"We think that there is no other safe rule to adopt, in our mixed system of state and federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the res, is entitled to retain it until the litigation is settled. * * * It is not material that a receiver appointed by the state court had first taken actual possession of the property, provided the federal court had the prior right to control the res."

In this case, inasmuch as Wallenstein, the holder of the tax title, commenced his suit in the state court to have his title adjudicated upon and quieted, against the parties to this suit, after this suit had been begun, and the subject-matter thereof brought under the dominion and control of this court, for the purpose of adjudicating the rights of the parties to this suit thereto, and of determining the nature and extent of the claim of the mortgagee to the property, and of subjecting it, if found liable thereto, to sale and conveyance to meet and discharge the said claim, and of delivering it into the possession of the purchaser at the sale, we are of the opinion that this case is comprehended within the rule hereinbefore laid down and clearly established: That the state court was without jurisdiction to entertain and determine said suit, and that all its proceedings therein are null and void; that the said tax title be, and the same hereby is, set aside as void; and inasmuch as the defendant Alexander, the grantee of the tax title, is equally charged with constructive notice of the pendency of this suit, and stands in no better light than his assignor, Wallenstein, that the said tax title is void in his hands; that the cross bill of Wallenstein, brought to foreclose the mortgage executed to him by Alexander upon the transfer of said tax title, be, and the same hereby is, dismissed; and as it is agreed between the parties that the mortgage which this suit was originally commenced to foreclose was executed and assigned to the complainants' testator, as alleged in the bill, and that the amount claimed therein is due, it is further decreed that the said complainants have a decree for the said amount of their said mortgage, and foreclosing the same according to law.

McBEE v. SAMPSON et al.

(Circuit Court, D. South Carolina. March 15, 1895.)

1. ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEE.

An assignee of a lease, holding by assignment from the original lessee, may assign such lease to any person, even though insolvent, and assumes no responsibility for the payment of rent by his assignee.

2. SAME—COLORABLE ASSIGNMENT.

It seems that, where an assignment of a lease is merely colorable, or is made in bad faith, for the purpose of evading responsibility, equity may give relief to the landlord.

3. SAME—INJUNCTION—ADEQUATE REMEDY AT LAW.

Equity will not interfere to enjoin the assignment of a lease on the ground that the proposed assignee is insolvent, where the responsibility of the assignor would continue, and the landlord accordingly has an adequate remedy at law.

This was a suit by Vardry A. McBee against O. H. Sampson, H. P. Hammett, and others to restrain the assignment of a lease. Heard on motion to continue a preliminary injunction.

Perry & Heyward, for complainant.

Cothran, Wells, Ansel & Cothran, T. Q. Donaldson, and A. H. Donaldson, for defendants.

SIMONTON, Circuit Judge. The facts of this case are these, as set out in the bill: Complainant, Vardry A. McBee, and his brother, Alexander McBee, on 16th March, 1876, executed to the Camperdown Mills, a corporation of South Carolina, a lease of a tract of land, situate in the city of Greenville, S. C., on both sides of the Reedy river. The term of the lease was 30 years from the date of execution. The rent reserved was an annual rental of \$4,870 on the 1st of March, 1876, to 1st March, 1884, and of \$5,400 from 1st March, 1884, to 1st March, 1891, and from the 1st March, 1891, to the end of the term, \$6,250; the rent payable semiannually, together with taxes accruing on the property. Nothing whatever was said in the lease concerning the assignment thereof by the lessee. The lessee, therefore, had full power to assign the lease at any time during its term. *Greenaway v. Adams*, 12 Ves. 395; *Tayl. Landl. & Ten.* § 402. In 1884 the Camperdown Mills became insolvent, and went into the hands of a receiver appointed by the state court; and on the 1st of August, 1885, pursuing an order of the said court, the receiver sold at public auction all the property of the Camperdown Mills, including this lease. At that sale, H. P. Hammett purchased the entire property of the Camperdown Mills, including this lease, for the sum of \$70,000. A deed of conveyance was executed by the receiver to H. P. Hammett and his associates, in which each of the associates was mentioned by name, and the amount of his interest in the purchase specified. All those associates of H. P. Hammett who are now alive are made parties defendant to this proceeding, together with the personal representatives of those of them who are now deceased. Hammett and his associates went into the possession of the property; carried on the business thereof until the January following. In the meantime they had obtained an act of incorporation from the legislature of the state of South Carolina, and had accepted the same, and thenceforward the premises were occupied and the business carried on by this corporation, which bore the name of the Camperdown Cotton Mills. No assignment in writing was made of this lease by Hammett and his associates to the Camperdown Cotton Mills. The Camperdown Cotton Mills continued in business until some time in April, 1894, when it in turn became insolvent, and passed into the hands of a receiver under proceedings instituted in this court by O. H. Sampson & Co. On the 31st of October, 1894, all the assets of the Camperdown Cotton Mills, except this lease, were sold by James L. Orr, Esq., who had been appointed receiver. At this sale O. H. Sampson & Co. became the purchasers. All of the property of the Camperdown Cotton Mills being thus disposed of, except this lease, a meeting of the directors of the said company

has been called for the purpose of considering the propriety of demanding from Hammett and his associates a formal written assignment of the lease to the Camperdown Cotton Mills. In proceedings heretofore had in this court in the original cause it was held that a written assignment was necessary to transfer this lease. On receiving notice of this proposed action on the part of the directors, the complainant filed this bill. After reciting in substance the facts above stated, and charging that the object of the meeting was to transfer to an insolvent corporation this lease, executed to him and his brother, and thereby to substitute this insolvent in place of Hammett and his associates, who, he claims, are responsible to him for the payment of the rent, and who are abundantly able to meet this responsibility, and asserting that, if this proceeding is allowed, he will be entirely deprived of the means of collecting his rent, and so defeat the very object of this lease, the bill prays that defendants be enjoined from making or attempting to make any deed, assignment, or transfer of any sort of the lease in question to the Camperdown Cotton Mills, or to any other corporation or person unable to pay the installments of rent as they fall due thereunder, without first securing to the complainant a prompt payment of the rent. Alexander McBee, who was one of the lessors, some time previous to this suit assigned all his right, title, and interest in the lease to the complainant. The rent of the premises up to the filing of this bill, with the exception of a period between the 1st day of March, 1894, and 30th day of April, 1894, has all been paid.

Upon the filing of the bill a rule was issued against the defendants to show cause why the prayer of the bill should not be granted, and an injunction issued in accordance therewith. The defendants have filed their return, in which, among other things, they say "that they are advised as matter of law, and aver, that, being simply assignees of said lease, they have the legal right, subject to the rights of said Camperdown Cotton Mills, to assign said lease to whomsoever they please, and that complainant has no equity to interfere." The question in this case is, what is the responsibility of the assignees of the lease to the lessor, and how long does that responsibility exist? There is no doubt that the lessee, being a party to the original contract, continues always liable thereon, notwithstanding any assignment he may make. *Eaton v. Jaques*, 2 Doug. 463; *Tayl. Landl. & Ten.* § 438. But an assignee by the assignment is put in privity of the estate of the lessor, but not in privity of contract. *Childs v. Clark*, 49 Am. Dec. 164. For this reason all the authorities hold that the assignee is responsible for the rent only so long as he remains in possession of the property, and they also hold that, in the absence of fraud, he can assign the lease at any time during his possession, and assume no responsibility for the payment of rent by his assignee. It is thus stated by *Fields, C. J.*, in *Johnson v. Sherman*, 76 Am. Dec. 481:

"The assignee of a lease may discharge himself from liability for subsequent breaches of the covenants thereof by assigning over to a beggar, to a married woman, to a prisoner, or to a person leaving the state, provided the

assignment be executed before his departure, even though it be made for the express purpose of avoiding his responsibility, and a premium be given as an inducement to accept the transfer."

A lessee remains liable on his express obligation, notwithstanding he may have assigned his lease. *Wall v. Hinds*, 4 Gray, 256; *Smith v. Harrison*, 42 Ohio St. 180. And the lessor may sue, at his election, either the lessee or the assignee, or may pursue his remedy against both at the same time, though, of course, with but one satisfaction. In such case the liability of the original lessee depends upon privity of contract, and continues during the whole term, while the liability of the assignee depends upon privity of estate, created by the assignment, and continues only during the time he holds legal title to the leasehold estate during the assignment. *Tayl. Landl. & Ten.* § 452; 1 Washb. Real Prop. 326, etc.; *Thursby v. Plant*, 1 Saund. 241b, note 6. The whole subject is discussed, and the law in relation thereto distinctly declared, in *Onslow v. Corrie*, 2 Madd. 340. That was a case in equity, and in the discussion of the case the court says:

"Why is the assignee liable to the landlord? Because of the privity of estate. The original lessee is liable in respect of the privity of contract. The liability of the assignee of a lease begins and ends with his character of assignee. In him there is no personal confidence by the lessor." "An assignee may, whenever he pleases, assign again, and the moment he divests himself of the character of assignee he also shakes off his liability for rent. * * *

Equity, however, gives relief to a landlord for his rent in cases of assignment—First, where the assignment is merely colorable and fictitious, the possession remaining with the assignor; or, secondly, though there be a real assignment, yet it has been made for the purpose of depriving the landlord of his legal remedies for rent due, or breaches of covenant incurred previous to the assignment. It will be observed that these cases, and, indeed, all the cases on the subject, including those quoted in the exhaustive argument of the defendants, speak of the liability of the assignees of a lease in any form. Counsel for defendants claim that the cases turn upon the form of action, whether in debt or covenant. But a close examination of the cases will show that this distinction exists only in the case of the lessee. If the lessor sue him in debt, he can plead assignment by consent of lessor; if the suit be in covenant, he cannot excuse himself by such a plea. This seems to be the settled law. *Wood, Landl. & Ten.* § 304; *Id.* p. 552, note 6. In the present case, Hammett and his associates lawfully received the assignment of the lease from the lessee, who, as we have seen, had the perfect right to assign it, there being nothing in the lease forbidding such assignment. During their possession under this assignment they came into privity of estate with the lessor, and were bound to pay all the rent which accrued or may accrue during their possession under the lease. But this lease is their property, and it is clothed with all the incidents of property, one of which is the right to dispose of it. They, therefore, under every principle of law, have the right to assign it. We have seen that under such an assignment they assume no responsibility for their

assignee, and that their responsibility for the future rent will cease with their assignment of the lease. Of course, their responsibility for any rent past due and unpaid will continue. If this assignment be not bona fide, and be merely colorable,—that is to say, if it be made for the purpose of avoiding responsibility for rent already accrued, or to evade the performance of covenants they were bound, during their tenure, to perform, or if their assignee is simply a man of straw, who will hold for them,—then an assignment, made under such circumstances, would not free them from the responsibility.

It is contended that at the auction sale, at which Hammett and his associates became the assignees of the lease, the agent of the lessor gave public notice that the purchasers of this lease would be held to the same responsibility as was then upon the lessee. But this announcement could not affect the legal rights of any purchaser at this sale. The lessee was not selling under any permission given it by the lessor. The consent of the lessor was in no wise necessary to the sale, and therefore he could not impose any conditions which would in any way bind the purchaser. The prayer of the bill is for an injunction against any assignment of the lease by Hammett and his associates. It is very clear that no injunction as broad in its terms as this can be granted. He also prays that they may be enjoined from assigning to the Camperdown Cotton Mills, an insolvent corporation, in the hands of a receiver, and practically defunct. The power of the receiver, and the extent of his control over the property of the corporation of which he is appointed, are measured by the terms of the order appointing him. In the present case it appears that James L. Orr, Esq., in the case of Sampson and others against the Camperdown Cotton Mills, was appointed receiver of all and singular the property and effects of the defendant corporation. If, therefore, as was contended by the counsel for the defendants at the hearing, the Camperdown Cotton Mills have an equity to require the assignment of this lease to it, that equity inures to the receiver. And the perfecting this equity by a legal assignment would require that such assignment be made to the receiver, and in such case the lease would be held for the benefit of the creditors of the Camperdown Mills. If, however, the Camperdown Cotton Mills never acquired such an equity, and if the entire property in the lease remains in Hammett and his associates, under the trend of the authorities above referred to, they could assign to the Camperdown Cotton Mills, even though it be insolvent. The existence of the Camperdown Cotton Mills as a corporation has not been destroyed by the appointment of a receiver. It does not hold its franchise at the will of this court, nor subject to the control of this court. Nothing can deprive it of its franchise except a forfeiture thereof, enforced by the state of South Carolina, from whom it is derived, or by the voluntary surrender of the franchise on the part of the corporation.

There is another view to be taken of this case. This court, sitting as a court of equity, is asked to make use of the extraordinary remedy of an injunction to prevent the assignment of this lease. If, as the complainant insists, Hammett and his associates have no

right to assign the lease, then the injunction is unnecessary. If they have no right to free themselves from responsibility by such an assignment, and if in fact that responsibility will remain, notwithstanding an assignment, or an attempt to make an assignment, or the assignment proposed, then the complainant has a plain, adequate, and complete remedy at law against them, and he does not need, and cannot entitle himself to, the aid of this court.

The restraining order heretofore granted is rescinded. The prayer for the injunction is refused. The bill is dismissed, with costs.

PENNSYLVANIA CO. FOR INSURANCE ON LIVES AND GRANTING ANNUITIES v. JACKSONVILLE, T. & K. W. RY. CO. et al.

JACKSONVILLE, T. & K. W. RY. CO. v. AMERICAN CONST. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1895.)

Nos. 325 and 331.

1. COSTS IN RECEIVERSHIP PROCEEDINGS—APPORTIONMENT.

A subordinate railroad was taken into the hands of a receiver appointed for the controlling company engaged in operating it, and, after being operated for some time by the receiver, was surrendered to its own company. *Held*, that the property so surrendered was liable for its due proportion of the costs of the receivership accruing while it was in the receiver's hands, although the company owning it never became a party to the proceedings until it appeared for the purpose of contesting such liability; and that the apportionment of such cost was a matter resting in the sound discretion of the circuit court.

2. COSTS IN EQUITY—DISCRETION OF CHANCELLOR.

The matter of costs lies largely in the discretion of the chancellor, and a decree made by him, reviewing the action of the clerk determining what papers should be formally filed, and the manner of filing, will not be revised on appeal.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

These were appeals taken respectively by the Pennsylvania Company for Insurance on Lives and Granting Annuities against the Jacksonville, Tampa & Key West Railway Company and others, and by the latter company against the American Construction Company, Philip Walters, and others, from a decree adjudicating the matter of costs arising in receivership proceedings.

J. C. Cooper and T. M. Day, for Jacksonville, T. & K. W. Ry. Co.

J. C. Cooper and R. H. Liggett, for Pennsylvania Co. for Insurance on Lives and Granting Annuities.

R. W. Davis, for Florida Southern R. Co.

Before McCORMICK, Circuit Judge, and BRUCE, District Judge.

PER CURIAM. These cases are substantially one, and were heard as such in this court. The subject of the contention is the clerk's costs in a suit in equity in which the railroad and other property of the Jacksonville, Tampa & Key West Railway Company and of the Florida Southern Railroad Company was in the actual

custody of the court, and was operated and controlled by a receiver appointed in the suit in which the costs accrued. Nearly the whole of the costs in controversy were taxed for the filing of the receiver's monthly reports and the accompanying vouchers submitted to the court during the eight months that the receiver was operating the railroads under the orders of the court. The property of the Jacksonville, Tampa & Key West Railway is still in the custody of the court, operated and controlled by another receiver, the successor of one to whom the first receiver delivered the same under the orders of the court. The present receiver and his immediate predecessor were appointed in another suit pending in the same court during the whole time of the continuance of the first receiver's holding. The first receiver was appointed in a suit by a stockholder; the subsequent receiver in a suit by the trustee representing the mortgage bondholders of the Jacksonville, Tampa & Key West Railway Company. When the stockholder's suit was brought, the Jacksonville, Tampa & Key West Railway Company was in the actual possession, and had the control and operation, of the railroad and other property of the Florida Southern Railroad Company. It appears that the property of this company has been surrendered to the Florida Southern Railroad Company, and it is insisted that this company was never a party to either of the equity proceedings referred to, although its property was, as before stated, in the actual custody of the court during the whole period of the first receiver's employment as such, and the two properties were operated by him as one railroad. The Florida Southern Railroad Company did, however, appear in the circuit court in these suits to contest its liability for the costs in controversy; and it was found by that court to be liable and was adjudged to pay a certain portion of these costs arising out of the court's operating of its property.

In equity proceedings the matter of costs is necessarily so largely in the discretion of the chancellor that a decree relating to that subject alone is not ordinarily reviewed in the appellate court. In the absence of manifest abuse of that discretion, the appellate court will decline to control its exercise. There is no statute or rule of court prescribing what papers, to the exclusion of all others, shall or may be filed in court. In the absence of such a mandatory limitation, it seems clear that the clerk should and must file all such papers in an equity proceeding as the chancellor orders him to file. And if the clerk, acting on his own judgment and sense of duty or lawful interest, files separately the vouchers accompanying a receiver's reports, when the parties object because the vouchers are not proper papers to be filed in court, or are many of them fastened together in bundles, and should be filed as one paper, or for any other reason, and the issue is brought to the decision of the chancellor, who decides that many of them should be filed, as they have been, separately, marked "Filed" by the clerk, the order or decree announcing that decision is controlling on the clerk, and a sufficient warrant to him for filing such papers. It may or it may not be necessary or judicious to regulate the practice in this regard by a rule of court. There were 15,621 vouchers filed with

the receivers' reports, for which the clerk charged 10 cents a voucher, amounting to \$1,562.10. It may be that these vouchers unnecessarily incumber the records of the court, and unduly swell the cost of the proceedings. We express no opinion as to whether these vouchers should have been kept in a safe place among the records of the railroad offices, or filed with the special master, or brought into court and filed with the clerk. As the statutes and rules of court now stand, it was in the discretion of the judge to decide this question, and we do not feel authorized to review his decree in this matter, or in the matter of making a part of the amount of the costs a charge on the property of the railway and railroad companies respectively. We are clear that so much of the proper cost as accrued during the first receiver's operation of the railroads, and grew out of that operation, was and is a proper charge on the property of those corporations, and that, under the conditions in which the costs accrued, the apportioning of them against the respective properties must rest in the sound discretion of the judge of the circuit court. The decrees appealed from are affirmed.

TABOR v. INDIANAPOLIS JOURNAL NEWSPAPER CO.

(Circuit Court, D. Indiana. March 14, 1895.)

No. 9,184.

1. PLEADING—SURPLUSAGE—COMPLAINT FOR LIBEL.

Allegations in a complaint for libel that plaintiff addressed several letters (setting them out in full) to defendant, asking a retraction of the alleged libelous statements, and that no answers thereto were received, constitute a violation of the rule requiring a statement of facts constituting the cause of action, and not the evidence to sustain it; and all matter relating to such letters must be stricken out on motion.

2. PRACTICE—FILING INTERROGATORIES IN ACTIONS AT LAW.

The rule of practice in the federal courts does not permit the plaintiff in an action at law to file, with his complaint, interrogatories to be answered by defendant. *Ex parte Fisk*, 5 Sup. Ct. 724, 113 U. S. 713, followed.

This was an action for libel brought by Julia Marlowe Tabor against the Indianapolis Journal Newspaper Company. Defendant moves to strike out certain matter from the complaint.

Lucius B. Swift, for plaintiff.

Hawkins & Smith, for defendant.

BAKER, District Judge. The plaintiff, in her complaint, alleges that the defendant did maliciously, with intent to injure her good name and reputation, and to defame and injure her in respect of her profession as an actress, print and publish in the regular Sunday issue of the Indianapolis Journal, of and concerning the plaintiff, a certain false and malicious libel, which is set out in the complaint. The complaint then further alleges that on the 16th day of January, 1895, the plaintiff caused to be addressed to the defendant's editor a letter, which is set out, asking for a retraction of the

alleged libelous matter. It further alleges that, no answer having been received to that communication, on the 21st of January, 1895, the plaintiff caused another letter to be addressed to the defendant, asking for a retraction of the alleged libel; and it alleges that no answer was received to that letter. The complaint further alleges that on the 5th day of February, 1895, the plaintiff addressed to the defendant another letter, in like manner asking for a retraction of the alleged libelous matter; and that no response to either of said letters has been made, and the alleged libelous matter has never in any manner been retracted by said defendant. The complaint alleges that plaintiff has been damaged by said libelous publication, in her person and in her profession, in the sum of \$25,000, for which she demands judgment. The complaint is also accompanied by five interrogatories, and the court is asked to require that the same be answered by the defendant under oath, positively and without evasion, within such time as may be limited by the court therefor. These interrogatories, if proper to be filed and answered, call for facts which would be pertinent to the matters alleged in the complaint.

The defendant has moved the court to strike out all that part of the complaint relating to and containing the several letters above mentioned. This motion must be sustained. While it is true that a refusal to retract a libel may be given in evidence on the trial of the cause in support of the charge that the alleged libelous publication was maliciously made, it is improper to set out such evidence at large in the complaint. All that part of the complaint which contains the letters relates to matter constituting no part of the cause of action, and which occurred after the alleged cause of action accrued, and can only be competent as evidence to reflect light on the prior intention of the publisher of the libel at the time the publication was made. It is fundamental in the law of pleading that the facts constituting the cause of action, and not the evidence to support it, shall be set out in the complaint. The plaintiff is given an exception to this ruling, and has leave within 20 days to file her bill of exceptions.

Although no motion has been made by the defendant to strike out the interrogatories filed with the complaint, the court feels constrained *sua sponte* to strike them out. It is settled by the rule of practice in this court that the plaintiff will not be permitted to file interrogatories to be answered by the defendant, with his complaint, in a common-law action. This principle is established by the decision of the supreme court of the United States in *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, and later cases in the federal courts follow the doctrine of this case.

An order, therefore, will be entered, striking from the files all the interrogatories annexed to the complaint in this cause, to which ruling the plaintiff excepts, and has 20 days in which to file her bill of exceptions.

HAMMOND v. CRAWFORD.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

1. BROKERS—COMMISSION FOR EFFECTING SALE—WHEN EARNED.

Defendant made a contract in writing with plaintiff, agreeing, "in case he effected a sale or deal of" certain mines, through the introduction by plaintiff of one S., to pay plaintiff certain sums in money and stock. Plaintiff introduced S. to defendant, and an agreement was made between them that defendant should organize a corporation, and convey the mines to it, and issue certain stock to S., who should then make certain payments in cash to defendant and to the corporation, it being provided that the charter and by-laws of the corporation must be mutually satisfactory to the parties. Subsequently, defendant, having organized the corporation, offered to S. its charter and by-laws and a deed of the mines. S. refused to consummate the contract on the grounds that defendant's title was not good, and that the charter and by-laws of the corporation were not satisfactory to him. The transaction then came to an end, and no sale or deal with S. was effected. *Held* that, as plaintiff's intervention had not effected either a completed sale or an enforceable agreement for sale, he was not entitled to the commission stipulated in his contract with defendant.

2. PRACTICE—REQUEST FOR SUBMISSION OF A QUESTION TO JURY.

When a party does not ask to go to the jury on a question arising in the case, he cannot contend, in an appellate court, that such question should have been left to the jury.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by William J. Hammond, Jr., against George Crawford, on a written contract. The circuit court directed a verdict for defendant, and entered judgment thereon. Plaintiff brings error.

Charles H. Brush, for plaintiff in error.

Hugh L. Cole, for defendant in error.

Before BROWN, Circuit Justice, and LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. This is an action upon a written contract in the words and figures following:

"N. Y., July 15, 1891.

"The understanding I have with W. J. Hammond, Jr., is as follows: That in case I effect a sale or deal of the Confidence group of mines situated in Socorro county, New Mexico, through the introduction, by said Hammond, of A. F. Sortwell or his associates, I am to pay said Hammond from the sale of stock of the Confidence Mining Company, which I am to sell at par, \$25,000 in cash, and am also to assign to W. J. Hammond, Sr., \$25,000 of the aforesaid mining stock, and, in addition to the above, I am to pay over to said Hammond, Jr., \$25,000 in cash, and am to assign to said Hammond, Jr., or whom he may direct, \$25,500 of the aforesaid mentioned mining stock.

"George Crawford."

The plaintiff contended that he performed the services required of him, and, alleging that the stock of the said company was worth \$25 per share (the par value being \$5), demanded judgment for \$302,500. He sought to prove performance by showing that through his procurement Sortwell entered into an agreement with defendant containing the following provisions, viz.: That Crawford was to cause

to be organized a corporation under the laws of New Jersey, and to convey to such corporation, by a good and sufficient warranty deed, the mining property known as the "Confidence Group of Mines," situated in the county of Socorro, N. M., the said deed and other evidences of title to the said property to be approved by counsel learned in the law, nominated by Sortwell; that the capital should be \$500,000 in 100,000 shares at \$5 a share, and that Crawford should deliver to Sortwell 45,000 full-paid shares; that Sortwell, upon delivery of said deed and of the certificate of incorporation, should pay to Crawford personally \$125,000 and to George Crawford, as treasurer of the company, \$100,000; that Crawford, on receipt of the \$125,000, should erect a stamping mill of a designated capacity, and turn the same over to the company; that the incorporation of the said company and the payment of the purchase money for the 45,000 shares should be consummated on or before October 1, 1891; and that "the charter of the aforesaid corporation and the by-laws of the same [shall] be mutually satisfactory to the parties to this contract." The date of consummation of this Crawford-Sortwell agreement was extended by mutual consent until January 4, 1892. On that day Crawford offered a deed from himself and wife, a charter of the Confidence Mining Company taken out under the New Jersey laws, and a copy of the by-laws of such company. Sortwell, through his counsel, both being present at the time, objected, and refused to consummate the agreement upon the expressed grounds (1) that there was no good and sufficient title shown; (2) that the charter and incorporation of the Confidence Mining Company were not satisfactory to Sortwell; (3) that the by-laws of said company were not satisfactory to Sortwell. That ended the transaction, and no sale or deal with Sortwell was ever effected. These facts are undisputed. The trial judge held that under the agreement sued upon the parties contemplated that the plaintiff's commission or compensation was to be dependent upon the effecting by the defendant of a sale by which he was to realize the money out of which the plaintiff was to be paid, and that the conditions had not been brought into existence by which plaintiff was entitled to compensation from the defendant; and verdict was directed for the defendant, to which ruling plaintiff duly excepted. He did not ask to go to the jury. It is assigned as error: (1) That verdict was directed for defendant. (2) That verdict was not directed for plaintiff. (3) That the court did not refer it to the jury (a) to determine whether or not, under the terms of the contract, the compensation was not to be paid until a deal had been effected by which defendant would realize the amount of money at which it was proposed that the 45,000 shares of stock should be sold; (b) to determine whether plaintiff had not performed his part of the agreement; (c) to determine whether or not defendant had title to the Confidence group of mines, with an instruction to render a verdict for plaintiff, if they found defendant had no title. Not having asked at the trial to go to the jury on the points set out in the assignment of errors, plaintiff is not entitled to contend in this court that the interpretation of the contract should have been left to the

jury. But, if he were, we are satisfied that the trial judge correctly disposed of that question. The contract is inartificially drawn, and awkwardly expressed, but it contains no technical terms, and presents no ambiguity as to the fundamental question presented on the trial. The trial judge stated that "it omits to inform us what kind of a sale or deal was contemplated by the parties as the one to be effected by the defendant through the intervention of the plaintiff." It might be necessary to supply that omission by proof, if the question were whether some sale or deal actually effected was the kind of sale or deal contemplated by the contract; but upon the undisputed facts of the case no sale or deal at all was effected through plaintiff's intervention. None certainly was effected by the mere execution of the Crawford-Sortwell agreement, for that expressly reserved to Sortwell the right to recede from his offer if the charter and by-laws of the new company were not satisfactory personally to him; and, if he did not choose to be satisfied with them, Crawford could not compel him to. The plaintiff's intervention therefore effected neither a completed sale to Sortwell nor an agreement of purchase susceptible of enforcement against him. Had Sortwell objected to carrying out the agreement solely on the ground that Crawford's title to the property was defective, the authorities cited on plaintiff's brief might apply, but the undisputed testimony shows that he based his refusal also on the grounds that neither charter nor by-laws were satisfactory to him, a condition the nonfulfillment of which was not dependent on the action of Crawford. The judgment of the circuit court is affirmed.

CITY OF FINDLAY v. PERTZ et al.

(Circuit Court of Appeals, Sixth Circuit. February 25, 1895.)

No. 195.

1. **PRINCIPAL AND AGENT—AGENT ACTING FOR BOTH PARTIES TO CONTRACT.**

One B., who was an agent of P. & S. for the sale of automatic separators, manufactured by them for use on natural gas wells, entered the employ of the board of gas trustees of the city of F. as superintendent of the natural gas works managed by them for said city. While in the employ of said board, he ordered, in its name, from P. & S., 32 separators, upon the sale of each of which P. & S. allowed him a commission of \$10, the agreement for such commission being unknown to the board of gas trustees. As soon as the board learned of such agreement, they discharged B., notified P. & S. that they disavowed the contract made by B. on the ground of fraud in making the same, offered to return the separators, and demanded back the money which had been paid under the contract. *Held*, that the conduct of B. in acting as agent for both parties, without the knowledge of the board of trustees, and of P. & S., in procuring the contract through such agency, was fraudulent, and entitled the city to rescind the contract.

2. **SAME—RATIFICATION—MUNICIPAL CORPORATION.**

Held, further, that the contract, being neither immoral nor unlawful, but such as the city had a right to make, might be ratified by the city, as by a private individual, either formally or by its conduct.

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

This was an action by John W. Pertz and George R. Stewart against the city of Findlay, Ohio, to recover the price of certain automatic gas separators alleged to have been sold to said city. In the circuit court the plaintiffs recovered judgment. Defendant brings error.

The facts necessary to be stated to an understanding of the legal questions to be decided are substantially these:

The plaintiff in error is a municipal corporation of the state of Ohio. It owned and operated a plant for the distribution of natural gas to consumers within the city. This plant was under the control of an arm of the city government called the "board of gas trustees," composed of five members, elected annually by the qualified voters of the city. That board had authority to employ a superintendent, whose duty it was to maintain and operate the plant, make all necessary improvements and repairs, collect the dues from consumers, and render all other necessary services, under direction and supervision of the board of gas trustees, as might be required for a successful operation of a natural gas system. The duties of the superintendent were such as to require an expert in the boring and management of gas wells and in the safe and economical distribution of the gas to consumers. The position was that of an employé of the city government, and was one involving expert knowledge and a considerable degree of trust and confidence. The defendants in error were partners, doing business under the firm name of Pertz & Stewart, at Kokomo, Ind., and as such were patentees and manufacturers of a machine called an "automatic separator." These machines were adapted to be attached to the orifice of a natural gas well, and purported to separate the oil or water which came to the surface intermingled with the gas, and were represented to operate automatically. This firm had in their service one Melvin M. Brooks, who acted as their agent in Indiana for the sale of their separators upon a commission. In the spring of 1890, this agent went into the Findlay, Ohio, oil field, for the purpose of selling separators for the said Pertz & Stewart. While in that field as the agent of defendants in error, he was chosen superintendent of the gas plant owned and operated as aforesaid by the city of Findlay. July 12, 1890, Brooks wrote to defendants in error a letter concerning separators for use on the city wells. That letter is not produced by them. Mr. Stewart states that the letter was one of inquiry as to how the separators would work on oil wells. The answer to that letter was dated July 16, 1890, and was in these words:

"Pertz & Stewart, Manufacturers of Automatic Gas Separator and Drip.

"Kokomo, Ind., July 16, 1890.

"Mr. M. M. Brooks, Findlay, Ohio—Dear Sir: Your favor of the 12th received. We will be glad to furnish you any number of separators you may desire. You may connect them to a well producing oil with the gas, and rest assured that they will separate the oil just as readily as the water; but, when you desire to connect to a well producing oil, please so state in your order, for the reason that we make the valve a little larger for oil than we do for water. We sell them with the same guaranty for separating oil as we do for water. Hoping to hear from you soon,

"Yours very truly,

Pertz & Stewart."

The board of gas trustees, upon representations of Brooks, authorized him to purchase for the city of Findlay three of these automatic separators. This was done by a letter dated July 22, 1890, in these words:

"Findlay, Ohio, July 22nd, 1890.

"Pertz & Stewart, Kokomo, Ind.—Gentlemen: Please ship us at once to Stewartsville, Hancock County, Ohio, 3 separators for oil and gas, and 1 for water and gas. Stewartsville is on the Nickel Plate Railroad.

"Yours truly,

The City Gas Works."

This letter was written by Brooks, and defendants in error admit that, when received, they recognized it to have been written by him.

August 11, 1890, Brooks ordered 16 other separators, by letter in these words:

"Findlay, Ohio, August 11th, 1890.

"Messrs. Pertz & Stewart, Kokomo, Ind.—Gentlemen: Please ship to Stewartsville, Ohio, via Nickel Plate R. R., 10 automatic separators, and to Van Buren 6 of the same. The latter is a station on the Toledo, Columbus & Cincinnati R. R., a short distance north of Stewartsville. If you cannot ship the entire order at once, please ship to Stewartsville first. I think that oil is the * * * likely to come first in these wells. I examined the ones sent, but can't detect any difference in them.

"Truly yours,

The City Gas Works,

"By M. M. Brooks, Supt."

On September 7, 1890, Brooks again made an order for 13 additional machines, by the following letter:

"Findlay, Ohio.

"Pertz & Stewart, Kokomo, Ind.—Gentlemen: Please ship separators as follows: 5 to Stewartsville; 8 to Findlay. I had discovered the error in your invoice of Aug. 22d, and had it corrected. Please send them forward as soon as possible.

"Truly yours,

M. M. Brooks, Supt."

The first three separators were billed at \$105 each, and on September 12, 1890, a remittance in full of bill was made by the following letter:

"Findlay, Ohio, September 12, 1890.

"Pertz and Stewart, Kokomo, Ind.—Gentlemen: Inclosed find New York Exchange No. 37,568, for three hundred and fifteen dollars, same being on account. Please acknowledge receipt of same.

"Respectfully yours,

The City Gas Works,

"Per C. K. Beach, Sec'y."

As these separators were delivered, they were attached to the gas wells operated by the gas trustees, by their superintendent, Melvin M. Brooks. November 1, 1890, defendants in error rendered an account for the 29 separators which had been ordered by the letters of August 11th, and September 7th. This account was in these words and figures:

"Kokomo, Ind., November 1, 1890.

"City Gas Works, Findlay, Ohio, In Account with Pertz & Stewart, Proprietors of John W. Pertz Automatic Separator.

Aug. 20.	To Mdse.....	\$315 00
" 22.	"	630 00
" 23.	"	105 00
Sept. 4.	"	630 00
" 16.	"	840 00
" 22.	"	525 00

\$3,045 00

"Please remit. Unless otherwise advised, will draw for \$1,050 on the 10th inst. Please honor draft, and oblige."

To this the following reply was made:

"Findlay, Ohio, November 6, 1890.

"Messrs. Pertz & Stewart, Kokomo, Ind.—Gentlemen: Please do not draw on us. We note you have billed the separators at the gross price. Please send credit memoranda of the discount by return mail. We understand the discount is ten per cent. on a sale of four. We presume a greater discount will be allowed on the number we have purchased. Your reply by return mail will oblige,

"Yours respectfully,

The City Gas Works,

"Chas. K. Beach, Sec'y."

The gas trustees denied that they had authorized the purchase of the 29 separators ordered by the letters of Brooks above cited, and, suspecting that

us, and desire you to distinctly understand you never had any contract with this board, and we have no present intention of any with you. You no doubt realize the fraudulent character of your dealings with Mr. Brooks so far as this board is concerned, as we judge from your letter. The separators you sent to Mr. Brooks are subject to your order here, so far as we are concerned in the matter, but you must at once take care of them at your own expense. We will see to the disconnecting of such as are attached to wells, but will have no further care of them. The account you inclose us will not be paid, as we owe you nothing whatever. We demand that you return to us the \$315.00 sent you on September 12, as the same was sent you under a mistake. As to the fact of our being indebted to you, if it is not returned, we shall take legal steps to collect it by attachment on the separators you have here. You understand we base our action and claim on the ground of fraudulent contract between you and Mr. Brooks.

"Yours, etc.,

Board of Gas Trustees,
"J. G. Hull, President."

January 19, 1891, suit was begun by defendants in error in the circuit court of the United States for the Northern district of Ohio for the sum of \$2,725, with interest, being the balance due as per account rendered November 17, 1890, and above set out. The pleading was, under the Ohio Code practice, a petition, answer, and reply. The answer of the city of Findlay set up the following defenses: (1) That the superintendent of the City Gas Works, Melvin M. Brooks, was secretly the agent of the plaintiffs, Pertz & Stewart, and that they had illegally and fraudulently procured him to procure for them a contract for the sale of their separators by promising to him a commission on each separator sold. (2) That the defendant was absolutely ignorant of the dual agency of the said Brooks, and in reliance upon him as its sole and exclusive servant and employé, and in reliance upon his representations as to the usefulness and value of the separators sold by plaintiffs and as to the necessity for purchasing same, had authorized him to contract for three of said machines. (3) That said Brooks, without authority, had ordered 29 other separators, and had placed them upon various gas wells belonging to defendant, without the knowledge of defendant. (4) That defendant had not discovered the fact that said Brooks was at the same time acting for both buyer and seller until in November, 1890, and that upon that discovery it had discharged him from its service, and repudiated the entire transaction, and notified plaintiffs that the said separators were subject to their order, and demanded a return of the \$315 paid them for the three separators ordered with its consent. (5) It alleged, in addition, that the said Brooks represented that said separators would effectually separate either oil or water from gas, and would automatically eject the water or oil thus separated, and were reasonably worth \$105 each, but that said machines were not capable of doing such work as represented, or doing it automatically, and were of no practical value. (6) This answer concluded with a prayer that the petition might be dismissed, and that defendant have judgment for \$315, and for other proper relief. The reply to this answer admitted that Brooks had acted as their agent in Indiana, and that in 1890 he went to the Findlay oil fields for the purpose of selling separators; that the first they heard from him was when they received from him the orders heretofore set out. They admitted that they had sent him a commission on the separators first ordered. They say that they did not know that the gas trustees of Findlay were ignorant of the relations between Brooks and the plaintiffs, and supposed the commissions allowed Brooks "would eventually be credited to the city." They insist that they acted in good faith, and without collusion or purpose to defraud defendants; that the invariable price of the separators was \$105, with an allowance of \$10 on each sold through their agents; that, at the request of Brooks, they had finally credited the city with the commissions he had earned. They further insisted that the said separators were attached to the gas wells at the time the defendants repudiated the contract, and that defendants had continued to use them, and were using them when suit was begun; that the use which had been made of them had made them unmarketable by wear and exposure, and that they could not be disposed of except at a considerable sacrifice. There was a jury, and verdict for the full amount claimed by de-

defendants in error. From the judgment thereon, a writ of error was sued out by the city of Findlay, and errors have been assigned upon the charge and for refusal to charge as requested.

Janson Blackford, for plaintiff in error.

Harvey Scribner and Blacklidge, Shirley & Moon, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after stating the facts, delivered the opinion of the court.

1. The objection that the bill of exceptions was not filed during the term is not well taken. During the term at which the judgment was rendered, and on the 19th of September, 1893, leave was granted to file a bill of exceptions within 40 days. By an order made December 13, 1893, it was recited that a bill of exceptions had been allowed and signed and filed on the 24th of October, 1893. This was within the time allowed by the order made during the trial term, and was entirely within the power of the court to permit.

2. The objection that the bill of exceptions does not show that exceptions to the charge of the court were taken before retirement of the jury is equally groundless. The charge is made a part of the bill of exceptions, and follows the evidence, being preceded only by a request made for a peremptory charge for plaintiff, and by two requests for special charges by defendant. Immediately following the charge there follows: "Mr. Blackford [one of the attorneys representing the plaintiff in error]: The defendant excepts," etc. Then follows the ground of exception, including the refusal to charge as requested, and exceptions to the charge as delivered. We think it sufficiently appears that exceptions to the charge were seasonably taken. The learned trial judge took from the jury all consideration of the defenses presented by the plaintiff in error, and instructed them that the only issue for their determination was to determine the reasonable market value of these separators when delivered. As the proof was uniform that the patentees and makers had but one price, and that they were to be obtained only from them and at their price, the instruction was equivalent to a peremptory instruction for the full amount of the account sued on. This view of the court seems to have been in a large part due to the evidence tending to show a continued use of these machines after the discovery of the alleged dual relation occupied by its superintendent, Melvin M. Brooks. He seems also to have attached great weight to the fact that the defendants in error had not especially induced or procured Brooks to influence this particular sale. The latter consideration seems to us not at all important. There was evidence tending quite strongly to establish the fact that defendants in error regarded Brooks as having acted for them in procuring the order forwarded by him for these separators.

In support of the defense there was evidence: First. That Brooks had acted as their (Pertz & Stewart's) agent on commission for a long time before going to the Findlay gas district, and that he had

gone into the Findlay district for the purpose of continuing the sale of these separators. Second. The separators delivered to the city were all billed at \$105 each, and no discount or credit was proposed, allowed, or mentioned as due to the city by virtue of the relation its superintendent bore to them. Third. They remitted to Brooks personally a commission on the first order, and gave the city no notice of this fact, and held themselves liable to Brooks for commissions on his subsequent orders, so soon as their account was paid. Fourth. When the city discovered the commission allowed its superintendent, and when that superintendent directed the defendants in error to allow the city a credit for these commissions, then and only then did they propose such a credit.

Another undisputed fact is that Brooks concealed his relation to the sellers, and concealed his receipt of a commission, and, when confronted with the charge, utterly denied that he had been allowed any commission or discount on the sale, or that the separators could be bought with a discount off the market price. The answer suggested by defendants in error to all this was that the sellers did not know that the buyer was ignorant that its agent was likewise the agent of the sellers, and supposed that eventually this double agent would give the buyer for whom he bought the benefit of the commission paid him by the sellers for whom he sold. This defense is absolutely frivolous. Undoubtedly there are circumstances under which the same person may act as the agent of two distinct principals, and in regard to transactions and dealings between the principals. As said by Campbell, J., in *Mining Co. v. Seuter*, 26 Mich. 76: "The authority of agents may, where no law is violated, be as large as their employers may choose to make it," etc. "There can be no presumption that the agent of the two parties will deal unfairly with either. And when they both deliberately put him in charge of their separate concerns, and there is any likelihood that he may have to deal with the rights of both in the same transactions, instead of lessening his powers, it may become necessary to enlarge them far enough to dispense with such formalities as one man would use with another, but which could not be possible for a single person to go through with alone." It is most obvious that in all such cases of a double agency it is absolutely essential that both principals shall know of and assent to the dual character. *Capener v. Hogan*, 40 Ohio St. 203; *United States Rolling-Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450; *Bell v. McConnell*, 37 Ohio St. 400; *Mechem*, Ag. § 67.

The evidence we have recited, to say the least of it, strongly tended to establish the fact that Brooks understood himself to have an arrangement with the defendants in error by which he would be allowed personally a commission on each separator which he, as an employé of the plaintiff in error, should buy from the defendants in error, and it tends with equal force to establish the fact that the defendants in error recognized that Brooks was personally entitled, under an existing arrangement with them, to demand and receive the same commission he would have earned by a like sale to any other customer. There was therefore evidence entitling the plaintiff

in error to go to the jury upon the defense of fraud invalidating the contract of sale.

Any agreement or understanding between one principal and the agent of another, by which such agent is to receive a commission or reward if he will use his influence with his principal to induce a contract, or enter into a contract for his principal, is pernicious and corrupt, and cannot be enforced at law. This principle is founded upon the plainest principles of reason and morality, and has been sanctioned by the courts in innumerable cases. "It has its foundation in the very constitution of our nature," says Judge Dillon, "for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails." 1 Dill. Mun. Corp. § 444. "An agent cannot be allowed to put himself in a position in which his interest and his duty will be in conflict." Leake, Cont. (3d Ed.) 409. The tendency of such agreement is to corrupt the fidelity of the agent, and is a fraud upon his principal, and is not enforceable, "even though it does not induce the agent to act corruptly." "It would be most mischievous to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not in fact corrupted. It is quite immaterial that the employer was not damaged." Wald's Pol. Cont. 245, 246, note; citing *Harrington v. Dock Co.*, 3 Q. B. Div. 549, and other cases. *Taussig v. Hart*, 58 N. Y. 425; *United States Rolling-Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450-460; *Smith v. Sorby*, 3 Q. B. Div. 552; *Young v. Hughes*, 32 N. J. Eq. 372; *Yeoman v. Lasley*, 40 Ohio St. 190. Such agreements are a fraud upon the principal, "which entitle him to avoid a contract made through such agency." Leake, Cont. 409; *Panama & S. P. Tel. Co. v. India Rubber G. P. & Tel. Works Co.*, 10 Ch. App. 526. "Where there are a principal, an agent, and a third party contracting with the principal, and cognizant of the agent's employment, and there are dealings between the third party and the agent which gives the agent an interest against his duty, then the principal, on discovering this, has the option of rescinding the contract altogether." Wald's Pol. Cont. 247. "Any profit made by an agent in the execution of his agency must be accounted for to the principal, who may claim it as a debt for money received to his use. A gratuity given to an agent for the purpose of influencing the execution of his agency vitiates a contract subsequently made by him, as being presumptively made under that influence; and a gratuity to an agent after the execution of the agency must be accounted for to his principal; as in the case of a servant employed to make payments accepting discounts or presents from the creditor." Leake, Cont. 409. The same author says: "If an agent stipulates with a contractor for a commission upon the work to be done for his principal, he must account for the commission, and it is good ground for his dismissal." Page 410; *Ice Co. v. Ansell*, 39 Ch. Div. 339; *Stoner v. Weiser*, 24 Iowa, 434; *Bell v. Bell*, 3 W. Va. 183; *Moore v. Mandlebaum*, 8 Mich. 433. The principle which prevents an agent from contracting with himself, or from entering into any agreement which

gives him an interest conflicting with his duty, applies more strongly to the officers, servants, and agents of a municipal government than to private parties. 1 Dill. Mun. Corp. § 444.

Brooks, as we have already stated, was an employé of the city of Findlay. This Pertz & Stewart knew. The letter heads and his official signature fully advised them that he was the agent of a public corporation. Now, if with this knowledge they dealt with the city of Findlay knowing the relation which he bore to them, they knew that his interest in making a sale for them conflicted with his duty and fidelity as a public agent. The agency of Brooks for the city was one which required expert knowledge, and involved a considerable degree of trust and confidence. His duty was to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicted with his private interest was corrupting in its tendency. We know of no more pernicious influence than that brought about through a system of commissions paid to public agents engaged in buying public supplies. Such arrangements are a fruitful source of public extravagance and speculation. The conflict created between duty and interest is utterly vicious, unspeakably pernicious, and an unmixed evil. Justice, morality, and public policy unite in condemning such contracts, and no court will tolerate any suit for their enforcement.

The forcible language of Mr. Justice Field, in speaking for the court in *Tool Co. v. Norris*, 2 Wall. 45, and repeated in *Oscanyan v. Arms Co.*, 103 U. S. 274, is quite as applicable to the debauchery of the agent of a municipal corporation as it was when the interests of the federal government were sought to be affected by the same kind of pernicious influence. In the case cited the learned justice said, concerning such contracts:

"Considerations as to the most efficient and economical mode of meeting the public want should alone control in this respect the action of every department of government. No other consideration can lawfully enter into the transaction so far as the government is concerned. Such is the rule of public policy, and whatever tends to introduce any other element into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public services and to unnecessary expenditures of the public funds. * * * All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." *Oscanyan v. Arms Co.*, 103 U. S. 274.

This principle of public policy finds full recognition in section 6969 of the Revised Statutes of Ohio, by which it is provided that any public officer, agent, servant, or employé who, while acting as such public officer, agent, or employé, shall become directly or indirectly interested in any contract for the purchase of any property for the state, county, or municipality, shall be guilty on conviction of a penitentiary offense. This statute has been construed as ap-

plying to the agents, officers, and employés of towns, villages, and cities of the state, and as a prohibition upon all contracts between such a municipality and an agent or servant interested therein. *Doll v. State*, 45 Ohio St. 445, 15 N. E. 293.

The contract or arrangement between defendants in error and Brooks, the servant of the plaintiff in error, was no more illegal after this statute than it was under common-law principles before the statute. What was the effect of that arrangement or contract on the contract with plaintiff in error? We must distinguish between the bargain for a commission between the defendants in error and the agent of the city, and the contract between the two principals. The first was clearly illegal and incapable of enforcement; the latter was on its face altogether within the contracting power of the parties, was free from any immorality, and altogether legitimate. The means by which the city may have been induced to enter into it was the vicious element in the trade. The board of gas trustees had no intention to deal with Brooks or any one else incapacitated under the Ohio statute, or under principles of public policy, from contracting with the city. That board was wholly ignorant of the secret arrangement between its agent and the persons with whom it proposed to bargain. Neither that board nor the city council knew of the double agency of Brooks. Undoubtedly, upon the authorities we have already cited, the city, upon discovery of the dealings between its agent and the defendants in error, had a right to repudiate the contract, and sue for damages sustained by the fraud. So, upon the other hand, if the buyer had been a private party or a business corporation, the fraud might be waived, and the contract affirmed, notwithstanding the corruption of the agent through whom it had been made. But it has been pressed upon us that, inasmuch as the agent corrupted was a public agent, the contract made through his corruption was absolutely void, and incapable of ratification, and that no subsequent conduct of the plaintiff in error in retaining and using the machines bought can furnish a basis upon which the guilty party can maintain a suit founded upon the corrupt contract. It seems to us that this argument confounds the corrupt agreement between the agent of the city and the other principal with the contract between the principals. There can be no question about the ratification of the arrangement for a commission. No one pretended to act for the city in bargaining for or receiving an illicit commission. "The principle of ratification only applies where the agent had professed to contract for the person who afterwards ratifies." *Leake*, Cont. 391.

The question we have to deal with is this: Can the city, notwithstanding the surreptitious dealing between its agent and the seller, waive the fraud as a private individual might and ratify the purchase? This is not a purchase of property from an agent or officer of the city. Neither is it a purchase of property in which any such agent or officer has an interest. It is simply a case of where an agent for the purchase of property from one capacitated to deal with the city is given a gratuity, reward, or commission by

the seller, which tended to give that agent an interest conflicting with fidelity to his principal. Upon this discovery of this improper inducement operating upon its agent, the city had a right to repudiate the purchase and return the property bought. This right it might exercise without regard to any actual injury it had sustained, and without regard to the effect of the allowance of the commission upon the integrity of its agent. *Harrington v. Dock Co.*, cited above, and *Lister v. Stubbs*, 45 Ch. Div. 1. Under such circumstances, a contract, neither immoral nor prohibited, between private parties, would not be incapable of affirmance and enforcement by the principal who had been defrauded. The innocent principal would have an option to affirm or avoid it, on discovery of the facts. The authorities upon this are clear and numerous. *Wald's Pol. Cont.* 247; *Leake, Cont.* 409.

The learned trial judge was of opinion, and so instructed the jury, that, upon discovery of the improper dealing with its agent, the city might repudiate or affirm the contract as it should elect. We entirely agree with him in this. The contract it made was neither *malum in se* nor *malum prohibitum*. No question of public policy is involved by a ratification of the bargain. That involves no affirmance or adoption of the corrupt agreement for illicit commissions. Upon the contrary, it would have the right to hold the agent liable as for money had and received to its use. It might go still further, and sue the seller for the fraud, and recover all damages consequent upon an improper dealing with the buyer's agent. It would be no answer to a suit by the city for a breach of the contract, as to the automatic operation of these separators, to say that the agent of the plaintiff had been corrupted by the defendant, and induced to make the contract through improper considerations. The buyer, not being a party to the corruption of its own agent, has the undoubted right to enforce the contract. Clearly, the court would not be aiding in the enforcement of an illegal or corrupt contract if the city was not in *pari delicto* and the agreement in itself was unobjectionable. The fact that unlawful means were adopted to induce a contract which is lawful itself, and capable of being lawfully performed, does not of itself make the contract unlawful as to the innocent party, nor does any principle of public policy forbid the enforcement thereof by the defrauded principal. The unlawful means by which the seller induced the buyer to deal with him is a matter collateral to the principal agreement. We recognize the general rule that money or property paid or delivered on an unlawful agreement cannot be recovered back. That principle, as stated by Lord Mansfield, in *Holman v. Johnson*, 1 Cowp. 343, is this:

"The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action

against the plaintiff, the latter would then have the advantage of it; for, where both are equally in fault, *potior est conditio defendentis*."

"The test for the application of this rule is whether the plaintiff can make out his case otherwise than through the medium and by the aid of an illegal transaction to which he was himself a party." Wald's Pol. Cont. 332.

This principle has no application here. The city was not a party to any illegal or unlawful or immoral agreement. If it were a plaintiff suing upon a breach of warranty contained in the contract in question, it would not be obliged to make out its case "through the medium and by the aid of any illegal transaction to which it itself was a party." The contract between the city and the sellers of these chattels was neither *malum in se* nor *malum prohibitum*. It is therefore enforceable by either party, unless the unlawful dealings between the agent of one of the parties and the other principal is a ground for rescission. If the contract was one which the city could have lawfully made or authorized in the first instance, then it is one which, if made by an unauthorized agent or through the fraud of its agent, to which the other party was alone privy, it may ratify upon full knowledge of all the facts. *State v. Buttles*, 3 Ohio St. 309. The case last cited affords an interesting instance of the power of a principal to ratify an act of an agent wholly unauthorized, and which the agent was by law prohibited from doing. Certain agents for the state of Ohio had loaned the state's money, and taken a bond therefor, payable to them as agents for the state. The lending of the state's money was prohibited under a penal statute. The state, through its legislature, ratified this unlawful act, and sued at law on the bond. The opinion was by Ranney, J., who, among other things, said that the state had a perfect right to waive the wrong, and adopt the contract made in her name:

"If, when adopted, the consideration upon which it was made, or its performance by the other party, is found to be illegal or immoral, it will no sooner be enforced for her than for the most obscure citizen; but, if it then stands without objection in both these particulars, it is no defense to say she was wronged by her agents, when they assumed, without authority, to act in her name. That is a matter between her and her agents. The option whether she will make herself a party to their acts, and be bound by the contract they have made, belongs to her, and not to those who have not and could not have been injured. In short, any contract that an individual or body corporate or politic may lawfully make they may lawfully ratify and adopt, when made in their name without authority; and, when adopted, it has its effect from the time it was made, and the same effect as though no agent had intervened. The state could lawfully have loaned this money, and the defendant's testator could lawfully have bound himself to repay it. If the contract has been ratified and adopted by the state, in judgment of law, the state did loan the money, and the defendant's testator did promise the state to repay it." *State v. Buttles*, 3 Ohio St. 322, 323.

The case of *Milford v. Water Co.*, 124 Pa. St. 610, 17 Atl. 185, has been cited as entertaining an opposing doctrine. Rightly understood, it has no very forcible bearing upon this case. A statute of the state absolutely prohibited any municipality from entering into any contract in which members of the city council were concerned, and made participation in such a contract by members of the city government a penal offense. The city council contracted

with a water company for a supply of water for a term of years. A majority of the council constituted a majority of the directors of the water company. Subsequently, when the council contained none of the directors of the water company, rents were paid, and use of the water continued. The water company relied upon this as a ratification, and sued for other rents. It was held that the contract was void and incapable of ratification. The case seems to stand upon the principle that the party to be held by ratification must be capable, not only of doing the act at the time it is ratified, but at the time the act ratified was done. Wald's Pol. Cont. 108; Cook v. Tullis, 18 Wall. 338. "Ratification relates back to the original making of the contract, and confirms it from that time." Leake, Cont. 393. The town was incapable of making a contract with that water company when it was made, and while it might, at the date of ratification, have made a new contract, it was held incapable of confirming the old one.

We do not agree with the trial judge that the evidence of ratification, after full discovery of the fraud, was so clear as to leave no issue for the jury. The city did by letter repudiate the agreement, and notify the sellers to remove the machines. This it had a clear right to do. But it is said that, while the city said it would not be bound by the bargain, its acts in retaining and using them thereafter was inconsistent with rescission, and amounted to ratification. Undoubtedly, the subsequent retention and use of these machines was evidence tending to contradict the letter repudiating the purchase. *Dodsworth v. Iron Works* (Feb. 5, 1895) 66 Fed. 483. In the case last cited, a like repudiation of an agreement for failure of machinery to comply fully with precedent conditions was held to have been rendered nugatory by subsequent conduct. But in that case there was a subsequent continued use for more than two years, in the ordinary course of the buyer's business, which was held such clear evidence of an intention to accept as to leave no issue of fact for the jury. The city could not be held estopped by ratification until after full discovery of the fraud. A mere suspicion was not enough to put it to an election. *Mining Co. v. Watrous*, 9 C. C. A. 415, 61 Fed. 163. The letter of November 18, 1890, was written as soon as any satisfactory evidence of the improper dealing with its agent came to its knowledge. There was evidence tending to show that between that date and the bringing of this suit (January 16, 1891) the city had continued to use at least some of these machines. Such use would, of course, be evidence of an intention to affirm a contract otherwise avoidable for fraud. But this use was for less than two months, and falls in that respect far short of a like retention and use held to be conclusive in *Dodsworth v. Iron Works*, which we have before cited, and was not an act determining the intention to ratify so conclusively as to leave no question for the jury. Slight acts of use will not bar rescission. *Bigelow, Frauds*, 434, 435. In a case of this kind, where a public municipality has been defrauded, there ought to be, where mere acts are relied upon as evidence of ratification, such clear evidence of an intentional exercise of the right of ownership as would be incon-

sistent with any other theory than that of an intention to waive the right of rejection. The question of ratification should have been submitted to the jury.

Finally, if the city is found to have ratified the contract, it would operate as a confirmation of the trade as originally made. If representations were made by Brooks as to the automatic operation and general capacity of these machines to perform the work needed, and thus induced the purchase, these representations, in case a right to rescind is found to have been waived, may be treated as warranties made by the agent of defendants in error. Ratification operates as an adoption of the entire agreement and all of its parts. If the sale was upon a guaranty, or under representations amounting to a warranty, ratification confirms it subject to the guaranties of warranty, and the buyer may, when sued for the purchase price, recoup to the extent of any damage sustained by breach of the contract with respect to any warranty concerning the capabilities of the machine. The case of *Dodsworth v. Iron Works*, heretofore cited, controls this aspect of the case.

For the error indicated, the judgment must be reversed.

CITY OF KEY WEST v. BAER.

(Circuit Court of Appeals, Fifth Circuit. January 29, 1895.)

No. 323.

1. PRACTICE—RULINGS IN THE PROGRESS OF THE TRIAL.—REV. ST. §§ 649, 700.

The expression "rulings of the court in the cause in the progress of the trial," contained in Rev. St. § 700, refers only to rulings upon the admission or rejection of evidence; and where a case is submitted to the court, without a jury, pursuant to section 649, and the court chooses to find generally, the losing party has no redress, except for errors occurring in such rulings.

2. SAME—SPECIAL FINDINGS.

The court to which a case is submitted, without a jury, cannot be required to find special issues of fact.

3. SAME—FORM OF BILL OF EXCEPTIONS.

A document embracing all the testimony submitted by the parties upon the trial of a case, set out in the order of its introduction, without special relation to any of the exceptions taken, and not freed from matter which is not essential to explain and point to such exceptions, is not a proper bill of exceptions.

4. CONTRACTS FOR STREET WORK—CONSTRUCTION.

A contractor sued the city of Key West for breach of a contract for grading, paving, etc., of streets and sidewalks, alleging that it violated the same, and wrongfully stopped the work before completion. The contract provided for monthly payments, "on estimates made by the engineer of materials furnished on the ground, and work done, 20 per cent. being reserved until the final estimate is made." *Held*, that this required the city to pay, monthly, 80 per cent. of the value of material furnished on the ground, as well as of the work done, and that by "material on the ground" was meant all such suitable material in reasonable quantities as the contractor had procured from abroad, and placed in Key West, at a suitable point, to be used as needed. *Fardee*, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This was an action by George J. Baer against the city of Key West to recover damages for the breach of a contract for the grading, paving, etc., of streets and sidewalks. The case was submitted by consent to the court, without a jury. The court found generally for the defendant, and entered judgment in his favor. Plaintiff excepted to the ruling, and brings error to review the judgment.

The contract contained the following provision:

"Payment will be made monthly, on estimates made by the engineer of material furnished on the ground, and work done; twenty per cent. of such estimates being reserved until the final estimate is made. When all the work embraced in this contract is fully completed, agreeable to the specifications and stipulations of this agreement, and accepted by the engineer, said engineer shall cause a final estimate to be made of the amount and value of said work, according to the terms and prices of this agreement."

W. A. Blount, for plaintiff in error.

H. Bisbee and C. D. Rinehart, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

McCORMICK, Circuit Judge. The parties to this action filed in the circuit court a stipulation in writing waiving a jury. On the trial there were rulings on demurrers to the pleadings, and on objections touching the introduction of testimony. After the submission of evidence was completed, the defendant requested the judge to approve or disapprove of a list of propositions of law, embracing 38 propositions, duly numbered, "as being applicable to the points of this cause to which they respectively relate." In actions at law tried, as this was, on a written stipulation waiving a jury, "the rulings of the court in the cause in the progress of the trial, when excepted to at the time, may be reviewed * * * upon a writ of error, * * * provided the rulings be duly presented by a bill of exceptions. When the finding is special the review may also extend to the determination of the sufficiency of the facts found to support the judgment." Rev. St. § 700.

In *Norris v. Jackson*, 9 Wall. 125, the supreme court put special emphasis on the words "in the progress of the trial," and declare that in such cases a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury. The case of *Norris v. Jackson* was decided at the December term, 1869, of the supreme court. At its next term, the proper practice, under section 4 of the act of 1865 (now, re-enacted, section 700 of the Revised Statutes), was fully discussed and substantially restated as announced in *Norris v. Jackson*; and, bearing on the question we are now considering, the court use this language:

"Suppose the facts proved to have been as assumed by the defendants in their requests, then it might well be conceded that the judgment was for the wrong party; but the issues of fact were tried and determined by the circuit court, and the act of congress provides that the finding of a circuit court in such cases shall have the same effect as the verdict of a jury, and the consti-

tution provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. * * * Matters of fact found by the circuit court under such a submission cannot be re-examined here, * * * as the review, when the finding is general, is confined to the rulings of the court in the progress of the trial; and, even when the finding is special, nothing else is open to review except the inquiry whether the facts found are sufficient to support the judgment." *Miller v. Insurance Co.*, 12 Wall. 235.

And at the next succeeding term the supreme court use this language:

"Had there been a jury, the defendant might have called upon the court for instructions, and thus raised the questions of law which he deemed material. Or, had the law which authorizes the waiver of a jury allowed the parties to require a special finding of the facts, then the legal questions could have been raised and presented here upon such findings as upon a special verdict. But, as the law stands, if a jury is waived, and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence." *Dirst v. Morris*, 14 Wall. 484.

Two years later this subject was again before the supreme court, and, in the course of an elaborate discussion and restatement of the rules theretofore announced after the passage of the statute now in force, the court use this language:

"None of these rules are new, as they were established by numerous decisions of this court before the act of congress in question was enacted." *Insurance Co. v. Folsom*, 18 Wall. 237.

In another similar case, decided at the same term (October term, 1873), the defendant in the action in the circuit court, after both parties had submitted their evidence, requested the circuit court to decide substantially (1) that the alleged contract, inasmuch as war existed at the time between the United States and the Confederate States, was illegal and void; (2) that the alleged contract, if not actually void, was an executory agreement, and, as such, was terminated by the war; (3) that the alleged contract, if otherwise valid, was too indefinite to be executed; (4) that no interest is recoverable during the war, or any portion of the war, upon a contract between alien enemies; (5) that, upon the whole case, judgment should be for the defendant. But the circuit court refused to so decide, and ruled against the defendant upon each of the propositions, and the defendant excepted to the ruling. On the questions thus presented, the supreme court say:

"Beyond all doubt, the only effect of the exception to the refusal of the court to grant the fifth request, if the exception is admitted to be well taken, will be to require the court here to review the finding of the circuit court in a case where the finding is general, and where it is unaccompanied by any authorized statement of the facts, which it is plain this court cannot do, for the reasons given in the opinion of the court in the case of *Insurance Co. v. Folsom*, decided at the present term [18 Wall. 237]. Our decision in that case was that in a case where issues of fact are submitted to the circuit court, and the finding is general, nothing is open to review by the losing party under a writ of error except the rulings of the circuit court in the progress of the trial, and that the phrase 'rulings of the court in the progress of the trial' does not include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general finding, which certainly disposes of the exceptions to the refusals of the circuit court to decide and rule as requested in the first four prayers presented by the defendant, as it is

clear that those exceptions seek to review certain conclusions of the circuit court which are necessarily embodied in the general finding of the circuit court." *Cooper v. Omohundro*, 19 Wall. 65.

Again, two years later, the supreme court say:

"Matters of fact in such cases are not reviewable here under any circumstances, as appears by all the cases decided by this court, since the act was passed allowing parties to waive a jury, and to submit the law and fact to the determination of the circuit court. Consequently, it is irregular to report the evidence in the transcript, except so far as it may be necessary to explain the legal questions reserved, as to the rulings of the court in the progress of the trial; nor is either party entitled to a bill of exceptions as to any special finding of the court, for the plain reason that the special findings of the circuit court in such a case are not the proper subject of exceptions nor of review in this court." *Tyng v. Grinnell*, 92 U. S. 467.

"Prior to the enactment of the act of March 3, 1865 (now sections 649 and 700, Rev. St.), it was held by the supreme court that, 'when the case is submitted to the judge to find the facts without the intervention of a jury, he acts as a referee by consent of the parties, and no bill of exception will lie to his reception or rejection of testimony, nor to his judgment on the law' (*Weems v. George*, 13 How. 190); and that 'no exception can be taken where there is no jury, and where the question of law is decided in delivering the final judgment of the court' (*U. S. v. King*, 7 How. 832-853). Section 4 of the act of March 3, 1865, was passed to allow the parties, where, a jury being waived, the cause was tried by the court, a review of such rulings of the court, in the progress of the trial, as were excepted to at the time, and duly presented by bill of exceptions, and also a review of the judgment of the court upon the question whether the facts specially found by the court were sufficient to support its judgment. In other respects the old law remained unchanged." *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321.

After a careful examination of the cases from which the language of this opinion thus far has been substantially, when not literally, taken, and of numerous other cases decided by the supreme court cited in the opinions from which we have constructed our argument, it seems clear to us that the language "in the progress of the trial," emphasized by Mr. Justice Miller in *Norris v. Jackson*, *supra*, must have application to the wrongful admission or rejection of evidence; that is, in the progress of the trial that would have had place before the jury had not the parties waived a jury. Questions arising on the settling of the pleadings are subject to review, but not by reason of the terms of section 700, because that section only saves for review such rulings "as are duly presented by a bill of exceptions." Rulings on the pleadings necessarily appear on the record without a bill of exceptions. If the party ruled against chooses to except thereto, he should do so at the time the ruling is made, and his exception should be noted in the minute that records the ruling. The words "in the progress of the trial" are clearly shown by the last clause of the section to have no relation to the findings of the court, for which express and exclusive provision is made by the words: "And, when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment." Besides the evident absurdity of having the trial judge charge himself, or the even more incongruous attitude of having the counsel charge the court, the vital objection to the construction contended for is that its practical effect must be to force on the attention of the mind of the trial court special issues of fact,

so as to require special findings, when the clear voice of the statute and of sound principle calls for the exercise by that court of the discretion to determine in each case whether the findings shall be special or general; and the immediate ultimate logical result must be the conversion of every such trial at law into a hearing in equity, and the writ of error on such judgments at law into an appeal, conferring on the court of errors the office of examining into the findings of fact, contrary to the statute, the constitution, and time-honored practice. Without anticipating the suggestions that must occur to every impartial lawyer who considers the subject in the light of the adjudged cases, we conclude that as the law stands, if a jury is waived, and the court chooses to find generally for the one side or the other, the losing party has no redress on error for errors occurring in the progress of the trial except for the wrongful admission or rejection of evidence; that the court cannot be required to find special issues of fact, and, where the court chooses to find specially, the only question on such findings subject to review on error is "the sufficiency of the facts found to support the judgment."

A distinct assignment of error is based on the refusal of each of the propositions of law presented by the defendant at the close of the evidence for the approval or disapproval of the court, "as being applicable to the points of this cause to which they respectively relate." These assignments are numbered 49 to 86, inclusive. If the trial had been before a jury, and this list of 38 distinct propositions had been presented together as special requests for charges to be given the jury, the refusal to give them could not be held to be error, unless each one of them was proper to be given as asked, and not included in the court's general charge. Now, the plaintiff in error being judge, 16 of these 38 propositions should have been refused, for it has in this court abandoned the assignments based on their refusal. The law involved in the rulings on the settling of the pleadings, and on the admission or rejection of evidence over objections, and in the judgment on special findings when the findings of fact are special, must necessarily embrace all the unmixed questions of law that arise in the case; and it would be difficult, if not impossible, to press further without confusing and misleading the mind of the trial judge in the exercise of those functions of the jury which the law and the action of the parties have cast on him. Instead of affording relief in the trial of actions at law, in which it is so often difficult to draw the line between questions of law and questions of fact, such a construction as that contended for would aggravate the difficulties of the trial to an extent that would force trial judges to refuse to try and determine actions at law without a jury. If the construction contended for by the plaintiff in error was as clearly sound as we consider it clearly bad, the rulings complained of cannot be reviewed, unless they not only were excepted to at the time, but are also "duly presented by a bill of exceptions."

There is in the transcript before us what was proposed to the circuit court by the plaintiff in error as its bill of exceptions to the opinions and decisions of the judge. It covers 310 pages of the printed record. It opens with this paragraph:

"And after the expiration of said term, to wit, on the 18th day of July, in the year of our Lord one thousand eight hundred and ninety-four, by virtue of a special order to that effect made, the said defendant made up and tendered its bill of exceptions, which were settled and signed by the judge, and ordered to be made a part of the record, which said bill of exceptions is in the words and figures following, to wit."

Then follow copies of different writings offered in evidence, the depositions of all the witnesses whose testimony was admitted, the propositions of law submitted for approval or disapproval, exceptions to certain questions and answers, and a note that the party excepted to the ruling thereon, and a note of such exception to the ruling on each of the propositions of law tendered, concluding on the 374th page of the printed record with these words:

"Propose this its bill of exceptions to the said opinions and decisions of the said judge, and request him to sign the same, according to the form of the statute in such case made and provided, which is done, this 16th day of July, A. D. 1894.

Aleck Boarman,

"Judge of the Circuit Court of the United States, in and for the Southern District of Florida."

It purports to embrace all of the testimony submitted by the parties. It all appears to be set out in the order of its introduction, without any special local relation to any of the exceptions on which the 87 assignments of error claim to repose. We will not tax our time and the patience of the reader by repeating the reasoning we have heretofore delivered on this subject. *Phosphate Co. v. Cummer*, 9 C. C. A. 279, 60 Fed. 873; *The Francis Wright*, 105 U. S. 381; *Lincoln v. Claflin*, 7 Wall. 132. The document referred to cannot be taken as a bill of exceptions. We commend the authorities just cited to the consideration of counsel in this case and all other attorneys admitted or expecting to be admitted to practice at the bar of this court. We warn them that bills of exception must be prepared with reasonable reference to the well-known requirements, to receive consideration in this court. "If counsel will not heed the admonitions upon this subject, so frequently expressed by us, the judges of the circuit courts to whom the bills are presented should withhold their signatures until the bills are prepared in proper form, freed from all matter not essential to explain and point the exceptions." *Lincoln v. Claflin*, *supra*.

This much disposes of all of the 87 assignments of error except those which rest on exceptions taken to the rulings on the pleadings, and thus far we all agree. Of those not disposed of by what we have already said, only five are insisted on, and these may be reduced to one, to the effect that the court erred in sustaining the demurrer to the pleas numbered 16, 24, 26, 31, and 27, as amended. Of those pleas, the ones numbered 16, 24, 26, and 31 are founded on a construction of the contract that is the basis of the action, which a majority of this court cannot approve. The circuit court evidently construed the contract to require the plaintiff in error to pay 80 per cent. of the value of material on the ground, as well as of the work done, at the stated monthly periods at which the payments were to be made; that by material on the ground was meant all such suitable material in reasonable quantities for doing the

work as the contractor had procured from abroad, and placed in Key West, at a suitable point, to be used as needed. In this construction of the contract a majority of this court concur, and, if this is a sound construction of the contract, the pleas 16, 24, and 26 are manifestly bad, and the demurrer rightly sustained. Plea 31 is in effect a demurrer. It was properly stricken out. Plea 27, as amended, comes largely under the defendant's construction of the contract, which we do not approve, and thus falls with it. So far as it does embrace other matters, they are not well pleaded, and the demurrer was rightly sustained.

The judgment of the circuit court is affirmed.

PARDEE, Circuit Judge (dissenting). I agree with the majority of the court on the questions of practice decided, but dissent on the merits. The contract between the city of Key West and George J. Baer was a letting to the said George J. Baer of the work of grading, guttering, curbing, and constructing pavements and sidewalks and cross gutters in the city of Key West. The manner of payment was distinctly specified as follows:

"Payment will be made monthly, on estimates made by the engineer of material furnished on the ground, and work done; twenty per cent. of said estimate being reserved until the final estimate is made. When all the work embraced in this contract is fully completed, agreeable to the specifications and stipulations of this agreement, and accepted by the engineer, said engineer shall cause a final estimate to be made of the amount and value of said work, according to the terms and prices of this agreement."

This contract was construed in the court below so as to hold the city of Key West liable as purchaser for all the material the contractor, Baer, saw fit to furnish on the ground, and this construction is approved by a majority of this court; and the result is that, in a suit for damages for breach of a contract on the part of a municipal corporation for completed work, the city is made liable, not only for all the completed work, all the profits that the contractor would have made on brick gutters and crossings, on curbing unset, and on excavations that were not made, but also for a lot of brick and curbing material furnished on the ground, which was never delivered to or accepted by the corporation. Further than this, interest is given, as additional damages, on the prospective profits and price of material from judicial demand. If it is conceded that the contract between the city of Key West and the appellee, Baer, was so violated and broken by the city as to give Baer an action for damages, then, under suitable allegations, the appellee, Baer, should have been permitted to recover the amount of profit which he would have made if he had been allowed to complete the contract; the same to be arrived at by taking the difference between the cost of doing the work and what he (Baer) was to receive for it, making a reasonable deduction for the less time engaged, and for the release from the care, trouble, risk, and responsibility attending the full execution of the contract; and neither the contract nor the circumstances of the case warranted adding to such damages the cost of material which the contractor had provided for the performance of the work, but which was un-

used. If, by reason of the contract, the contractor had supplied himself with material for the construction of the work,—which construction, by the fault of the city, he was not allowed to make,—and such material had depreciated in value, or, by reason of its being placed in a suitable position for use in the work, was not worth its market value, such damages could be undoubtedly recovered if sued for and proved. But no such damages were alleged or attempted to be proved; on the contrary, the suit, so far as material is concerned, is one for the price against the city of Key West, as a purchaser of the same.

In my judgment, the contract was erroneously construed in the circuit court. What in the contract was expressly declared to be manner of payment only, and which clearly meant no more than that the city of Key West, for the perfected work, should advance, from time to time, pending the completion, such portions of the contract price as the work completed and the material on the ground would justify, was construed in the circuit court to obligate the city not only to pay for completed work, but also to purchase such material as the contractor should furnish on the ground for the purposes of the contract. The issue was distinctly made in the court below by the sixteenth plea, as follows: "That said curbing was not, and never had been, put by the plaintiff into the work contracted for by him;" by the twenty-fourth plea, as follows: "That said bricks were not, and never had been, put by the plaintiff into the work contracted for by him;" and by the twenty-sixth plea, as follows: "That all of the bricks were, shortly after the making of the contract between the plaintiff and defendant, brought by sea to the city of Key West, and placed upon a dock, not under the control of the defendant, and several hundred yards from the nearest place on the streets, to be worked on by the plaintiff, as set forth in the declaration; and that the said bricks, except some sold by the plaintiff, have remained upon said wharf until the present day, and no delivery thereof has ever been accepted by the defendant." These pleas were demurred to by the plaintiff in the court below, and the demurrers were sustained.

In my opinion, the judgment of the circuit court should be reversed, and a new trial ordered.

ABBOTT v. UNITED STATES.

(Circuit Court, D. Washington, W. D. January 12, 1895.)

No. 250.

LEASING POST OFFICES—POWERS OF POSTMASTER GENERAL—TERM OF LEASES.

The power of the postmaster general to lease buildings for post-office use is limited, by Rev. St. § 3732, which regulates contracts and purchases in behalf of the United States, to leases for a period not exceeding that covered by the appropriations of the year in which the contract is made. Nor was this power enlarged, except as specified, by the act of March 3, 1885, which provides that the postmaster general may, "in the disbursement of this appropriation," apply part thereof to leasing post offices of the first, second, and third classes for a term not exceeding five years. *Chase v. U. S.*, 15 Sup. Ct. 174, followed.

This was an action by Twyman O. Abbott against the United States to recover damages for breach of a contract to lease certain rooms for use as a post office.

W. C. Sharpstein and Crowley & Sullivan, for plaintiff.

William H. Brinker and F. C. Robertson, for the United States.

GILBERT, Circuit Judge. The plaintiff brought an action against the United States to recover damages for an alleged breach of contract. He alleges that in 1889, in the city of Tacoma, Wash., the plaintiff, in answer to a published notice calling for proposals to furnish a post-office building at Tacoma, submitted to the postmaster general a proposition to erect a brick building on certain premises belonging to the plaintiff, and to furnish to the government for a post-office building a certain room therein for a term of five years at an annual rental of \$1,200, and to furnish at his own expense all the light, fuel, and furniture necessary for the purposes of said post office, and to construct a vault in said room, all in accordance with certain plans therewith submitted; that on or about the 17th day of June, 1889, the postmaster general accepted said proposition, and the plaintiff proceeded to erect said building; and thereafter, on or about the 27th day of December, 1889, the same was occupied by the United States for post-office purposes in pursuance of said contract; that on the 30th day of September, 1890, the building was abandoned by the government, and the post office was removed to other quarters. The damages sued for consist in a small balance claimed to be due for rent during the time the premises were actually occupied as a post office, but principally of certain expenses incurred by the plaintiff in fitting up said building for post-office purposes, constructing the vault therefor, and in making certain alterations in the building in pursuance of the requirements of the post-office department, together with the necessary expense incurred at the time of the abandonment of the building in making alterations necessary to adapt the building to other uses than those for which it had been so especially constructed and fitted. The total damages claimed are \$9,500.62.

It is unnecessary to consider all of the defenses that are made to this cause of action. That principally relied upon by the defendant is the denial of the authority of the postmaster general to enter into a contract that would be binding upon the United States for the term of five years, or any greater period than that which was covered by the appropriations of the year in which the contract was entered into. The recent decision of the supreme court in *Chase v. U. S.* (decided upon the 10th day of December, 1894) 15 Sup. Ct. 174, conclusively sustains this defense. It was there held that section 3732 of the Revised Statutes, providing that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfillment, except in the war and navy departments, for clothing, subsistence, forage, fuel, quarters, or

transportation, which, however, shall not exceed the necessities of the current year," limits the contracting power of the postmaster general to such contracts as may be fully met by the appropriations devoted to such purposes, and that its scope is not enlarged by the law which declares it to be the duty of the postmaster general "to establish post offices"; that the power to establish post offices does not carry with it the power to enter into leases of post-office buildings. That case arose under a contract made by the postmaster general in the year 1870 for the lease of certain premises for post-office purposes for a term of 20 years, which premises were so occupied for 16 years of the term. The court said:

"There is no claim that the lease in question was made under any appropriation whatever, much less one adequate to its fulfillment. So that the only inquiry is whether the contract of lease was 'authorized by law,' within the meaning of the statute relating to contracts or purchases on behalf of the government. * * * While the postmaster general, under the power to establish post offices, may designate the places—that is, the localities—at which the mails are to be received, he cannot bind the United States by any lease or purchase of a building to be used for the purposes of a post office, unless the power to do so is derived from a statute which either expressly or by necessary implication authorizes him to make such lease or purchase."

It is contended by the plaintiff that the postmaster general had the power to make the contract under consideration by virtue of the provisions of the act of March 3, 1885 (23 Stat. 386), where it is provided:

"That the postmaster general may, in the disbursement of this appropriation, apply part thereof to the purpose of leasing premises for use of post offices of the first, second and third classes, at a reasonable annual rental to be paid quarterly for a term not exceeding five years."

The section so quoted is a part of the act making appropriations for the service of the post-office department for the fiscal year ending June 30, 1886. The power of the postmaster general to make contracts of lease is there expressly limited to the "disbursement of this appropriation." It does not confer upon him the general power to make such contracts, nor declare that thereafter he shall have that power, but it provides only that he may exercise that power in connection with the appropriation made for the year referred to. The most that could be claimed for this statute by the plaintiff is that during the year for which the appropriations were made in that act the postmaster general might lawfully enter into contracts beginning with that year and extending into the future for a term of five years in all, and which would be binding upon the government for that period. It is impossible to find in it any authority to enter into a contract of lease in a subsequent year. In making this contract, therefore, in the year 1889, for a period of five years, the postmaster general exceeded the powers conferred upon him by law, and the contract was not binding upon the government. Liability was incurred to the plaintiff only to pay the rental of the post-office premises for the period during which they were occupied for that purpose. For that period the United States has paid all of the rental, save and except \$46, and the plaintiff is

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entitled to judgment for that amount, and for costs as allowed (1 Supp. Rev. St. 562, § 15), since the defendant put in issue the plaintiff's right to recover the sum so due.

NORTHERN PAC. R. CO. v. DE LACY.

(Circuit Court, D. Washington. September 13, 1894.)

No. 195.

1. PUBLIC LANDS—RAILROAD GRANTS—REVOCATION.

The grant made to the Northern Pacific Railroad by the act of July 2, 1864, to aid in constructing its line across the Cascade Mountains to Puget Sound, took effect as of that date, and was not revoked or canceled by the joint resolution of May 31, 1870, by which this line, formerly the main line, was designated as the branch line, and the former branch line, to the Columbia river, was designated as the main line. U. S. v. Northern Pac. R. Co., 14 Sup. Ct. 598, 152 U. S. 284, explained.

2. SAME—EXCEPTIONS TO GRANT—PRE-EMPTION ENTRY—ABANDONMENT.

The filing, after the date of the granting act, of a pre-emption claim to lands which fall within the primary grant limits, does not operate to except the land out of the grant, where such claim is finally abandoned by the pre-emptor, and his rights forfeited, because of a decision by the land office that the land is not subject to entry.

3. SAME.

The fact that the pre-emption declaratory statement remains uncanceled on the records of the land office until after the definite location of the road cannot be considered as excepting the land from the grant, where both parties to the suit admit the fact of the previous abandonment and forfeiture by the pre-emptor, and the party contesting the railroad title predicates his right to the land upon such abandonment.

This was an action of ejectment brought by the Northern Pacific Railroad Company against James De Lacy to recover certain lands alleged to fall within the grant made by congress to the railroad company.

Ashton & Chapman and Fred. M. Dudley, for plaintiff.

Ballard & Norris, for defendant.

GILBERT, Circuit Judge. The Northern Pacific Railroad Company brings ejectment to recover the possession of 160 acres of land in section 21, township 20 N., range 3 E. of the Willamette Meridian, in the state of Washington. The plaintiff claims title by virtue of the act of congress of July 2, 1864, incorporating the Northern Pacific Railroad Company, and authorizing it to construct and maintain a railroad from a point on Lake Superior westerly, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the state of Oregon, leaving the main line at the most suitable place, not more than 300 miles from its western terminus; also, the joint resolution of May 31, 1870, authorizing the company to construct its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line, across the Cascade Mountains, to Puget Sound. The

defendant claims title and possession by virtue of a homestead entry made, or attempted to be made, by him on the 9th day of April, 1886; and he contends that the land in controversy was excepted both from the grant of July 2, 1864, and from the joint resolution of May 31, 1870, by reason of the pre-emption claim of John Flett. He alleges that John Flett filed a pre-emption declaratory statement upon this land on the 9th day of April, 1869, and occupied the same under said declaratory statement until 1871, and further states that "Flett, not having resided on the land since 1871, forfeited all his right to make final proof," but that the pre-emption declaratory statement so entered in the land office by Flett remained of record therein, and was not canceled until 1891. It is the contention of the defendant that this declaratory statement of Flett, remaining of record at the time the lands granted to aid the construction of the Northern Pacific were withdrawn from settlement, when the map of the general route was filed, and at the time the map of definite location was filed, operated to except the land from the grant to the Northern Pacific, under the words of the granting act, as the same have been construed by the courts.

The land in controversy lies within the primary limits of the land grant both of the main line of the railroad, as definitely located between Portland and Puget Sound, and the line of the Cascade branch, as definitely located between the point where it leaves the main line, and crosses the Cascade Mountains to Puget Sound. It has been held that the grant of lands to aid the construction of that portion of the main line between Portland and Puget Sound dates from the joint resolution of May 31, 1870, and that prior to that time there was no land grant whatever in aid of the construction of that portion of the road. *U. S. v. Northern Pac. R. Co.*, 152 U. S. 284, 14 Sup. Ct. 598. And if the title in controversy in this suit were to be determined by the rights which the railroad company acquired under the joint resolution, only, the decision must be for the defendant; for it is clear that at and prior to the date of the joint resolution there was upon file in the local land office a valid and subsisting pre-emption entry upon the land in controversy, which entry, being unforfeited and uncanceled, operated to except the land from the grant. *Railway Co. v. Dunnmeyer*, 113 U. S. 629, 5 Sup. Ct. 566; *Bardon v. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856; *Land Co. v. Griffey*, 143 U. S. 32, 12 Sup. Ct. 362. But the land is, as already shown, also within the primary limits of the grant to aid the construction of the Cascade branch, and it remains to be considered how the rights of the respective parties are affected by that fact. The grant of July 2, 1864, gave land in aid of the construction of a railroad across the Cascade Mountains to Puget Sound. That grant was not intended to be abrogated by the joint resolution of May 31, 1870; and there is nothing in the opinion of the supreme court in *U. S. v. Northern Pac. R. Co.*, *supra*, to the contrary. That decision goes no further than to hold that in the act of 1864 there was no land grant to aid the construction of a line between Portland and Puget Sound, and nothing to show that it was the intention of congress to connect those two points by a railroad. It must be held, there-

fore, that the grants to aid the construction of a line by way of the Columbia River valley to Portland, and a line across the Cascade Mountains to Puget Sound, took effect upon July 2, 1864, and that the joint resolution of May 31, 1870, while designating the Columbia river line as the main line, which had before been called the branch line, and naming the line across the Cascade Mountains to Puget Sound the branch line, which had before been the main line, did not, and was not intended to, revoke or cancel the grants in aid of those respective lines, but recognized the grants as existing and remaining in force. The lands in aid of the line across the Cascade Mountains to Puget Sound were granted in 1864. The land in controversy in this suit was public land at that time, and it passed to the railroad company by the grant, if at the date of the definite location, to wit, on May 26, 1884, the United States had full title, or the same were not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights.

It is contended that the Flett pre-emption entry in the land office constituted a pre-emption claim, which operated to bring the land within the exception contained in the grant, and that, therefore, the railroad company has no title upon which to recover. If there were no information before the court concerning the pre-emption claim, other than the entry in the land office, a different case would be presented; but the defendant alleges in his answer an abandonment of this land by Flett in 1871, and a forfeiture of all his rights under the pre-emption entry. He produces before us also the record of a contest before the register and receiver of the local land office of the district in which this land is situated, which contest was carried by appeal to the secretary of the interior, and by him decided on the 28th day of November, 1891. From the record so offered, it appears that the plaintiff and defendant in this case, and John Flett, were parties, and appeared and presented the evidence of their respective rights. In that contest, as appears from the record, the evidence concerning Flett's pre-emption settlement was fully submitted, and it was shown that in 1870 Flett had offered to prove up upon his claim before the officers of the local land office, and had been informed by them that the land was railroad land, and was not subject to his entry; that he made no appeal from that decision, and in consequence thereof abandoned his claim, and in 1874 made homestead entry on other lands. In consequence of the conclusion so reached by the secretary of the interior, a patent was issued from the government to the railroad company for the land on December 13, 1892. There are two periods to be regarded in determining whether the lands passed to the railroad company under its grant,—the date of the grant, and the date of the definite location of the road. If at either of these dates a claim attached, such as is mentioned in the exceptions to the granting act, the land which was subject to such claim was excluded; but if such a claim attached at a time between those dates, and was extinguished before the latter date, it would have no discernible effect upon the status of the title. *Amacker v. Railroad Co.*, 7 C. C. A. 518, 58 Fed. 850. And this irrespective of whether or not

the claim was in existence at the time of filing the map of general route, so as to exclude the land from the consequent withdrawal in favor of the railroad company. The fact that this land was not among the lands so withdrawn from sale or settlement has no bearing upon the questions involved. The withdrawal was a provision for the protection of the grant, but it was not a step in the acquirement of the railroad company's title. Its title to lands under the grant did not depend upon the withdrawal. The material fact in this case is that at the time the line was definitely located the claim of Flett no longer attached, but had been extinguished. It is immaterial whether it was extinguished by a proceeding in the land office resulting in a cancellation of the entry, or by the voluntary action of the claimant, amending his entry and releasing the lands, as in the Amacker Case, or by the abandonment and forfeiture of the claim, as in the case now under consideration. The defendant relies upon the fact that the Flett entry remained uncanceled until 1891. A declaratory pre-emption statement, on file prior to and at the time the grant was made, would be proof of the intention of congress to exclude from the grant the land covered thereby; and such an entry in the files of the land office, made after the date of the grant, and remaining in existence at the time of the definite location, so as to furnish evidence of a claim that might ripen into a title by compliance with the land laws, would likewise serve to exclude the land from the grant, for it was not the intention of the grant, as construed by the decisions, to permit an inquiry into the bona fides of such a claim, or the performance of the conditions which rested upon the claimant. But here it is not only admitted by both the parties to the action that Flett abandoned and forfeited his claim in 1871, but the very right of the defendant to possess and claim the land is predicated upon such abandonment by Flett, and the extinction of Flett's claim. Such an admission must be held to destroy the effect and force of the entry in the land office. The court will not regard the existence of an entry, the life of which is admitted to have expired, but must be guided by the admitted fact. It must be held, therefore, that the land in controversy was public land, subject to the grant in 1864, and free from any claim that would exempt it therefrom in 1884, when the line of the road was definitely located, and the plaintiff is therefore entitled to judgment.

WATTS v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(Circuit Court, D. West Virginia. June 2, 1894.)

1. JURISDICTION—OWNER CAN ALONE SUE.

Where insured property has been destroyed by a wrongdoer, and the insurer has paid to the owner less than the value of the property, the insurer cannot sue the wrongdoer in his own name for the injury. The action must be brought in the name of the owner of the property destroyed. Affirmed in 66 Fed. 460.

2. EVIDENCE—CROSS-EXAMINATION—REBUTTAL.

If evidence is not strictly admissible, yet when introduced by one party, and not withdrawn, the other party may cross-examine the witness as to

such evidence, and offer evidence in rebuttal thereof. Affirmed in 66 Fed. 460.

8. EVIDENCE—REBUTTAL.

Where the issue was made by defendant that a house could not be set on fire by the use of a soldering iron, as claimed by plaintiff, it is competent, in rebuttal, to prove that the agent of the defendant, on the morning of the burning of plaintiff's house, by the use of the same soldering iron by him, and at plaintiff's house, and used in the same way, set fire to the window casing of another house where he was soldering wires. Affirmed in 66 Fed. 460.

4. INSTRUCTIONS—SPECULATIVE REFUSED.

An instruction purely speculative in its character will be refused.

5. INSTRUCTIONS.

"Must find from the evidence" is the proper form of instructing the jury, and it is not proper to say to the jury: "You must be satisfied and convinced by the evidence," etc. Affirmed in 66 Fed. 460.

6. INSTRUCTIONS—COURT MAY EXPRESS OPINION OF EVIDENCE.

It is the settled rule in the federal courts that the judge may express his opinion on the facts, when the matters of fact are ultimately submitted to the jury.

7. INSTRUCTIONS—CONSIDERED TOGETHER.

All instructions should be considered together, and the court is not bound to qualify each one, but it is sufficient if, taken together, they propound the law correctly.

8. INSTRUCTIONS—COURT NOT REQUIRED TO GIVE AS ASKED.

The courts of the United States are not required to give instructions as requested by counsel. If the court charge the jury rightly upon the case generally, it has done all the law requires. Affirmed in 66 Fed. 460.

This was an action on the case brought by C. C. Watts, a citizen of West Virginia, against the Southern Bell Telephone & Telegraph Company, a corporation created and existing under the laws of New York. The action was brought on the 19th day of March, 1894, to recover damages for the destruction, by fire, on the 7th day of February, 1894, of the plaintiff's house and furniture.

The declaration alleged that the defendant had some time before placed a telephone in the library room of plaintiff's house, and that "on the 7th day of February, 1894, the said defendant attached to and connected with said telephone instrument another wire, called and known as a 'return wire,' and, in so doing, bored a small hole through the wall of said house, from the outside to the inside of said library room, and through the window frame of said middle bay window of said library room, to which said telephone instrument was attached, in order to pass the said return wire through the said hole, and connect it on the inside of said room with said telephone instrument; that said connection was made by the said defendant by the process known as 'soldering,' and by means of a heated soldering iron, by the use of which the said return wire and the wire attached to said telephone instrument on the inside of said room, and running up the said window from the point of its connection with said return wire, near the top of said window frame in said room, were soldered together; and that the said window frame to which said instrument was attached was composed of well-seasoned pine lumber, and liable to be set on fire at the place where the said hole was bored, by the said soldering iron being brought in contact therewith. And the said plaintiff avers and says that the said defendant, its agent and servants, so wrongfully, unlawfully, carelessly, and negligently conducted themselves about the soldering and fastening of the said two wires together, and the handling and use of the said soldering iron, so as to bring said iron in contact with said window frame at the place where said hole was bored as aforesaid, whereby said window frame was thereby, then and there, set on fire, and said dwelling house, of the value aforesaid, was then and there entirely burned and destroyed, together with the following personal property," etc., and claiming \$9,000 dam-

ages. The trial was had at Charleston, W. Va., at the May term, 1894, before the Honorable JOHN J. JACKSON, sitting as circuit judge, and a jury.

The defendants tendered a plea to the jurisdiction of the court, setting up the fact that the plaintiff was insured in the insurance companies named, and had received on the loss of his property about \$4,400, and that the said companies had been subrogated to the rights of the plaintiff, and the action is being prosecuted for their benefit, and that none of said insurance companies are residents of this district where the action is brought. To this plea the plaintiff demurred; and, on argument, the court sustained the demurrer, and held the plea bad; that the plaintiff, C. C. Watts, where the destroyed property was greater than the insurance thereon, could alone sue the wrongdoer for the destruction of his property; therefore he was alone the proper plaintiff in the action, and the court clearly had jurisdiction. Thereupon the defendant demurred to the declaration, which demurrer the court overruled. The plea of not guilty was then entered, and a jury was selected and sworn to try the issue joined. The plaintiff introduced evidence tending to prove that the defendant company sent its workmen to plaintiff's dwelling about half past 11 o'clock on the morning of February 7, 1894, to put up a return wire, and connect it with the telephone instrument which the company had, under contract, placed in the library of plaintiff's house for his use; that the family had given up said room to the agents of said company on said morning, to do said work; that said agents were at work there about an hour, and, when they had been gone about an hour, the house was discovered to be on fire. The plaintiff introduced evidence further tending to prove that defendant's workmen introduced the wire by boring a hole in the upper corner of the casing of the bay window of said library room; that the cavity of the casing extended below the floor to the sill of the house; that the wire so introduced had been soldered to a short wire on the telephone instrument; and that the other wires were at the same time and near the same place soldered with a hot soldering iron, heated to a cherry heat. The plaintiff further introduced evidence tending to show that the house had been built about seven years, and at the bottom of the casing shavings had been left by the carpenters who built it, and the contention of the plaintiff was that the fire had been communicated through the hole in the casing, and had set fire to cobwebs or other inflammable substances inside, and had dropped down to the shavings in the bottom of the casing below the floor of the library room. The plaintiff's testimony tended to prove that the family left the library when the workmen came; and that they sat down to the dinner table in the dining room, across the hall from the library, about 12:20 o'clock p. m.; and that, while they were eating their dessert, a noise in the direction of the library was heard as if something had fallen, which startled them. The plaintiff contended said noise was made by the falling of the weight in the window casing after the cord had been burned off; that they at once went into the hall, and found it full of smoke, and smoke was coming into the bay window of the library; and, running around the house, the family and servants saw fire under the library bay window, immediately under the telephone instrument, and smoke and blaze issuing from the iron ventilator underneath, and from the weather boarding over and above the window, and this was the first place where the fire was seen. The plaintiff also introduced evidence tending to prove that such a heated soldering iron as the workmen used, if placed in contact with wood of the kind the window casing was made of, would cause a blaze or spark of fire to pass through a hole in the wood, and ignite any inflammable substance inside. The plaintiff further offered evidence tending to prove that there was nothing inflammable in the cellar under the library, but that in the cellar under Mrs. Watts' room, adjoining the library, there were dry leaves several feet deep; but at the time the fire was first discovered, and all the time the house was burning, the wind was blowing from the library, and across Mrs. Watts' room, so the plaintiff contended that this showed the fire could not have originated in the leaves. The plaintiff gave in evidence other facts and circumstances tending to prove that the fire which destroyed his house was caused by the careless use of a heated soldering iron by defendant's workmen, and that there was no other cause for the fire. The defendant introduced evidence tending to prove that there was a flue in the cellar under Mrs. Watts' room, and the said cellar was full of dry leaves at the time of the fire, and its contention was

that a spark of fire went from the library up the flue, and then fell down the flue, into the cellar, and ignited the leaves. It offered evidence tending to show that no furniture was saved from Mrs. Watts' room, while the most of the furniture and books were saved from the library. The defendant also offered evidence tending to prove that fire might go up one flue in a chimney, and down another flue in the same chimney, and set fire to a house; also evidence tending to prove that the soldering iron was carefully handled at plaintiff's house, and that defendant's agents did not set fire to the house; also evidence tending to prove that fire could not with a properly heated soldering iron be communicated to the casing; that the fire could not have been communicated as claimed by the plaintiff. The defendant introduced a witness, Rauch, the workman who did the soldering, who testified there was no new hole bored to insert the new wire, but a small quarter-inch hole already there was used; that the soldering iron was not heated to a red heat, but only sufficiently to melt the solder, and that in making the connections he soldered three wires, but did not bring the iron in contact with the casing or scorch it, and that the iron was immediately passed out of the window to a workman outside, and carried away; that, after soldering, he bent the wires with his fingers, and saw nothing unusual. This witness, in answer to questions by the defendant, said, on that morning, before he went to plaintiff's house, he went to Sullivan's store, and put in a wire. On cross-examination, he described just what he did at Sullivan's, but against the objection of the defendant. Against the objections of the defendant, he stated that he soldered wires there with the same soldering iron that he afterwards used at the plaintiff's house; that he did not burn the wood at Sullivan's; that he soldered the wire at Sullivan's in the same way that he did at plaintiff's house, and in the same way he had shown the jury. The counsel for the defendant moved to exclude this evidence so elicited on cross-examination, but the court overruled the motion, on the ground that, as the defendant had opened up the question as to the work at Sullivan's, the evidence was competent. In rebuttal, the plaintiff introduced said D. M. Sullivan, who, against the objection of the defendant, gave evidence tending to prove that by the soldering done at his house by the said Rauch, in the same way as at plaintiff's house, he scorched and burned his window casing. The court overruled the objection, and refused to exclude the testimony, and held that, as the defendant had opened the subject, the evidence for that reason was competent; and, further, that it was competent substantive testimony in rebuttal, after the defendant had introduced evidence tending to show that it was impossible to set a house on fire by the use of a soldering iron in the manner claimed by the plaintiff in this case.

The plaintiff asked no specific instructions, but asked the court to charge the jury on the whole case. The defendant asked eight several instructions, as follows: "No. 1. The court instructs the jury that the defendant, by its agents, servants, and employes, had lawful right to go upon the premises and into the dwelling of the plaintiff, at reasonable times and in reasonable manner, to make necessary changes and repairs in defendant's telephone line in said dwelling. No. 2. The court instructs the jury that the presumption is that the work done by the defendant in and about plaintiff's dwelling February 7, 1894, in the line of their duty, was done in a proper and skillful manner; and, before a verdict can be found for the plaintiff, the jury must find from the evidence that said work was done in an unskillful and negligent manner, which resulted in the burning of the plaintiff's house. No. 3. The court instructs the jury that, if they find from the evidence that there are other theories of the origin of the fire that consumed the plaintiff's house equally as probable as the one on which plaintiff bases his case, then the jury must find for the defendant. No. 4. The court instructs the jury that, before they can find a verdict in this case, they must find from the evidence that the fire that consumed plaintiff's house originated from the careless and negligent use of a soldering iron, in joining wires on defendant's line in plaintiff's house by defendant's servants. No. 5. The court instructs the jury that if they find from the evidence that, at the time the plaintiff's house was burned, he had dry leaves from four to six feet deep stored in his cellar, that said cellar had an open door leading out therefrom, and that there was a seven-inch thimble in flue leading to top of open chimney from chimney butt in

same room that contained said leaves, then it is a question with the jury whether such action on the part of the plaintiff does not constitute such contributory negligence as to prevent any recovery by him in this cause. No. 6. The court instructs the jury that, if they find that the evidence proves merely that a probability exists that the burning of the plaintiff's property was caused by the negligence of the defendant's servants or agents, that will not authorize them to find a verdict for the plaintiff; but that the burden is on the plaintiff to prove that such burning was on the negligence of the defendant, its servants or agents. No. 7. The court instructs the jury that, in order to find a verdict for the plaintiff, they must be satisfied and convinced by the evidence that the fire was caused by the negligence of the defendant or its agents or servants in soldering the telephone wire in plaintiff's house, and that they will not be justified in finding for the plaintiff simply because they may find that the evidence renders it merely probable that said fire was so caused. No. 8. The court instructs the jury that even if they find from the evidence that the theory advanced by the plaintiff, and stated in the declaration, as to the origin of the fire, is more probable than any theory advanced by the defendant as to the origin of said fire, still they will not be justified in finding for the plaintiff, unless they are convinced by the evidence that said theory of the plaintiff is the true one as to the origin of said fire." These instructions were all disposed of in the charge to the jury. Nos. 1, 2, 4, and 6 were given as asked; Nos. 3 and 5 were refused; and Nos. 7 and 8 were modified.

Brown, Jackson & Knight, Okey Johnson, W. L. Ashby, and J. E. Chilton, for plaintiff.

Couch, Flournoy & Price, for defendant.

JACKSON, District Judge (charging jury). I congratulate you on the fact that you have reached, or are about to reach, the termination of this protracted trial. Of course, this is an important case to both the plaintiff and defendant. It is an action brought by the plaintiff to recover damages for the loss and destruction of his residence and personal property that was contained in said residence when it was destroyed by fire. It is alleged by the plaintiff that his residence and personal property was destroyed by fire on the 7th day of February, 1894, caused by the negligence of the agents of the defendant. I wish to say now that I do not intend in anything that I say to you to indicate what this evidence proves. You are to determine for yourselves what it proves, and, if I say anything that would seem to indicate what I think in this matter, you must pay no attention to it. I will give you the law, as is my right to do, and you are to apply it to the facts.

The evidence shows some undisputed facts. The first undisputed fact is that the house of the plaintiff was burned on the 7th day of February, 1894. The second is that the servants of the defendant were there on that morning, somewhere between 10 and 11:30 o'clock, making some changes in the telephone wires. The third undisputed fact is that the house shortly afterwards, within an hour, was on fire. The evidence then shows, if it shows anything, by some eight or ten witnesses, that the fire was at a certain point in the house. There is no evidence in the case, that I am aware of, that tends to show that this fire commenced at any other place than under the library floor in that house. If there is other evidence in conflict with this, of course you must consider it, and determine the case upon the weight of all the evidence. If there

has been any evidence given showing that the fire did not commence in the room under the library or in the library, or in or about the floor or place where it is claimed to have commenced, you must consider it, and give it such weight as you think it should have. Evidence has been tendered and offered by the plaintiff to show you the exact place where it did commence, but that is for you to consider and determine. Now, you are to determine this case from the evidence that has been delivered in your presence here. You are not only to consider the evidence of the plaintiff that has been delivered, but of the defendant also; and, in considering the evidence, it is your duty to reach some conclusion. That conclusion must be reached with reference to the weight of the evidence. That is the rule in civil cases, and it must be consonant with the preponderance of the evidence. If the plaintiff shows by a preponderance of the evidence that his house was burned by the carelessness and negligence of the defendant, then he is entitled to a verdict if the preponderance of the evidence convinces you of that fact. If, on the contrary, from the preponderance of the evidence, you reach the conclusion that the house was not burned by the negligence and carelessness of the agents of the defendant, you must find for the defendant. Or, in other words, in this case the facts and circumstances introduced by the plaintiff are to be considered as showing what he claims in this suit,—that his house was burned by reason of the carelessness and negligence of the defendant. On the other side, there is a chain of circumstances, as well as facts, offered by the defendant, to show that this house was not burned by the negligence and carelessness of the defendant, but by some other cause. If the circumstantial evidence before you shows that the house of the plaintiff was destroyed or burned down, and that the destruction or burning of the house was by reason of defendant's agents or employes working at and repairing its telephone attached to and connected with the house of the plaintiff as claimed, you should find for the plaintiff. But, if you reach the conclusion that the burning of the house was not the result of the negligence of defendant's agents or employes, you should find for the defendant. In civil cases the rule is that the jury should find for the party on whose side the weight of the evidence preponderates.

The defendant has asked eight instructions. The first one is intended to cover the right of the defendant to enter upon the premises of the plaintiff to make changes and repairs in the telephone. As the contract or lease gives the right, unquestionably it is the law, and therefore I give this instruction.

The second one, which is also given, instructs the jury that the presumptions are in favor of the work having been properly done at the plaintiff's house, and the burden of proof is upon plaintiff to show that the work was not properly done. Of course, the evidence is before the jury, and the jury will determine from the evidence as to how this work was done, whether it was carelessly or negligently done; and, if so, you will, of course, find for the plaintiff, if the fire was the result of the negligence of the defendant's agents, as claimed by the plaintiff.

The third instruction offered by the defendant the court refuses to give. It is purely speculative.

The fourth instruction I have given you. You must be convinced of the fact that the defendant, by its agents, was guilty of negligence in soldering in this house.

The fifth instruction offered by defendant the court refuses to give.

The sixth instruction is given.

Instructions 7 and 8 the court will give with slight alterations, but they are not drafted as I should like them. The seventh instruction read: Changed to "must find from the evidence," etc. Eighth instruction read: Changed to "unless you find from the evidence," etc.

I am asked to instruct you as to the weight and effect of circumstantial evidence. This character of evidence may be as convincing, and sometimes more so, than positive or direct evidence. As in this case, it is a change of circumstances coming from different sources, which are less likely to be false, and from which falsehood can be more easily detected. It is the reasoning from known and established facts to establish such as are claimed to exist, and is "capable of producing the highest degree of moral certainty in its application." Therefore, if the circumstantial facts detailed and proven before you lead your minds to the conclusion that the house of the plaintiff was destroyed and burned down, and that the firing and burning of the house was the result of the negligence of defendant's agent and employes, in soldering its wire while working at or repairing its telephone attached to and connected with the house of the plaintiff, you should find for the plaintiff. But, if you reach the conclusion from all the evidence that the burning of the house was not the result of the negligence of defendant's agents or employes, you should find for the defendant. In civil cases the rule is that the jury should find in favor of the party on whose side the weight of evidence preponderates, consistent with the probability of truth. There are two theories offered here,—one by the plaintiff, and one by the defendant. If you find for the plaintiff, you must reach a conclusion in your mind, from a preponderance of the evidence, that the burning of this house resulted from the negligence and carelessness of the defendant, his agents or employes, in their altering and repairing the telephone wires in this house, as claimed by the plaintiff; otherwise you should find for the defendant.

The defendant excepted to the refusal to give instructions 3 and 5, and modifying instructions 7 and 8, and to certain parts of the oral charge to the jury. After argument, the jury rendered a verdict for plaintiff for \$9,000, the damages claimed in the declaration. The defendant moved to set aside the verdict, as against the law and the evidence, which motion the court overruled, and entered judgment on the verdict.

NOTE. The judgment in this case was on writ of error affirmed, in Richmond, in the United States circuit court of appeals, February 5, 1895. 66 Fed. 460.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. WATTS.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 102.

1. PARTIES TO ACTIONS—SUBROGATION.

Where the owner of property, which has been destroyed by fire through another's negligence, has been paid a part of his loss by an insurer, who thereby becomes subrogated to the remedies of the assured, an action to recover from the wrongdoer the value of the property destroyed is properly brought in the name of the assured alone, and the insurer is neither a necessary nor a proper party to such action. 66 Fed. 453, affirmed.

2. EVIDENCE—CROSS-EXAMINATION—CONTRADICTING WITNESS.

W.'s house was destroyed by fire shortly after some repairs had been made to a telephone wire therein by one R., a servant of defendant, who used, in making such repairs, a hot soldering iron. It was alleged that the fire was caused by R.'s negligently setting fire to woodwork near the spot where the repairs were made. Upon the trial of an action by W. against defendant, R. testified that he had not scorched the woodwork; that he had gone to W.'s house from that of one S., where he had made similar repairs; that he had not scorched the woodwork at S.'s house; and that the repairs at W.'s had been made in the same way as at S.'s. *Held*, that it was competent, for the purpose of testing the accuracy of R.'s statements, to cross-examine him as to the manner in which he had done the work at S.'s house, and to show by S. that in fact R. had scorched the woodwork at his house. 66 Fed. 453, affirmed.

3. CONTRIBUTORY NEGLIGENCE.

It was not contributory negligence that W. had inflammable material stored in another part of his house, not immediately adjacent to the place where R. was at work, there being nothing to show that such material had anything to do with the fire, and the jury finding that the fire was caused by R.'s negligence.

4. CHARGING JURY—USE OF LANGUAGE SUGGESTED BY COUNSEL.

A judge is not bound to adopt the language suggested by counsel in asking instructions to the jury, and where the jury has been instructed, as to certain matters in issue, that they must "find from the evidence" certain facts, in order to give a verdict, it is not error to substitute this language for a direction that the jury must be "satisfied and convinced by the evidence" as to certain other facts, in an instruction requested by counsel. 66 Fed. 453, affirmed.

5. SAME—PROBABILITIES.

It is not error to refuse to instruct the jury, in an action for negligence, that, if there are other theories of the cause of the injury as probable as the one on which the plaintiff bases his claim, the jury must find for the defendant, when the jury has already been instructed that, even if they find the plaintiff's theory the most probable, they must be satisfied that it is true in order to give a verdict for the plaintiff; and had been instructed that the burden was on the plaintiff to prove negligence, and that the defendant was presumed to be free from negligence. 66 Fed. 453, affirmed.

In Error to the Circuit Court of the United States for the District of West Virginia.

This was an action by C. C. Watts against the Southern Bell Telephone & Telegraph Company to recover damages for negligence. Upon the trial in the circuit court, judgment was given for the plaintiff. 66 Fed. 453. Defendant brings error.

This was an action of trespass on the case brought by Watts, a citizen of West Virginia, against the Southern Bell Telephone & Telegraph Company, a citizen of the state of New York, to recover \$9,000, the value of a dwelling and its contents destroyed by a fire caused, as was alleged, by the negligence of the telephone company. The plaintiff offered evidence to prove that the defendant company sent its workmen to plaintiff's dwelling about half-past 11 on the morning of the 7th of February, 1894, to put in a return wire, and connect it with a telephone instrument which the company had, under a contract, placed in the library room of his house for his use, and that about an hour after the workmen left the house it was discovered to be on fire. The plaintiff offered testimony to prove that the defendant's workmen introduced the wire by boring a hole in an upper corner of the casing of a bay window of the library room; that the cavity of the casing extended below the floor to the sill of the house; that the wire so introduced had been soldered to a short wire on the telephone instrument; and that two other wires were at the same time and near the same place soldered with a hot soldering iron heated to a cherry heat. Testimony was produced to show that the house had been built about seven years, and that at the bottom of the casing shavings had been left by the carpenters who built it, and the contention of the plaintiff was that fire had been communicated through the holes in the casing, and had set fire to cobwebs or some inflammable substance inside, and had dropped down to the shavings in the bottom of the casing below the floor of the room. The plaintiff's testimony tended to prove that the family left the library when the workmen came, and were afterwards for some time eating dinner in a room across the hall on the other side of the house; that a noise was heard which startled them, and upon going into the hall it was found full of smoke, and smoke was seen coming into the bay window of the library, and running around the house the family and servants saw fire under the library bay window immediately under the telephone instrument, and smoke and blaze issuing from the iron ventilator underneath, and from the weatherboarding over and above the window, and that this was the first place where the fire showed itself. The plaintiff also offered evidence to prove that such a heated iron as the workmen used, if placed in contact with seasoned wood of the kind the window casing was made of, would cause a blaze or spark of fire to pass through a hole in the wood, and ignite any inflammable substance inside. The plaintiff gave in evidence other facts and circumstances tending to prove that the fire which destroyed his house was caused by the careless use of a heated soldering iron by defendant's workmen, and that there was no other cause for it.

The defendant produced a witness, Rauch, the workman who did the soldering, who testified that there was no new hole bored to insert the new wire, but a small quarter-inch hole already there was used; that the soldering iron was not heated to a red heat, but only sufficiently to melt the solder; and Rauch testified that in making the connections he soldered three wires, but did not bring the iron in contact with the casing or scorch it, and that the iron was immediately passed out of the window to a workman on the outside, and carried away; that after the soldering he bent the wires with his fingers, and noticed nothing unusual. Testimony of the plaintiff's witnesses showed that in the cellar, in a part partitioned off and not under the library room, but adjoining it, there was a considerable quantity of dried leaves, but that under the library there was nothing but some vegetables.

The defendant offered testimony to show that such an iron would not ignite wood, and that fire could not be communicated in that way, and produced a board before the jury, and the witness Rauch bored holes through it, and put a wire through it, and soldered it, to illustrate this contention. The witness Rauch, being cross-examined by the plaintiff, testified that he did not know of a case in which, in soldering telephone wires, he had ever burned the wood, and did not think he could have done so, and did not think a careful man would burn the wood, and that he had done the soldering at plaintiff's house in the same way he had done it at Sullivan's. The plaintiff then, in rebuttal, produced the witness Sullivan, who testified that in putting in the return wire at his store that same morning the workmen had bored three new three eighths-inch holes, and after this fire his attention was called to these holes, and he saw that where the soldering had been done there

were on the wood two scorched or burned places, each about one inch wide, one about two and one-half inches long, and the other about one and one-half or two inches long, one above and the other below one of the holes. The defendant objected to the evidence of the witness Rauch and the witness Sullivan, and excepted to the ruling of the court admitting their testimony as to the manner of putting in the return wire which had been put in at Sullivan's store just before Rauch went to plaintiff's house, and to the evidence of the scorching or burning of the window frame at Sullivan's store, as irrelevant and impertinent to the issue on this case.

The defendant, before the jury was sworn, filed a plea to the jurisdiction, alleging that the plaintiff at the time of fire was insured in two foreign insurance companies and a Pennsylvania company, and had been paid insurance amounting to \$4,500, and that the said companies were subrogated to the plaintiff's right of action in this case, and, as the said companies were not citizens of West Virginia and the plaintiff was a citizen of that state, the court ought not to take cognizance of the case. To this plea the plaintiff demurred, and the court sustained the demurrer, and ordered the plea stricken out. The defendant, having excepted to this ruling, then filed the general issue plea of not guilty.

The defendant prayed for eight instructions to the jury, as follows: "No. 1. (Granted.) The court instructs the jury that the defendant, by its agents, servants, and employes, had lawful right to go upon the premises and into the dwelling of the plaintiff, at reasonable times and in a reasonable manner, to make necessary changes and repairs in defendant's telephone line in said dwelling. No. 2. (Granted.) The court instructs the jury that the presumption is that the work done by the defendant in and about plaintiff's dwelling, February 7, 1894, in the line of their duty, was done in a proper and skillful manner; and before a verdict can be found for the plaintiff the jury must find from the evidence that said work was done in an unskillful and negligent manner, which resulted in the burning of the plaintiff's house. No. 3. (Refused.) The court instructs the jury that if they find from the evidence that there are other theories of the origin of the fire that consumed the plaintiff's house, equally as probable as the one upon which the plaintiff bases his case, then the jury must find for the defendant. No. 4. (Granted.) The court instructs the jury that, before they can find a verdict for the plaintiff in this case, they must find from the evidence that the fire which consumed plaintiff's house originated from the careless and negligent use of a soldering iron in joining wires on defendant's line in plaintiff's house by defendant's servants. No. 5. (Refused.) The court instructs the jury that if they find from the evidence that at the time plaintiff's house was burned he had dry leaves from four to six feet deep stored in his cellar; that said cellar had an open door leading out therefrom; and that there was a seven-inch thimble in a chimney flue in same room that contained said leaves,—then it is a question for the jury whether such action on the part of the plaintiff does not constitute such contributory negligence as to prevent any recovery by him in this case. No. 6. (Granted.) The court instructs the jury that, if they find that the evidence proves merely that a probability exists that the burning of the plaintiff's property was caused by the negligence of the defendant's servants or agents, that will not authorize them to find a verdict for the plaintiff, but that the burden is on the plaintiff to prove that such burning was the result of the negligence of the defendant, its servants or agents. No. 7. (Refused, but granted as amended by the court.) The court instructs the jury that, in order to find a verdict for the plaintiff, they must be satisfied and convinced by the evidence that the fire was caused by the negligence of the defendant, or its agents or servants, in soldering the telephone wire in plaintiff's house, and that they will not be justified in finding for the plaintiff simply because they may find that the evidence renders it merely probable that said fire was so caused. No. 8. (Refused, but granted as amended by the court.) The court instructs the jury that even if they find from the evidence that the theory advanced by the plaintiff, and stated in the declaration, as to the origin of the fire, is more probable than any theory advanced by the defendant as to the origin of said fire, still they will not be justified in finding for the plaintiff, unless they are convinced by the evidence that said theory of the plaintiff is the true one as to the origin of the fire." The court gave in-

structions 1, 2, 4, and 6, as asked for, and refused to give instructions Nos. 3 and 5, and, in lieu of instructions Nos. 7 and 8 as asked for, gave Nos. 7 and 8 as modified. "No. 7. (Granted as modified.) The court instructs the jury that, in order to find a verdict for the plaintiff, they must find from the evidence that the fire was caused by the negligence of the defendant or its agents or servants in soldering the telephone wire in plaintiff's house, and that they will not be justified in finding for the plaintiff simply because they may find that the evidence renders it merely probable that said fire was so caused. No. 8. (Granted as modified.) The court instructs the jury that even if they find from the evidence that the theory advanced by the plaintiff, and stated in the declaration, as to the origin of the fire, is more probable than any theory advanced by the defendant as to the origin of said fire, still they will not be justified in finding for the plaintiff, unless they find from the evidence that said theory of the plaintiff is the true one as to the origin of the said fire." The defendant excepted to the refusal of instructions Nos. 3 and 5, and to the modification of Nos. 7 and 8, and also excepted to the following portions of the court's oral charge to the jury: First. "The evidence shows, if it shows anything, by some eight or ten witnesses, that the fire was at a certain point in the house. There is no evidence in the case, that I am aware of, that tends to show that this fire commenced at any other place than under the library floor in that house,"—the defendant claiming that there was evidence tending to show that the fire commenced in the cellar room under the room known as "Mrs. Watts' Room," in the rear of the library, and that the portion of said charge above quoted was therefore improper. Second. The defendant also excepted to those portions of said charge which contain the following language: (a) "If the plaintiff shows, by a preponderance of the evidence, that his house was burned by the carelessness and negligence of the defendant, then he is entitled to a verdict, if the preponderance of evidence convinces you of that fact." (b) "If the circumstantial evidence delivered before you shows that the house of the plaintiff was destroyed or burned down, and that the destruction and burning of the house was, by reason of the negligence of the defendant's agents or employes, working at and repairing its telephone, attached to and connected with the house of the plaintiff, as claimed, you should find for the plaintiff." (c) "If the circumstantial facts detailed and proven before you lead your minds to the conclusion that the house of the plaintiff was destroyed and burned down, and that the firing and burning of the house was the result of the negligence of the defendant's agents or employes in soldering its wire while working at or repairing its telephone, attached to and connected with the house of the plaintiff, you should find for the plaintiff." It appears from the court's oral charge, made part of the bill of exceptions and printed in the record, that, in connection with that portion of the charge first above excepted to, the court said to the jury: "If there is other evidence in conflict with this, of course you must consider it, and determine the case upon the weight of all the evidence. If there has been any evidence given showing that the fire did not commence in the room under the library or in the library, or in or about the floor or the place where it is claimed to have commenced, you must consider it, and give it such weight as you think it should have." The verdict and judgment was in favor of the plaintiff for \$9,000, and the defendant brings error on the foregoing exceptions.

Flournoy & Price and Robert W. Stiles (George E. Price, of counsel), for plaintiff in error.

Ikey Johnson and J. F. Brown, for defendant in error.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

MORRIS, District Judge (after stating the facts). The demurrer to defendant's plea to the jurisdiction, which was sustained by the court, raises the question whether Watts could, in his own name and alone, institute an action at law to recover the full value of the property alleged to have been destroyed by the

defendant's negligence, after having been paid by the insurers about one-half his loss. It is contended that as the insurers were subrogated to the extent of their payments, and were entitled to be repaid if Watts recovered the whole loss from the defendant, they were necessary plaintiffs in the action, and if made plaintiffs the circuit court would be without jurisdiction, as then all the plaintiffs would not be citizens of the state in which the suit was brought. *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303. This contention cannot be maintained. It is true that the payment by the insurer works an equitable assignment of the assured's claim against the wrongdoer, but the wrongful act is indivisible, and gives rise to but one cause of action. The insurer is subrogated only to the remedies of the assured, and the rule is well settled that the suit is properly brought in the name of the person whose property has been destroyed. If he recovers a sum which, with the amount he has received from the insurers, is more than his whole loss, the excess belongs to the insurers, and he receives it as trustee for them. The wrongdoer is bound to respond in damages for the whole loss to the owner of the property, and how the money recovered is to be distributed does not concern him. *Aetna Ins. Co. v. Hannibal, etc., R. Co.*, 3 Dill. 1, Fed. Cas. No. 96; *Hart v. Railroad Co.*, 13 Metc. (Mass.) 99; *Chicago, etc., R. Co. v. Pullman South. Car Co.*, 139 U. S. 79-86, 11 Sup. Ct. 490; *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566; *Sheld. Subr.* §§ 230, 231. In an action at common law the right of the insurer is properly asserted in the name of the assured. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 321, 6 Sup. Ct. 750, 1176.

The statute of West Virginia, providing that the assignee of any bond, note, account, or writing, not negotiable, may maintain thereupon any action in his own name, without the addition of "assignee," which the original obligee or payee might have brought, has no application to a case of subrogation, where the payment by the insurer is only a partial indemnity.

The defendant's exception to the admission of testimony of the witness Rauch and the witness Sullivan we do not think well taken. Rauch was defendant's witness; the man employed by it who soldered the wire at plaintiff's house, and whose alleged negligence the plaintiff charged had resulted in the burning of his house. He was asked in chief by defendant where he had worked that morning next before going to plaintiff's house, and, when he answered at Sullivan's store, he was asked to describe what he had done there, and how he had bored the holes there, and how he had put the wire through, and then was asked to describe how he put in the wire at plaintiff's house. Upon cross-examination of this witness, it was the plaintiff's right to test the accuracy of his statements with regard to these matters, and why he had done them in one way at Sullivan's and in another way at plaintiff's house, and his reasons for boring a half-inch hole at Sullivan's, and for using a quarter-inch hole at plaintiff's. All the cross-examination on these matters was competent, not to show to the jury how the work had been done by the witness at Sullivan's, but to test

the accuracy and consistency of the plaintiff's statements as to how he had done the work at plaintiff's house, and the weight which the jury should give to his statements. And with regard to the scorching of the window frame at Sullivan's, the witness Rauch had testified that he did not think he had ever scorched or burned the woodwork of a house in soldering a telephone wire; that he had soldered the wire at plaintiff's house just as he had done at Sullivan's; and that he had not burned the wood at Sullivan's, and would consider it careless to do so. It should be borne in mind that plaintiff's house had been destroyed, and that no one saw the witness do the soldering there or saw the window casing after he left, and direct proof of its condition when witness left it was not obtainable. When, therefore, he testified that he did the soldering with the same iron and in the same way at both places, and did not burn the wood at either place, and when the defendant had him experiment with a piece of wood before the jury to demonstrate that such a heated iron would not burn the wood, surely it was competent, material, and pertinent for the plaintiff to show that the witness had actually scorched the window frame at Sullivan's. It is quite true that proof of the fact he had at other times been careless or unskillful would not be competent testimony to show that he was careless or negligent at the plaintiff's house, but by cross-examination any inconsistency in his testimony could be exhibited, and the fact stated by him that the heated iron would not burn a window frame was a fact which was directly pertinent to the issue, and could be contradicted. This fact was directly pertinent to the question of the possibility of the fire originating from the use of the soldering iron, the defendant having adduced testimony to show its impossibility.

The other exceptions relate to alleged errors in the instructions and charge. By the defendant's third prayer, which the court refused, the court was asked to say that, if the jury found that there were other theories of the origin of the fire equally as probable as the one on which the plaintiff based his claim, they must find for the defendant. It cannot be said that this proposition was happily worded. The duty of the jury was not to evolve theories, and base their verdict upon probabilities. It was to determine whether or not the plaintiff had proved that the fire originated from the negligent use of the soldering iron by defendant's workman. The court instructed them that before they could find for the plaintiff they must reach the conclusion from the evidence that the fire resulted from the defendant's negligence; otherwise they must find for the defendant. And by the seventh instruction, as granted, they were told that, even if they found from the evidence that the theory advanced by the plaintiff was more probable than any advanced by the defendant, still they would not be justified in finding for the plaintiff, unless they found from the evidence that the plaintiff's theory was the true one. They were also instructed by defendant's sixth prayer that the burden of proof was on the plaintiff to prove that the fire was the result of the defendant's negli-

gence; and by the defendant's second prayer, that the presumption was that the work had been done in a skillful and proper manner. We think that the gist of the defendant's third prayer was better expressed in other instructions asked by the defendant and granted, and also in the court's charge. It was therefore no error to refuse it in the form asked by the defendant's third prayer.

The defendant's fifth instruction asked the court to say that the fact that in a part of the cellar, under a room adjoining the library and divided from the cellar under the library, there were leaves banked up to the height of four or five feet in a corner, and that in part of the cellar there was a flue to the top of the chimney, was evidence from which the jury might find that the plaintiff was guilty of contributory negligence. Contributory negligence is such want of ordinary care on the part of a plaintiff as, co-operating with the negligent act of the defendant, is a proximate cause of the injury. How could it be held to be want of ordinary care in the plaintiff to keep leaves or newspapers or kindling wood in a part of his cellar divided off by a partition from the cellar under a room in which a workman was to solder a telephone wire? The fact that there were leaves in the cellar was a pertinent fact for the jury to consider in ascertaining if the fire might not as well have originated in some other way as from the hot soldering iron, but, when the jury had found that the fire originated from the negligent use of the hot soldering iron, the fact that there were leaves in the cellar had no causal connection with the origin of the fire. The prayer does not even require the jury to find that the fire was first communicated to the leaves, or that the fire could have been prevented if the leaves had not been in the cellar. It is quite obvious that there was no error in rejecting this prayer.

The next exception is to the modification which the court made in the defendant's seventh and eighth prayers. The court substituted in the defendant's seventh prayer, for the words, "they [the jury] must be satisfied and convinced by the evidence," the words, "they must find from the evidence"; and in the eighth prayer, for the words, "unless they are convinced by the evidence," the words, "unless they find from the evidence." An instruction to the jury that they must "find" a fact as to which there is conflicting testimony means, by common acceptance, that they must be satisfied of it to that degree of certainty which the case requires,—that is, in a criminal case, as to a fact necessary to constitute the crime beyond a reasonable doubt; in a civil case, by such preponderance of evidence as satisfies the mind. The word "find" had been several times used in this sense in the judge's charge and in the instructions granted at defendant's request. The court had used the words "to find," "to be convinced," "to reach the conclusion," in a way that could leave no doubt as to what was intended. That the court adhered to the word already used to express the same meaning is not error. A judge is not bound to adopt the language suggested by counsel, and should refuse to use it when it would seem to indicate a distinction where none is intended by him. *Ayers v. Watson*, 137 U. S. 601, 11 Sup. Ct. 201.

It is excepted to that the judge in his charge said that he was not aware of any evidence which tended to show that the fire commenced at any other place than under the library floor, but at the same time the judge said to the jury that, if there was any conflicting testimony tending to show that the fire commenced in any other place, they must consider it, and determine the case upon the weight of all the evidence. This certainly left all the testimony to be considered by the jury, and is not error. *Allis v. U. S.*, 155 U. S. 117, 15 Sup. Ct. 36.

Certain portions of the judge's charge set out in the statement of facts preceding this opinion, and marked "a," "b," and "c," were excepted to upon the ground that the language used, as to the acts of negligence which would make the defendant liable, was too comprehensive, and that the instruction should have been restricted to the acts of negligence alleged in the plaintiff's declaration. The declaration alleged but one act of negligence, viz. that in soldering the wire the soldering iron was carelessly and negligently brought in contact with the window frame at the place where the hole was bored, and thereby the house was set on fire. This was the sole act of negligence which the proof tended to establish. It was the one issue of fact by which, throughout the trial, the pertinency of the evidence offered was tested, and when, therefore, the court spoke to the jury with regard to the plaintiff's dwelling having been burned by the carelessness or negligence of the defendant's workman, there was but one act of negligence to which his remarks could possibly apply. In our examination of the whole case we do not find any rule of law incorrectly stated, or any instruction granted or refused in which there is reversible error. The judgment is affirmed.

ZACHRY et al. v. NOLAN.

(Circuit Court of Appeals, Fifth Circuit. February 19, 1895.)

No. 336.

1. CONTRACTS—ACCEPTANCE—QUESTION FOR JURY.

Plaintiff gave to defendants a written option to lease certain shares of stock in the A. Co., owned by her,—such option to continue for 30 days,—and at the same time gave defendants a proxy to vote on such stock. Within the 30 days, defendants offered, at a stockholders' meeting, to vote on the stock, and, when their right to do so was challenged, exhibited the proxy and the option in proof of their right, which proof was accepted, and their votes received. Plaintiff afterwards sued defendants for the rent of the stock, specified in the option, as upon accounts stated, claiming that defendants' acts in voting on the stock constituted an acceptance of the option. *Held*, that the question whether the option had been accepted or not was for the jury, and it was error to charge peremptorily that defendants' acts constituted an acceptance.

2. SAME—EVIDENCE.

Held, further, that a letter written by plaintiff to defendants some time after the meeting at which they voted on the stock, claiming that her power of attorney to vote the stock had been obtained by defendants' promise to guaranty her the rent specified in the option, which had not been fulfilled, and revoking the power of attorney, was admissible in evi-

dence as tending to show that, when it was written, plaintiff did not consider that the option had been accepted and a complete contract made.

2. SAME—STATUTE OF FRAUDS.

Though a contract for the use of property is invalid, by the statute of frauds, its covenants are still valid as long as the use continues, and reference may be made to them for the terms and times of payment, as a measure of the value of the use.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

This was an action by Ione Nolan against J. T. Zachry and L. Lanier upon an alleged account stated. In the circuit court, plaintiff recovered judgment. Defendants bring error. Reversed.

H. C. Tompkins, for plaintiffs in error.

John M. Chilton and Roquemore & White, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. This is a suit brought in the court below by the defendant in error against the plaintiffs in error, claiming \$3,590 as due by account. In the second count of the complaint the money is claimed as due by six separate accounts, stated on specified dates, for \$518 each. To the complaint the defendants below first filed the plea of general issue, and subsequently filed the special plea of the statute of frauds. To the latter plea a demurrer was interposed by the plaintiff, and sustained by the court; and the cause went to trial on the plea of the general issue, which cast on the plaintiff the burden of proving the allegations of the complaint. The plaintiff introduced in evidence a written instrument, in words and figures as follows:

"State of Louisiana, De Soto Parish. Be it known that I, Mrs. Ione Nolan, of said state and parish, do contract and agree with W. S. Jackson, L. Lanier, and J. T. Zachry, all of Troup county, Georgia, as follows: Whereas, the said Ione Nolan is the owner of seventy-four (74) shares in the Alabama and Georgia Manufacturing Company, of Alabama, and being desirous of realizing the best income on said stock, does hereby covenant and agree with said Jackson, Lanier, and Zachry, to give them, and such others as may be associated with them, the option of leasing my seventy-four (74) shares in said manufacturing company for the period of five years at seven (7) per cent. per annum on said stock. This option to be binding, and stand for thirty days from the fourteenth day of July, 1888, and this option shall not be revoked by me during the time specified. In testimony whereof, I have hereunto set my hand and affix my seal this July 14th, 1888.

Ione Nolan. [L. S.]

"Authorized by me.

Walter Nolan.

"Attest: L. H. Hudson. Jas. H. Sutherlin."

To this paper was affixed an acknowledgment of its execution by the plaintiff. The plaintiff then introduced evidence to the effect that at the regular annual meeting of the stockholders of the Alabama & Georgia Manufacturing Company held on the 25th July, 1888, adjourned to the 2d August, 1888, when the plaintiff's name was called, the defendant Zachry announced that he held her proxy, and would vote her stock; that his right to do so was challenged by the officer calling the roll of stockholders, who demanded to see Zachry's authority; that Zachry produced as his authority

an ordinary proxy, such as is usually employed for such purpose, which was signed by the plaintiff, and which authorized him to vote the stock; that at the same time he produced the written instrument hereinbefore set out; and that he announced at the time of producing the two instruments that he claimed the right to vote the stock, under the authority conferred by them. Upon the production of these instruments his right to vote was no longer challenged. The evidence further was that by means of voting this stock the defendants were enabled to control the election of the directors of the company, and did elect three new members of the board of directors, and thereby got control of it. The proxy referred to was not produced, but it was proven that it was given to the committee on proxies at the stockholders' meeting, and that papers of this character were kept by the company in the state of Georgia, and outside of the jurisdiction of the court. The defendant Zachry testified that he voted the stock of the plaintiff; that the power of attorney under which the stock was voted was given to him by the plaintiff, and that it gave him authority to vote her stock; that he got it on the 14th July, 1888, the same day the option contract was delivered to him; that they were both signed at the same time, but were written on different sheets of paper. He further testified that he went to the plaintiff's home, in Louisiana, for the purpose of getting the option and power of attorney, and obtained them from her there, and that his codefendant, Lanier, knew he was going there, and the purpose of his visit. This is, in substance, the case made by the evidence. There are many assignments of error, but the material questions raised by them, and which we deem it necessary to especially consider, are (1) whether the circuit court erred in giving the peremptory charge for the plaintiff; and (2) whether the court erred in excluding evidence offered by the defendants tending to show the revocation of the option contract introduced in evidence by the plaintiff. -

To render the defendants liable in this action, there must have been an acceptance by them of the option. There was an offer of a contract. It was not binding on defendants until accepted, and it reserved a limited time within which it could be accepted. While the plaintiff prescribed a certain time within which the option was to stand, she did not prescribe the manner and form in which it was to be accepted. The contract was not perfect until the offer was accepted, and the acceptance must have been absolute and unqualified. 3 Am. & Eng. Enc. Law, p. 850, and authorities cited in note. In this case there was no express acceptance of the option; but the plaintiff's contention is that, from the voting of the stock by the defendant Zachry under the authority of the plaintiff's proxy, and his claiming the right to do so under the proxy and the option, an acceptance was to be implied. A contract may be implied by conduct, but such conduct must be unambiguous and unconditional. *Id.* p. 856. The inference to be drawn from Zachry's acts was an inference of fact, and not of law; and the jury, and not the court, should have determined it. It is only when the inference is so clear that the jury cannot fairly draw

any other that the court is justified in taking the case from the jury. "Where a cause fairly depends upon the effect and weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved. It should never be withdrawn from them unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it." *Insurance Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18. Zachry's right to vote the stock was derived from the plaintiff's power of attorney, and from that alone. The "option contract," as it is called, would have given him no right to vote the stock, even if he had, at the time he exhibited it, expressly declared his acceptance of the option. But he made no such declaration. His act of voting must then have been referable to the power of attorney, which alone gave him the right to vote. If his conduct, from which an acceptance of the option was inferred, was as referable to one state of facts as to another, it cannot be said to have been unambiguous and unqualified. Neither can his conduct in voting the stock be construed by the motive that may have induced the plaintiff to give him the proxy to vote it, nor the option to lease it. The court erred in giving the peremptory charge, the effect of which was to say that from the act of voting the stock, and the attending circumstances, the law implied conclusively an acceptance of the option to lease the stock for the term of five years. The court thus withdrew from the jury the cause, which fairly depended upon the effect and weight of the testimony.

We are also of the opinion that the court erred in excluding the plaintiff's letter of October 9, 1888, with the evidence offered in connection therewith by the defendants. The letter referred to is as follows:

"Mansfield, La., Oct. 9th, 1888.

"Mr. J. T. Zachry—Dear Sir: Several months since, and before the meetings of stockholders of the Ala. & Ga. Mfg. Co. in July last, you obtained from me a power of attorney to vote my stock in that company (74 shares). This was obtained from me on the representation that you and Mr. Lanier were going to lease the stock of Messrs. Hutchinson, Jackson, and perhaps others, and the assurance that if I would sign the power I should receive seven per cent. on the amount of the stock, and within thirty days I should be given a written guaranty by you and Mr. Lanier,—either of you would give,—agreeing to pay me seven per cent. per annum for five years. I have never received either the seven per cent., or any guaranty or contract. The whole ground on which my signature was obtained was erroneous, and no consideration has been paid, or contract made, &c. I therefore hereby revoke and cancel the power of attorney given to you, and request that it be sent back to me. I would also notify you that you are not authorized to act under it further, as I have given another power of attorney, which supersedes the one mentioned.

"Yours, truly,

Ione T. Nolan.
"Walter Nolan."

The suit was in *assumpsit*, on accounts stated. The option contract was in evidence to prove the accounts declared on. It seems to us that the letter (and the evidence offered with it) was clearly admissible to show how the plaintiff considered and treated the option,—that she considered it had not been accepted; also, to show by her own declarations that no contract of lease was ever made,

and that she revoked and canceled the power of attorney given by her to Zachry. This evidence may not have been admissible, under the pleadings, to show, or as tending to show, a rescission of the contract of lease, but was admissible as tending to rebut and avoid the claim set up in the complaint, and sought to be established by the introduction of the option contract,—that on certain specified dates an account was stated between the parties. It further tended to show that, if said contract of lease was ever perfected, it had, by the act of parties, ceased to exist prior to the dates specified, on which the accounts sued on are alleged to have been stated.

We think the court erred in admitting, against the defendants' objection, a good deal of evidence tending to show the character of the administration and the condition of the corporation subsequent to the election of the board of directors, at which the defendant Zachry voted the plaintiff's stock. This evidence was irrelevant and immaterial, and did not in any way tend to establish the issues in the cause. It was calculated to mislead the jury, and to invite them to consider issues that were not in the case.

The court also erred in refusing to permit testimony that, after the receipt of the plaintiff's letter by Zachry, the defendants never exercised any acts of ownership over the stock. Such evidence was competent as a circumstance tending to show, in connection with other erroneously excluded testimony in the cause, the revocation of the option contract, and also as tending to show the extent of the defendants' use and control of the stock.

We find no error in the court's ruling on the demurrer to the special plea.

The suit is not on the contract of lease of the stock, but it is an action on account for the use of the stock. If the contract was made by the implied acceptance of the option, as claimed by the plaintiff, it may be invalid and unenforceable, because not in writing; but its covenants are valid as long as the use of the stock by the defendants lasts, and reference may be made to them for the terms and time of payment, in an action of this kind, as a measure of the value of such use. 8 Am. & Eng. Enc. Law, pp. 660-688. In our opinion the court also erred in its refusal to give charges numbered 1, 4, and 6, requested by the defendants. The judgment is reversed and the cause remanded, with directions to the circuit court to award a new trial.

Reversed and remanded.

N. K. FAIRBANK & CO. v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, S. D. Ohio, W. D. March 15, 1895.)

No. 4,535.

1. DEFINITION—MACHINERY—CAR AXLE.

The axle of a railroad car is a part of its motive machinery; and an accident caused by the breaking of such axle comes within an exception, in a bill of lading, of "accidents to boilers or machinery."

2. PRACTICE—JUDGMENT AGAINST GENERAL VERDICT.

Where, under the Ohio practice, a jury has found a general verdict, and has also found certain specific facts, in answer to written questions, if the general verdict is erroneous the court cannot direct judgment against it, unless all the facts necessary to support such judgment are expressly found, but can only direct a new trial, though the evidence to support a judgment against the general verdict is undisputed.

This was an action by N. K. Fairbank & Co. against the Cincinnati, New Orleans & Texas Pacific Railway Company to recover damages for the loss of certain oil, shipped over defendant's road. After a verdict for the plaintiff, the defendant moves to enter judgment for it, notwithstanding the verdict.

Ramsey, Maxwell & Ramsey, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, for defendant.

SAGE, District Judge. The plaintiff, a corporation, sues the defendant, as a common carrier, for the recovery of \$5,270.53, with interest, the value of four tanks of oil received by the defendant at Chattanooga, Tenn., under an agreement, in consideration of a reasonable reward to be paid, to carry safely for the plaintiff, and to deliver the same to the Louisville Southern Railroad Company, at its point of intersection with the defendant's line for transportation, thence to the plaintiff, at Chicago. The plaintiff avers that the defendant did not safely carry and deliver said goods, but failed to do so, whereby they were wholly lost to plaintiff. The defendant pleads, in substance, the general issue, and, specially, that on the 4th of May, 1889, the East Tennessee, Virginia & Georgia Railway Company engaged, by contracts in writing, for an agreed compensation, with the Southern Cotton-Oil Company, as shipper thereof, to transport for it from Atlanta, Ga., to Chicago, Ill., four tank cars of cotton oil consigned to the plaintiff, being the oil mentioned in the petition. It is set forth in the answer that, in the performance of said contracts, the East Tennessee, Virginia & Georgia Railway Company carried said cars of oil from Atlanta to Chattanooga, Tenn., the terminus of its line of railroad, and there delivered them to defendant, with the request to transport them from Chattanooga over its line, or a part thereof, to its junction with the next connecting carrier, in its line of transportation to Chicago.

It is alleged in the answer that, in the course of transportation from Chattanooga, a car axle of one of the cars composing the train in which said four cars were drawn, without any fault or negligence on the part of the defendant, broke, whereby the train was thrown from the track, and the cars containing the oil were destroyed, and the oil lost.

The defendant further answers that, by the terms of said contracts, it was agreed that neither the East Tennessee, Virginia & Georgia Railway Company, nor any connecting carrier whose line it might employ in effecting the transportation of said oil to Chicago, should be liable for any loss caused by any accident to machinery; that the loss of said oil was solely due to and caused by an accident to certain machinery, to wit, the axle of a car in defendant's

train in which said four tanks of oil were being transported, which axle, without any fault or negligence on the part of defendant, broke down under said car, whereby said four cars of oil, being in the rear thereof, were derailed, and the contents thereof were lost.

The reply puts in issue every allegation contained in the defenses specially pleaded.

For the purpose of dispensing with proof, it was stipulated in writing, at the beginning of the trial, and before any evidence was introduced, that the plaintiff, on or about April 30, 1889, purchased from the Southern Cotton-Oil Company, at Atlanta, the four tanks of oil mentioned in the petition for the sum of \$5,270.53, which was paid by the plaintiff to said company, and that said price was a fair and reasonable value of said oil; also, that on or about May 4, 1889, said oil was delivered by the Southern Cotton-Oil Company to the East Tennessee, Virginia & Georgia Railway Company, for transportation, and that said railway issued therefor the bills of lading to which reference will hereinafter be made. The jury returned a general verdict in favor of the plaintiff, and, to questions in writing submitted to them in accordance with the Code of Procedure of Ohio, answered, in writing: First. That the defendant's freight train, composed in part of four cars containing the oil sued for in this case, was thrown from the track by reason of the breaking of an axle of one of the cars of said train. To the question whether the broken axle was an axle of any one of said four cars, the jury answered that they disagreed.

They further answered, in response to a third question, that the breaking of the axle was not caused by the fault or negligence of the defendant. The bills of lading referred to above are in terms through bills of lading. Each is for a tank of cotton-seed oil consigned to N. K. Fairbank & Co., Chicago, Ill., via the East Tennessee, Virginia & Georgia Railway, Cincinnati, New Orleans & Texas Pacific, Cincinnati, Hamilton & Dayton, and Louisville, New Albany & Chicago Railroads.

It was stipulated, among other things, in each of said bills, that the liability of each carrier, as to goods destined beyond its own route, should be terminated by a proper delivery of them to the next succeeding carrier; that no carrier should be liable for any loss or damage arising from accidents to boilers or machinery; that the bill of lading "is signed for the different carriers who may be engaged in the transportation, severally, not jointly, and each of them is to be bound by and have the benefit of all the provisions thereof as if signed by it, the shipper, owner, and consignee. The acceptance of this bill of lading is an agreement on the part of the shipper, owner, and consignee of the goods to be bound by all of its stipulations, exceptions, and conditions, as fully as if they were all signed by such shipper, owner, and consignee." It is also stipulated in the bill of lading that it shall have the effect of a special contract, not liable to be modified by a receipt from or act of an intermediate carrier. The defendant moves the court to enter judgment in favor of the defendant upon the answers to the special

interrogatories submitted to the jury, or to set aside the general verdict, and grant a new trial, for the reasons assigned in the motion.

The effect of the stipulation above set forth was to withdraw from the issues to be submitted to the jury all the facts stipulated, as effectually as if they had been incorporated in an amendment to the answer. The shipper must be regarded as an agent of the plaintiff in making the contracts set forth in the bills of lading. Those contracts were for the carriage of the oil to Chicago over the lines of railroad mentioned in the bills. They were signed by A. M. Taylor, who testified that he was agent for the East Tennessee, Virginia & Georgia Railway Company at Atlanta, and that, as such agent, it was his business to sign bills of lading for goods shipped over that road. It is urged that there is no testimony tending to show that copies of the bills of lading were delivered to the defendant with the freight or otherwise, or that the defendant had any knowledge of them, or that there was any through traffic agreement between defendant and the East Tennessee, Virginia & Georgia Railway Company, or that that company fixed a through rate of freight, or that the agent of that company had any authority on behalf of any other company. It is true that no one of these facts is testified to by any witness, but the bills of lading specify that they are signed for the different carriers severally, not jointly, and that each is to be bound by and have the benefit of all the provisions thereof as if signed by it, the shipper, owner, and consignee; also, that the acceptance of the bill is an agreement on the part of the shipper, owner, and consignee of the goods to be bound by all its stipulations, exceptions, and conditions as fully as if they were all signed by such shipper, owner, and consignee. The defendant pleads these conditions, which is sufficient evidence of its adoption and ratification of the contract contained in the bill. The plaintiff admits by stipulation that the oil was delivered to the East Tennessee, Virginia & Georgia Railway Company for transportation, and that the bills of lading were issued therefor. It follows that the plaintiff, by accepting the bills, acceded to the limitations therein expressed, and that the defendant is entitled to the benefit of those limitations. The jury found, in answer to the first question put in writing, that the defendant's freight train, composed in part of the four cars, containing the oil sued for in this case, was thrown from the track by reason of the breaking of an axle of one of the cars of said train. To the third question, they answered that the breaking of the axle was not caused by the fault or negligence of the defendant. They disagreed whether the broken axle belonged to one of the tank cars containing the oil shipped to plaintiff. By the undisputed testimony, the loss resulted from the derailment of a car caused by the breaking of an axle. The bills of lading except from the carrier's liability losses resulting from accidents to boilers or machinery. The question then arises whether "machinery" includes the axle of a car. It is contended for the plaintiff that this is not machinery; that the limitation is upon a common-law liability, and therefore to be strictly

construed against the carrier. Counsel argue that taking the clause in which the word "machinery" appears, and considering it as a whole, it is apparent that the exemption is intended to embrace accidents to such parts or machinery as generate or distribute power; that is, machinery in connection with boilers and the transmission of steam power; such as is to be found in the engine room of a steamer. Their contention is that it is to be limited to the bursting of a steam chest in the locomotive, the breaking of a driving wheel, the bursting of a boiler, the breaking of any of the gearing of the locomotive, and possibly also the breaking of the air brakes which apply their power through valves in the engine. They quote Worcester's definition, as follows: "Mechanical combination of parts for creating or for applying power in engines or machines; machines collectively; the works of the machine; enginery,"—and insist that even this general definition is not broad enough to meet the case at bar; much less such limited and contracted definition as will be given by a court jealous of the attempts of the carrier to exempt itself from the liability attaching by law.

Webster's definition of a machine is: "A construction more or less complex, consisting of a combination of moving parts or simple mechanical elements, as wheels, levers, cams, etc., with their supports and connecting frame work, calculated to constitute a prime mover, or to receive force and motion from a prime mover or from another machine, and transmit, modify, and apply them to the production of some desired mechanical effect or work," etc.

One of his definitions of machinery is: "The means and appliances by which anything is kept in action, or a desired result is obtained." In Chambers' Encyclopaedia, machines are defined to be "instruments interposed between the moving power and the resistance, with a view to change the direction of the force, or otherwise modify it."

In *Seavey v. Insurance Co.*, 111 Mass. 540, it was held that dies intended to be used in a stamping machine, of which there were several hundred, only one pair being capable of use at one time, were all covered by a policy insuring machinery. To the same effect, see *Lowber v. LeRoy*, 2 Sandf. 202; *Com. v. Lowell Gas Light Co.*, 12 Allen, 75. In *Railway Co. v. Brooks*, 84 Ala. 140, 4 South. 289, the supreme court said:

"When cars, though used at times, and at other times detached, are formed into a train, to which the propelling force is imparted by means of a locomotive, the entire train constitutes machinery connected with or used in the business."

My conclusion is that the axles of a railroad car, constituting, as they do, an essential part of the appliances by which cars are moved, and without which it would be impossible to use them for the transportation of freight or of passengers, are parts of the motive machinery, and as distinctively machinery as wheels or drivers of a locomotive. It is not within the power of the court to direct a judgment against the general verdict unless the questions and answers, either with or without that verdict, include findings upon all the issues of fact in the case. There is no finding of fact that

the loss of the oil resulted from the breaking of the axle or the derailment of the cars, and, although that was the undisputed evidence, the court cannot proceed to judgment upon it, and must therefore, in accordance with this opinion, set aside the general verdict, and grant a new trial, which is accordingly done.

BRAUN v. BOARD OF COMMISSIONERS OF BENTON COUNTY.

(Circuit Court, D. Indiana. March 13, 1895.)

No. 8,929.

GRAVEL-ROAD BONDS—INDIANA STATUTE.

The statute of Indiana, relating to the construction of gravel roads, provides (3 Burns' Rev. St. § 6860; Rev. St. 1881, § 5096) that assessments to pay for such roads shall be levied on the property benefited; and also (3 Burns' Rev. St. § 6861; Rev. St. 1881, § 5097) that, for the purpose of raising money to meet the expenses, the commissioners of the county are "authorized to issue the bonds of the county, maturing at annual intervals, after two years * * * and said assessments shall be divided in such manner as to meet the payments of principal and interest of the bonds, * * * and, when collected, the money arising therefrom shall be applied to no other purpose but the payment of the bonds and interest. * * *" *Held* (following the construction of the statute by the courts of Indiana), that bonds issued in pursuance of this statute do not create a general obligation of the county upon which an action may be maintained for mere failure to pay them at maturity, but only an obligation payable out of the assessments, when collected, upon which the county cannot be made liable, unless it appears that the assessments have been collected and wrongfully withheld, or that the failure to collect is due to some negligent or wrongful act or omission.

This was an action by George A. Braun on certain bonds and coupons issued by the board of commissioners of Benton county, Ind.

Albert J. Beveridge, Harris & Thurston, and Rossington, Smith & Dallas, for plaintiff.

Elliott & Elliott and Walker & Gray, for defendant.

BAKER, District Judge. The complaint, in 52 paragraphs, counts upon 12 bonds of \$1,000 each, and the interest coupons thereto annexed. The bonds and coupons, except in time of payment, are duplicates of each other. Copies of one bond and one coupon are as follows:

"No. 1. \$1,000.00

"United States of America, State of Indiana, Benton County.

"Gravel Road Six per Cent. Coupon Bond.

"Three years after date, the county of Benton, in the state of Indiana, will pay to bearer one thousand dollars, lawful money of the United States, with interest thereon at the rate of six per cent., payable semiannually at the office of the banking house of Winslow, Lanier & Co., New York City, New York. The interest to be paid on the fifth day of February and the fifth day of August of each year, on the presentation and surrender of the annexed interest coupons as they shall severally become due. This bond is one of a series of twelve bonds of even date, made for the purpose of building a free gravel road in said county, known as the H. C. Harris Free Gravel Road, pursuant to an order of the board of commissioners of said county of Benton, and state of Indiana, on the 10th day of June, 1890 (see Record 11, at page 186), and

pursuant to an act approved March 3d, 1877, in relation to free gravel roads (see Acts 1877, p. 82, and the acts amendatory thereof and supplementary thereto). In witness whereof we have hereunto set our hands and have caused the seal of said county to be attached, at the town of Fowler, in said county and state, this 5th day of August, 1890.

"William Bennett, } Commissioners
 "James Darby, } of
 "John W. Wilson, } Benton Co. Ind.

"State of Indiana, Benton County—ss.: I, James A. McKnight, county auditor, do hereby certify that the annexed bond was issued to the county treasurer this 5th day of August, 1890. In testimony whereof I have hereunto set my hand and affixed the seal of said board of county commissioners this 5th day of August, 1890.

James A. McKnight,
 "Auditor Benton County, Ind."

"No. ———.

\$30.00

"The county of Benton, in the state of Indiana, will pay to the bearer on the fifth day of February, 1892, at the office of the banking house of Winslow, Lanier & Co., in the city of New York, N. Y., thirty dollars, on presentation and surrender of this coupon, being six months' interest due at that date on bond No. 1 of the bonds issued for the purpose of building the H. C. Harris free gravel road.

William Bennett,
 "James Darby,
 "John W. Wilson,
 "Commissioners."

The defendant answered, alleging, in substance, that the bonds and coupons were executed for the purpose of building and paying for the construction of a free gravel road, and for no other purpose; that said bonds and coupons do not constitute a general obligation of the county, nor were they executed in payment of any debt of the county, or to secure money therefor; that they were executed and issued to pay for said road pursuant to an act of the general assembly of the state of Indiana, approved March 3, 1877, and acts amendatory thereof and supplementary thereto, and that the purchasers of said bonds and coupons and the plaintiff each had notice of the purpose for which they were issued at the time they were issued and purchased, and then knew that they constituted no obligation as against the county; that the defendant never received any consideration whatever for said bonds and coupons, but whatsoever was paid or received for them was paid to and received by the contractor who built said road; that before the bonds were negotiated and purchased, litigation arose as to the validity of the proceedings for the construction of said road, which resulted in the defendant and its officers being enjoined from collecting any assessment for the same, and said proceedings were held invalid on the ground that the petition was not signed by a sufficient number of property owners subject to assessment for the construction of said road; that the plaintiff and the purchasers of said bonds and coupons each had notice of said litigation before they purchased the same, and while said suit was still pending; that all of the proceedings in said suit are, and were at the time said bonds and coupons were purchased, of record in the proper offices and records of said county; that the only provision in relation to said bonds or coupons made by said county or its officers is found in the order of its board of commissioners of June 10, 1890, in Record 11, page 186,

referred to in said bonds, and the only provision therein upon the subject is the following, to wit, "Said work [upon said road] to be paid for in accordance with the plans and specifications as fast as gravel-road bonds may be legally issued"; that said bonds and coupons were executed solely to pay for said work upon said H. C. Harris free gravel road, and were payable solely out of the assessments therefor, and not otherwise, as the plaintiff knew when he purchased the same; that no assessments have been or can be collected, by reason of the injunction aforesaid, which still remains in full force and effect. Reply in denial. The defendant, on the trial, failed to prove actual notice to the plaintiff of the suit resulting in a decree enjoining the collection of the assessments. So that the plaintiff's right of recovery rests on the character of the obligation created by the bonds. If the bonds are the primary and direct obligations of the county, the plaintiff is entitled to a recovery, but, if the bonds create a secondary obligation, only binding the county to use diligence and good faith in collecting and paying over the assessments provided for in the gravel-road statute, the plaintiff cannot recover on his present complaint. The complaint contains no allegation of negligence or wrong on the part of the county authorities. It simply avers the execution and delivery of the bonds to the plaintiff, that they are past due, and remain unpaid.

It is firmly settled that the purchaser of municipal bonds is chargeable with notice of the statute under which they are issued. He is also chargeable with notice of every recital contained on the face of the bonds. In the present case each bond recites that the bond is "made for the purpose of building a free gravel road in said county, known as the H. C. Harris Free Gravel Road, pursuant to an order of the board of commissioners of said Benton county, and state of Indiana, on the 10th day of June 1890 (see Record 11, at page 186), and pursuant to an act approved March 3, 1877, in relation to free gravel roads (see acts 1877, p. 82, and the acts amendatory thereof and supplementary thereto)." The statute (Acts 1877, p. 82) under which the bonds were issued confers upon the board of commissioners the power, in the manner therein provided, to construct, improve, and maintain free turnpike or gravel roads in the county, and, after various provisions in respect to the proceedings, it, among other things, requires an assessment upon the lands benefited lying within two miles of the improvement. Section 6, after providing the manner in which the benefits shall be assessed, provides:

"The said assessment upon lands under the provisions of this act, shall be placed upon a special duplicate, to be provided by the county auditor at the expense of the county for that purpose; and such assessment shall constitute and be considered a first lien on the real estate assessed, in the same manner as other taxes are; provided, that the cost and expense of the preliminary survey, proceedings and report of said improvement, shall be paid out of the county treasury, and be refunded, as well as all other amounts advanced by the county for the preliminary expenses of such improvements in the manner hereinafter provided." 3 Burns' Rev. St. § 6860 (Rev. St. 1881, § 5096).

The seventh section, as amended by Acts 1883, p. 35, reads as follows:

"That for the purpose of raising the money necessary to meet the expenses of said improvement the commissioners of the county are hereby authorized to issue the bonds of the county, maturing at annual intervals after two years, and not beyond eight years, bearing interest at the rate not to exceed six per cent. per annum, payable semi-annually, which bonds shall not be sold for less than their par value; and said assessment shall be divided in such manner as to meet the payment of principal and interest of said bonds, and so be placed upon the duplicate for taxation against the lands assessed, and collected in the same manner as other taxes, and when collected the money arising therefrom shall be applied to no other purpose but the payment of said bonds and interest: provided, that no bonds shall be delivered, or money paid, to any contractor except on estimate of work done, as the same progresses or is completed: provided further, that the amount of such bonds outstanding at any one time shall not exceed one and one half per centum on the value of the taxable property within such county." 3 Burns' Rev. St. § 6861 (Rev. St. 1881, § 5097).

There is nothing in any amendatory or supplemental act material to the question before the court. The construction given to a statute of a state by its highest judicial tribunal is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. *Leffingwell v. Warren*, 2 Black, 599; *Balkam v. Iron Co.*, 154 U. S. 177, 14 Sup. Ct. 1010; *Railway Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114; *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 284, 12 Sup. Ct. 844; *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012; *Bucher v. Railroad Co.* 125 U. S. 555, 8 Sup. Ct. 974; *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10. If the highest judicial tribunal of a state adopts a new view as to the proper construction of a statute of the state, and reverses its former decisions, the courts of the United States will follow the latest settled adjudications. *U. S. v. Morrison*, 4 Pet. 124; *Green v. McNeal's Lessee*, 6 Pet. 291; *Leffingwell v. Warren*, 2 Black, 599. There is an apparent, but not a real, exception to the doctrine that the courts of the United States will follow the latest settled adjudications of the highest judicial tribunal of the state in the construction of a state statute. Where a state statute has been construed by the courts of the state, and parties have acted upon that construction, and have entered into contracts upon the faith of it, the courts of the United States will refuse to follow later adjudications, which change the former construction, whenever the rights of either of the contracting parties would be injuriously affected by so doing. *Taylor v. Ypsilanti*, 105 U. S. 72; *Douglass v. County of Pike*, 101 U. S. 677; *Anderson v. Township of Santa Anna*, 116 U. S. 361, 6 Sup. Ct. 413; *Gelpcke v. Dubuque*, 1 Wall. 194; *Trust Co. v. De Bolt*, 16 How. 425. This exception is apparent only, for it rests upon the principle that the construction becomes a part of the statute, and to permit it to be changed so as to impair the obligation of a contract would violate a familiar provision of the federal constitution. The courts of the United States will not inquire whether the construction of the state statute is right or wrong, for, whether it be the one or the other, it is equally conclusive upon them. The construction put upon the statute by the courts of the state becomes a

part of it, and can no more be disregarded by the courts of the United States than it could be if it had been originally incorporated into the text of the statute.

Therefore the sole question left for consideration is what construction, if any, has been placed upon the statute by the decisions of the highest judicial tribunals of the state. A review of these decisions, in my judgment, clearly establishes the doctrine that gravel-road bonds, of the character here under consideration, do not create a general obligation of the county, upon which an action may be maintained for mere failure to pay them at maturity, but only an obligation payable out of the assessment of benefits when collected; and that the county cannot be made liable to an action upon them, unless it appears that the assessments have been collected and wrongfully withheld, or that the failure to collect the assessments is caused by some negligent or wrongful act or omission of the board of commissioners. The case of *Gavin v. Commissioners*, 104 Ind. 201, 3 N. E. 846, was a suit by a landowner to enjoin the collection of an additional tax to aid in the construction of a free gravel road. Taxes amounting to \$476.50 had been assessed upon the plaintiff's land for that purpose, which were made payable in six annual installments, by an order of the board of commissioners entered on September 9, 1882. On June 9, 1884, after the completion of the road, without any notice to the plaintiff, an additional tax, amounting to \$38.12, was assessed upon his land, to aid in the construction of said free gravel road. It was held that the tax so assessed was illegal and void for want of notice. The court say:

"The statute is careful to protect the county interests, and to guard against the use of the general funds of the county to pay any part of the expenses incident to the construction of a free gravel road."

The case of *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481, was a suit by Strieb against the treasurer, auditor, and board of commissioners of Grant county to enjoin the collection of a tax assessed upon his land for the payment of bonds which had been issued to aid in the construction of a free gravel road. The bonds, amounting to \$43,000, were alleged to be void, because they created a debt against the county in excess of 2 per cent. of the assessed value of the taxable property within such county. The creation of an indebtedness by a county in excess of that amount is prohibited by an amendment to the constitution of this state adopted March 14, 1881, which declares:

"No political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate, exceeding two per centum of the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount, given by such corporation, shall be void: provided, that in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property owners, in number and value, within the limits of such corporation, the public authorities, in their discretion, may incur obligations necessary for the public protection and defense to such an amount as may be requested in such petition." Const. art. 13, § 1 (*Burns' Rev. St. § 220; Rev. St. 1881, § 220*).

A judgment could not, by any possibility, have been pronounced without authoritatively determining whether the bonds issued under the act of 1877 were or were not the general obligations of the county. This was the pivotal question, and its decision determined the controversy. It was decided that the bonds did not constitute a debt of the county. The court quoted section 7 of the act of 1877, as amended by the acts of 1883, and placed its judgment upon the sole ground that bonds issued under that statute were not the bonds of the county, and created no indebtedness against the county in its political or municipal character. If the bonds had been held to be an indebtedness of the county, a conclusion exactly the reverse of that adjudged must have been reached. The court thus expressed its judgment:

"We are of opinion that the bonds issued by the board of commissioners of Grant county under the provisions of the section quoted, and pursuant to the authority thereby conferred, did not and do not constitute an indebtedness of such county, and did not and do not evidence an indebtedness incurred by said county, within the inhibition of article 13 of our state constitution. Such bonds are not payable by the county, or out of the general funds of the county treasury. They are payable out of the particular fund to be raised by the collection of the assessments made on the lands adjacent to such free gravel road, 'divided in such manner as to meet the payment of principal and interest of said bonds,' and placed as directed on the tax duplicates against the lands assessed, 'and collected in the same manner as other taxes,' which fund, when so collected, 'shall be applied to no other purpose than the payment of said bonds and interest.' No other provision is made by law for the payment of either the bonds or the interest thereon; and the bonds and interest are made payable out of the particular fund to be derived from the collection of the assessments made on the lands adjacent to such free gravel road, and from no other source, and such fund is pledged by the statute for the payment of said bonds and interest. It is manifest, we think, from all the provisions of the above-entitled act of March 3, 1877, and the amendments thereof, that the legislature intended that the entire cost and expense of constructing any free gravel, macadamized, or paved road, and all bonds of the county issued for the purpose of raising the money necessary to meet the expense of such improvement, should be borne and paid out of the particular fund to be raised by and from the collection of the assessments made on the lands adjacent to such road. While it is provided that the preliminary expenses of such an improvement may be paid out of the county treasury, yet it is further provided that the amount so paid must be refunded out of the particular fund to be raised as aforesaid from the assessments on adjacent lands."

The case of *Commissioners v. Fullen*, 111 Ind. 410, 12 N. E. 298, was a suit to enjoin the collection of an additional assessment to aid in the construction of a free gravel road. It was there held that the legislature intended to make the lands benefited by the improvement bear the whole expense, and that the board of commissioners had authority to levy an additional assessment, not exceeding the special benefits conferred upon the land. The court, speaking of the proper construction of the statute, say:

"It is important to keep constantly in mind that the law requires that the entire cost shall be collected from the property owners, for it was not intended that in any event, or upon any possible contingency, should the cost be paid out of the county treasury. As the clear intention of the legislature was that the whole expense of the improvement should be paid by the property benefited, it must follow that the power to carry into effect the intention of the legislature is a continuing one, and that it is not exhausted by its exercise in the first instance."

It is further said:

"The construction of a free turnpike or gravel road is not, in a strict legal sense, a county matter, for the commissioners do not levy assessments by virtue of their position as the official representatives of the county, but by virtue of an express statute specially conferring that power upon them. * * * If they are not agents of the county, then loss ought not, in any event, to fall upon the county."

See *Burton v. State*, 111 Ind. 600, 12 N. E. 486, which reaffirms the ruling in *Strieb v. Cox*, supra.

The case of *Commissioners v. Fahlor*, 114 Ind. 176, 15 N. E. 830, was a suit to enjoin the collection of an additional assessment, made to aid in the construction of a free gravel road. It was held that an additional assessment, made after the original assessment had been placed upon the tax duplicate, without notice to the landowner or reference to viewers, was void, and its enforcement would be enjoined. Speaking of the construction placed upon the statute in *Board v. Fullen*, 111 Ind. 410, 12 N. E. 298, the court say:

"The conclusion is there maintained beyond question, that the statute imperatively requires the entire expense incident to the construction of such roads to be borne by the adjoining landowners."

The case of *Commissioners v. Hill*, 115 Ind. 316, 16 N. E. 156, was an action upon the bond of the contractor who had taken the contract for the construction of a free gravel road. Referring to the act of March 3, 1877, and the act of April 8, 1885, the court there said:

"These two laws also concur in providing clearly and unequivocally that the corporate county shall not be subjected to nor incur any debt, liability, or damages by reason or on account of the construction of any such road, or by reason of any act done, or for the failure or omission to act by the county board, or by the engineer or superintendent in charge of the construction of such road. This conclusion follows of necessity from, and is supported by, several recent decisions of this court in cases involving the construction of the aforesaid laws for the construction of free gravel roads, and the liability of the corporate county for debts or damages growing out of, or resulting from, acts of commission or omission by the county board, or by the engineer or superintendent in the construction of such roads. *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481; *Commissioners v. Fullen*, 111 Ind. 410, 12 N. E. 298; *Burton v. State*, 111 Ind. 600, 12 N. E. 486; *Abbett v. Commissioners*, 114 Ind. 61, 16 N. E. 127."

The case of *Commissioners v. Fullen*, 118 Ind. 158, 20 N. E. 771, is the same case which was before the court in 111 Ind. 410, 12 N. E. 298. The court there say:

"The debt created for this purpose [i. e. the construction of a free gravel road] is primarily the debt of the landowners, and is chargeable upon a specific fund, and not upon the county."

See *Quill v. City of Indianapolis*, 124 Ind. 292, 23 N. E. 788, where the same doctrine is reasserted.

In *Spidell v. Johnson*, 128 Ind. 235, 25 N. E. 889, it is held that the county is not liable for bonds issued to aid the construction of a free gravel road. The court, citing the case of *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481, say:

"Bonds such as those in question are not the obligations of the county. The lien fixed by statute upon the lands benefited constitutes a security for the benefit of the bondholders."

In the case of *Little v. Commissioners*, 7 Ind. App. 118, 34 N. E. 499, it is held that the act of 1877 requires that the entire cost of constructing a free gravel road shall be collected from the adjacent landowners, and that in no event can the cost of such improvement, or any part thereof, be paid as a debt of the county out of the county treasury.

The case of *Walker v. Commissioners* (Ind. App.) 38 N. E. 1095, was an action upon a gravel-road bond, alleging simply its execution, and that it was due and unpaid; a copy of the bond being set out as an exhibit. A demurrer to the complaint for want of sufficient facts was sustained. This ruling was affirmed by the appellate court. The court there say:

"This seems to be the first case in which the question arises in a direct action upon the bond, but the general doctrine as to the nonliability of the counties for gravel-road obligations has been frequently asserted and reasserted, until it can no longer be regarded as an open question."

If an uninterrupted course of adjudications by the highest judicial tribunals of a state can be deemed to settle the construction of any statute, the construction of the act of 1877 must be regarded as settled. That construction imperatively requires the court to hold that the bonds and coupons in suit do not create obligations of the county upon which an action can be maintained upon a complaint simply alleging the execution and delivery of them to the plaintiff, and that they are past due, and remain unpaid. The case of *Kimball v. Commissioners*, 21 Fed. 145, in so far as it is in conflict with the foregoing views, is no longer authoritative, for the reason that the construction placed upon the act of 1877 by the supreme court of this state must prevail. The construction placed upon the act of 1877 by the courts of this state is in conflict with decisions elsewhere (*State v. Commissioners*, 37 Ohio St. 526); but it is not important to examine those cases, since this court is bound to follow the construction adopted by the highest courts of this state. There will be a finding and judgment for the defendant, with costs.

DODSWORTH et al. v. HERCULES IRON WORKS.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 191.

1. AMENDMENT OF PETITION — VARIATION OF CONTRACT BY PAROL BEFORE BREACH.

A petition, filed under the code practice of Ohio in lieu of a common-law declaration, declared upon a written contract to recover the price of certain machinery. *Held*, that it was not error, after answer and reply, to permit the petition to be amended in this form of action so as to show a variation of the terms of the contract by parol before breach.

2. RESCISSION OF CONTRACT—CONTINUED USE OF ICE MACHINE.

A contract for the purchase of an ice machine cannot be rescinded after more than two years' use in the ordinary course of business, although the purchaser declined to accept the machine, and requested the vendor to remove same, within three or four months after its delivery.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an action upon a written contract by the Hercules Iron Works against Caleb Dodsworth and others, in which the plaintiff obtained judgment. 57 Fed. 556. From this judgment, the defendants have sued out a writ of error.

In February, 1890, the Hercules Iron Works, a corporation of the state of Illinois, contracted to construct and erect for the defendants, Caleb Dodsworth and others, as partners, a machine and appurtenances for the production of ice, of the Hercules pattern and style, in accordance with certain specifications. This machinery was to be placed on the premises of defendants, and upon foundations prepared by them in accordance with plans furnished by plaintiff, and was to be completed and put in operation May 1, 1890, provided the foundations were prepared and possession of the premises given to the contracting corporation by March 15, 1890. The guaranties contained in the written contract were as follows: "First. That the machine will be capable of producing 25 tons of good, crystal, merchantable ice each twenty-four hours of continuous operation, provided it is kept in good order, and properly handled, and the temperature of the condensing water is not above 60 degrees Fahrenheit. Second. That the best material and workmanship will be used in the construction of the machine and apparatus; and, if any portion proves defective, we will furnish same free of cost. Third. We do not infringe upon the patent rights of any one, and will defend any suit brought against you of which we shall have timely notice. Fourth. * * * Fifth. That we will furnish one competent engineer for thirty days after the machine is erected and started, who will superintend its running as you may direct, and who will instruct your employes in care of machine. Sixth. It is our intention to give you our 25-ton machine complete in every detail, and if there is anything required to make the same complete, not specified herein, it will be furnished without any cost additional to that hereinafter named. Seventh. The whole plant will be completed and in operation about May 1st, provided you give us possession of the premises March 15th, and the foundations and platform are ready at that time. Eighth. When the machine is run at its maximum capacity, in good order, and properly handled, with condensing water at 60 degrees F., and with engineers at \$2.50 per day, firemen \$2 per day, laborers \$1.50 per day, and Pittsburgh coal at \$1.45 per ton delivered, water to be pumped from well with power pump, the cost to produce ice will not exceed 85 cents per ton, not including interest upon the investment." The penalty for nonperformance and for delay in completion was that the Hercules Iron Works should pay any actual damage that might accrue to Dodsworth and his partners, "not exceeding twenty dollars per day for each and every day until said plant is in operation, unavoidable accidents, however, excepted." The terms of payment were: One-third when the machinery has been delivered upon the premises; "the remaining two-thirds after the machinery has been running thirty days, provided it has performed the guaranty as herein stated." The first payment was made on delivery of the machinery. There was some delay by defendants in completion of foundations for the machinery, and in the completion of the building in which the plant was to be erected. The machinery was constructed and put in operation about June 1, 1890, and no point is now made as to this delay. The defendants took possession of the machinery, and have operated the same during the ice seasons of 1890, 1891, and 1892. Default having been made in the deferred payments, suit was begun in 1893 in the circuit court of the United States for the balance due on the contract, with interest.

The petition, filed under Ohio code practice in lieu of a common-law declaration, set out the contract, alleged full performance by the plaintiff, and that the defendants, after the plant had been in operation for more than 30 days, "received said ice machine and plant, and accepted the same." The plaintiff then averred that "it had performed all the conditions of said contract on its part to be performed, and has become entitled to the payment of the said price, according to the terms of the contract, with interest." The defendants answered, and made their answer a cross petition. The defenses set out were:

(1) That they had never accepted the said ice machine. (2) That the contract had not been performed according to its terms and conditions by the plaintiff, in that it had failed to furnish many parts thereof as required, particularly a certain power pump described in the contract. (3) That the guaranty with respect to the capacity of the machine to produce 25 tons of good, crystal, merchantable ice every 24 hours of continuous operation had not been performed; and that said machine was not, and never had been, capable of complying with said guaranty. (4) That they have called upon plaintiff to complete said machine, but it had refused and failed to do so. (5) That they had notified the plaintiff to remove the machine, but that it had failed and refused so to remove it. (6) By way of cross petition, it alleged that they had been greatly damaged by the plaintiff's breach of contract, and sought to recover as follows: (1a) The money they had paid to and on account of plaintiff, and for articles bought by the defendants which should have been furnished by plaintiff. (2a) That, in carrying out their part of the contract, they had expended large sums of money, which by failure of plaintiff to furnish the machinery within the time required, and of the kind and capacity required, were totally lost to defendants. The plaintiff, in reply, denied all and each of the allegations of the answer and cross petition not specifically admitted. It admitted that the force pump in the contract had not been furnished, but averred that it was omitted at the special instance and request of the defendants, and that the value of the same, which was \$150, should be deducted from the contract price. The defendants, upon the filing of this reply, moved for judgment upon the pleading. This was overruled, and leave given plaintiff to amend the petition, which was done, by inserting therein a statement that the power pump had been omitted at request of defendants, and that the value of the same was to be deducted from the contract price. Upon these pleadings, the jury, upon the evidence and upon the law as charged, returned a verdict for \$17,024.40, being the full balance claimed by plaintiff, with interest, less the value of the pump and certain small payments made to or for plaintiff, concerning which there was little or no controversy. From this judgment defendants have sued out a writ of error.

D. Wulsin, F. O. Suire, and Wm. Worthington, for plaintiffs in error.

Robert S. Fulton and Harmon, Colston, Goldsmith & Hoadly, for defendant in error.

Before LURTON, Circuit Judge, and SEVERENS and SWAN, District Judges.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The petition declared on the written contract. It alleged, as required by good pleading, that the plaintiff had fully performed the contract. This the plaintiff should aver, or, in the alternative, a willingness and readiness to perform, but for some conduct of the defendants sufficient in law to excuse performance. The plaintiff's reply to the defendants' answer admitted that a force pump had not been furnished, but, as an excuse, averred that it had been omitted at the special request and instance of the defendants, and that its value was to be deducted from the contract price. Upon this admission the defendants moved for judgment upon the pleadings. This was overruled, and the plaintiff allowed to amend by inserting in the petition the facts as to the pump. This action of the court is the subject of the first two assignments of error. The insistence of appellants is that this was and is a suit upon the contract, and that it is essential to any recovery in this suit, there being no common counts, that the plaintiff show a substantial compli-

ance with the terms of the contract, and that an admission that the contract was not completed by furnishing the power pump, whether that appears by the reply or on the evidence, is fatal to any recovery in this form of action. Aside from all question as to the materiality of this pump, or the effect of the acceptance alleged, the question presented by the refusal of the court to render judgment in favor of defendants, upon the admission in the reply that the pump had not been furnished, became immaterial upon the subsequent amendment of the petition, so as to show that the omission had been waived. The effect of the agreement by which this pump was to be omitted, and instead thereof a deduction made, was to amend the contract by parol before a breach. The contract was not one required by the statute to be in writing. But, if it had been, the result would be the same, under the ruling in *Swain v. Seamens*, 9 Wall. 272, 273. That was a bill to compel the defendant to cancel and discharge a certain mortgage according to the terms of an agreement with the complainant. The defendant resisted performance, upon the ground that a building which the plaintiff was to erect on his part did not in dimensions correspond with the stipulations of the agreement. The plaintiff replied that he (defendant) had acquiesced in the change, and had accepted the mill as built and completed. The court held that the defendant was estopped to deny that the contract had not been performed, or to set up the statute of frauds as a defense to the substituted performance, the court saying that:

"When a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be peculiarly prejudiced, by the assertion of such adversary claim."

In *Fleming v. Gilbert*, 3 Johns. 528, the plaintiff's action was upon a bond. The defendant relied upon proof that the plaintiff had not performed the condition of the bond within the time specified therein. The plaintiff answered that the time of performance had by parol been extended; and so was the proof. The court, on appeal, said:

"The plaintiff's conduct can be viewed in no other light than as a waiver of a compliance with the condition of the bond, so far as it related to the mortgage on the record; and I see no infringement of any rule or principle of law in permitting parol evidence of such waiver. It is a sound principle of law that he who prevents a thing being done shall not avail himself of the nonperformance he has occasioned."

In *Young v. Hunter*, 6 N. Y. 207, the court said that:

"Independent of the question of waiver, if the defendants, by their acts, prevented the performance by the plaintiff of the conditions of his contract, he was excused from such performance. It is a well-settled and salutary principle that a party cannot insist upon a condition precedent when its nonperformance has been caused by himself."

Concerning the manner in which a plaintiff might avail himself of the defendant's waiver of performance in a particular way or time, it is said by an eminent text writer:

"The action having been brought upon the original contract, if the defendant set up that the plaintiff did not himself perform according to its

terms, the plaintiff may reply that he was ready to do so, but that it was dispensed with by the defendant assenting to a substituted performance; and his proof of such assent is not considered a variance from his declaration." Browne, St. Frauds, § 425.

In accord is *Long v. Hartwell*, 34 N. J. Law, 126, 127.

The conclusion must be that it was not error to suffer the petition to be amended so as to set out this omission and the defendant's assent thereto.

It was conclusively shown upon the evidence that the possession of this machinery was surrendered to the defendants in June or July, 1890, and that defendants had regularly used the same in the ordinary conduct of their business during the ice seasons of 1890, 1891, and 1892, and were still operating the same when this suit was begun and at the time of the trial. Defendants attempted to meet the force of this by putting in evidence two letters written by them in October, 1890, declining to accept the machinery, and notifying the plaintiff to remove it. The circuit judge, in respect to this conduct and its effect upon the defenses of the defendants, said:

"The plaintiff seeks to recover of the defendants, who were at the time the contract was made a partnership, the purchase price of an ice machine which the plaintiff was to erect upon the land belonging to the defendants. The purchase price stated in the contract is about \$23,000. The plaintiff admits that it has received something over \$7,000, and asks to recover the balance of the contract price of \$23,000. The defendants, answering, say that they ought not to be compelled to pay for the ice machine, because it was not up to the contract. It appears from the evidence undisputed that the machine is still in the possession of the defendants, and that it was operated all the summer of 1890, and has been operated also during the summer of 1891, and during the summer of 1892, during the ice season of those years. It appears that the defendants in October, 1890, notified the plaintiff that they would not accept the machine, because it was not up to the contract. Now, in my view of the law, it was their duty, if they did not see fit to accept the machine, to take it out, after notifying the plaintiff to take it out; and, the plaintiff failing, it was the duty of the defendants to take out the machine, and then bring an action against the plaintiff with all the damages to which they had been put by reason of the failure of the plaintiff to perform the contract and give them a machine up to contract. They might, in that, charge the plaintiff with the cost of removing the machine, but they could not go on and use the machine after that, and then say they did not accept the machine. I am obliged, therefore, in my view of the law, which will doubtless be re-examined by a court of error, to hold that the only question in this case for you to consider is not whether the defendants are liable upon the contract, but it is to determine how much less than the contract price they ought to pay for the machine they have accepted under the contract."

There was no dispute as to what the conduct of the defendants had been in regard to the retention and use of this machinery. While it is true that in October, 1890, the defendants said they would not accept, yet their subsequent conduct was an unqualified contradiction of what they had said. The contract provided that two-thirds of the purchase price should be payable "after the machinery had been running thirty days, provided it has performed the guaranty as herein stated." The guaranty referred to was "that the machine will be capable of producing 25 tons of good, crystal, merchantable ice each twenty-four hours of continuous operation,

provided it is kept in good order, and properly handled, and the temperature of the condensing water is not above 60 degrees Fahrenheit." It is manifest that the intention was that 30 days' time should be allowed, after the machinery was put in operation, for testing its capacity, and within which defendants might elect to accept or reject. There was evidence tending to show that in July a test had been made, which established the capacity of the machine, and that defendant Rossa, who was acting as superintendent, declared himself satisfied as to the guaranty, and accepted the machinery. There was also evidence that the machinery was operated in the regular course of defendants' business from that test down to the October letters, near the close of the ice season. But the circuit judge passed by all which had occurred prior to the October letters, and put the case, so far as the question of rescission was concerned, on the acts of the defendants after those letters. If it be assumed that defendants had not lost the right to reject the machinery when they wrote the October letters, they clearly did abandon that right by their subsequent conduct. The machinery which had been constructed and delivered was in professed compliance with the contract. The plaintiff delivered it as a compliance, and the defendants so understood. This is evident from their own letters. Under these circumstances, the defendants, at most, were entitled to a reasonable time to determine, after testing and experimenting, whether they would accept it as a substantial compliance with the contract. If the rejection announced in October, 1890, had been adhered to, and the vendor had refused to remove the machinery, it ran the risk of being made liable for all the expenses and hazards of storage, in addition to damages for breach of contract. On the other hand, the defendants became subject to the general rule that "he who seeks to reject an article as not in accordance with the contract must do nothing, after he discovers its true condition, inconsistent with the vendor's ownership of the property." *Brown v. Foster*, 108 N. Y. 390, 15 N. E. 608.

The fact which made the conduct of defendants conclusive upon their right of rescission was not the retention, for, under some circumstances, that might amount to little, but their use of the machine in the ordinary course of business for more than two years. There were three remedies open to the defendants when they discovered that this machinery was not in accordance with the contract. The first was to reject, and give notice of their determination to the vendor. This course, if adhered to, would have entitled them to sue for a return of purchase money, and such other damages as they had sustained by the failure of the vendor to furnish them the machinery according to the contract. If the machinery had not been removed by the plaintiff upon notice of rejection, then the defendants might have removed and stored it, subject to the risk of the seller; or, if suffered to remain, they might have recovered storage. The second remedy open to defendants was to accept the machinery, and bring an action for breach of the warranty in the contract. The third remedy, having paid but part of the price, was to set off by way of counterclaim, when sued by the

buyer for the balance due, the damages sustained by the failure of the machinery to comply with the contract. *Benj. Sales* (Corbin Ed.) § 1348. The right of rejection was lost by the long-continued use of the machinery, which use was utterly inconsistent with a purpose to resort to the first remedy which was open to them, and consistent only with a claim of title and ownership. *Id.* § 1356. The cases of *Underwood v. Wolf*, 131 Ill. 425, 23 N. E. 598, and *Brown v. Foster*, 108 N. Y. 387, 15 N. E. 608, and *Vanderbilt v. Iron Works*, 25 Wend. 665, are precisely in point. The learned counsel for appellants have cited and relied upon a class of cases concerning building contracts, which hold that the mere possession and use of a house constructed on one's own land will not, unattended by other circumstances, operate as a waiver of any conditions precedent in the contract under which it was constructed; and that a suit on the contract, for the contract price, may be successfully defended, notwithstanding such use and occupation, unless it is shown that the work was done in substantial compliance with the contract. The reason for distinguishing cases of that class from those concerning the sale or construction of machinery not so annexed to the soil as to pass with it is well stated in *Smith v. Brady*, 17 N. Y. 188, where *Comstock, J.*, said:

"The owner of the soil is always in possession. The builder has a right to enter only for the special purpose of performing his contract. Each material, as it is placed in the work, becomes annexed to the soil, and thereby the property of the owner. The builder would have no right to remove the brick or stone or lumber after annexation, even if the employer should unjustifiably refuse to allow him to proceed with the work. The owner, from the nature and necessity of the case, takes the benefit of part performance, and therefore, by merely doing so, does not necessarily waive anything contained in the contract. To impute to him a voluntary waiver of conditions precedent from the mere use and occupation of the building erected, unattended by other circumstances, is unreasonable and illogical, because he is not in a situation to elect whether he will or will not accept the benefit of an imperfect performance."

In the case before us the machinery was capable of removal. It had not become annexed to the soil, and for that reason the property of the owner of the soil. That it was capable of removal is shown by the October letters notifying the seller to remove it, and there is no evidence in the case in any way indicating a situation analogous to that of one occupying a house not built according to an agreement. This acceptance, though having the effect to pass the title to the defendants and to cut off any right to rescind did not, under the circumstances, operate to cut off defendants from their right, when sued for the price, to set off or recover by cross petition any damage which they had sustained by the failure of the machinery to comply with the terms and conditions of the contract. *Manufacturing Co. v. Phelps*, 130 U. S. 525, 9 Sup. Ct. 601. In *Vanderbilt v. Iron Works*, heretofore cited, the question involved was a contract to equip a steamboat with an engine. In an action for the price, it was held that the acceptance of the engine, though deficient in some particulars, would prevent the buyer, in an action for the price, from insisting upon the defects as a nonperformance of the condition precedent; yet the

buyer was not cut off from showing such defects, and obtaining a reduction of the price, when sued for a balance due. The cases of *Brown v. Foster* and *Underwood v. Wolf*, heretofore cited, are also in point as to remedy of a buyer who has waived his right to reject in toto.

These conclusions operate to overrule defendants' assignments of error Nos. 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 17. Assignments Nos. 3, 4, and 16 were withdrawn on the argument.

The evidence that the power pump was omitted by consent, and that its value was \$150, was quite conclusive. There was no error in the instruction to that effect, and the fourteenth assignment must be overruled.

The question as to whether the blue-print plans for the building and for the foundation for the freezing tank, as prepared by the plaintiff's draftsman, were sent to and received by defendants, was submitted to the jury. There was evidence sufficient to support a finding to that effect. The court construed those plans, in connection with the contract, as imposing on the defendants the duty of building a foundation of five or six walls under the compressor, and that the plans showed that between those walls there should be cinders close up to the floor above. He also charged that if the defendants failed to build the foundation and fill in with cinders, as they were obliged to do, any failure of proper insulation attributable to the failure to use cinders, as indicated on the blue-print plans, could not be charged to the plaintiff. We think there was no error in this, and the fifteenth assignment is therefore not well taken.

The defendants were given every opportunity to show, if they could, any defects in the machinery furnished, or any want of capacity to perform the work it had been warranted to do. The verdict can bear but one construction, which is that the machinery was in substantial accord with the contract, and that the defendants had sustained no damage by reason of any failure to perform the contract.

On the whole case, we are entirely satisfied with the result. The judgment must therefore be affirmed.

HARTFORD FIRE INS. CO v. SMALL.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1895.)

No. 324.

1. **INSURANCE—WAIVER OF CONDITION AGAINST ADDITIONAL INSURANCE.**

Waiver of an express condition against taking additional insurance can only be inferred when the evidence shows that the subject-matter of the waiver and consent was in the minds of the parties, coming together on that definite proposition.

2. **SAME—PROVISIONS AGAINST POWER OF AGENTS TO WAIVE CONDITIONS.**

Declarations in policies against the power of officers or agents to waive conditions except by writing indorsed thereon must be enforced by the courts as part of the contract, unless there is some valid reason for not doing so.

In Error to the Circuit Court of the United States for the Southern District of Georgia.

This was an action at law by A. B. Small against the Hartford Fire Insurance Company upon a policy of fire insurance. In the circuit court there was a verdict for plaintiff, and the court rendered judgment thereon. Defendant thereupon sued out this writ of error.

King & Spalding and Marion Erwin (Alex C. King, of counsel), for plaintiff in error.

Steed & Wimberly (Clem P. Steed, of counsel), for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

BRUCE, District Judge. A. B. Small sued the Hartford Fire Insurance Company for \$2,400 and interest, claimed as a loss by fire which occurred February 26, 1893, which loss was covered by a policy of insurance issued by the defendant company on the 12th day of March, 1892, to McBride & Nichols, who transferred the policy after loss to plaintiff, A. B. Small. He also sued for \$600 damages and \$300 attorney's fees, upon the ground that the defendant company had refused to pay the loss for more than 60 days after it became due and had been demanded, and that said refusal was in bad faith and groundless. The policy was upon a stock of goods, furniture, and fixtures at Unadilla, Ga., and the suit was commenced in the city court of Macon, Bibb county, Ga., and was removed by the defendant company into the United States circuit court for the Southern district of Georgia, Western division, on the ground of diverse citizenship. The policy, as originally written, contained the words: "\$5,000 other concurrent insurance permitted on stock." To this declaration the defendant pleaded the general issue, and, in addition thereto, that the policy sued on was void because of a breach of the covenant therein, which provided:

"This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void if the insured now has or shall hereafter make or produce any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

Plaintiff amended his declaration on the trial by alleging that said policy, after the words, "\$5,000 other concurrent insurance permitted on stock," contained the additional figures or numbers "\$2,500" under "\$5,000," and the signature, "J. A. Wilson, Agent. 5-16-92." To this the defendant filed a further plea:

"That the words and figures alleged by said amendment to be in said policy, and the signature, 'J. A. Wilson, Agent,' were not the act, deed, or contract of the defendant, and were not made by it or by any one authorized by it."

It appeared by the evidence in the trial that, at the time of the loss, the insured had, in addition to the policy sued on, policies of insurance in different companies covering the same stock of goods to the amount of \$10,000. "\$5,000 other concurrent insurance permitted on stock" was written on the policy when it was executed, March 12, 1892. Afterwards, "J. A. Wilson," after the words, "\$5,

000 other insurance permitted on stock," wrote the additional words "\$2,500," with his signature, "5-16-92." Wilson was a mere soliciting agent, did not write policies, and it cannot be maintained that he had authority to bind the insurance company in what he did, and, if he had, the consent was only to \$2,500 more insurance; so that there was \$2,500 additional insurance unconsented to, even if Wilson's power to bind the company be conceded.

But it is claimed that this condition of the policy as to additional insurance was waived, or that the additional concurrent insurance was consented to by the action and conduct of J. F. Cobb, who was an insurance agent at Cordele, in Dooly county, Ga. He represented some 15 or 16 companies, as he testifies, among which was the Hartford; but he did not write the policy of the Hartford on the McBride & Nichols stock. That was solicited by Wilson, and written by Thomas Eggleston, agent, whose office was in Atlanta, Ga. Now, what does the evidence show in reference to the waiver of the condition of the policy as to additional insurance, or the consent to it, on the part of Cobb, and what consent did he give that can be held to bind the company? A question is suggested about his power, and about whether the risk in question was within his territory, but, without regard to that, does the evidence in the record show that Mr. Cobb in anything he did or said waived, on behalf of the company, the condition of the policy sued on, or gave any consent to additional concurrent insurance upon that policy? He says in his testimony in reply to—

"Q. Did you have anything to do with the issuing of the Hartford insurance policy on McBride & Nichols' stock? A. Nothing whatever. Q. Was it referred to you by the company in any way, shape, or form? A. No, sir; it was not. Q. Were you requested by McBride & Nichols at any time, in your capacity as agent for the Hartford Insurance Company, to allow other insurance? A. No, sir; that company was never mentioned, only in this letter where they gave me the amount of all the insurance."

And, again: "Q. Did you, as agent for the Hartford Company, undertake in any way, shape, or form to allow them that privilege? A. No, sir; I did not specify that company. As I stated in my letter, I told them it would not be out of place to keep that entire amount of insurance provided they got the goods they claimed."

Mr. McBride, one of the insured, in answer to question, says:

"Q. Look at this application, and see if you can refresh your memory from that, and tell what companies they were? A. No, sir. Those are the companies we had insurance in, but to tell you which policies expired, I do not remember. Q. Were those policies which expired November 25, 1892, policies in the Hartford Fire Insurance Company? A. No, sir. Q. They were not? A. No, sir. Q. What agent represented, in your dealings, the policies which expired on November 25th? A. Mr. Cobb. Q. Then Mr. Cobb was the agent of the companies so far as the policy which expired on November 25, 1892, was concerned, but that was not the Hartford policy? A. No, sir. Q. What policy did Mr. Bozeman issue? A. In the London, Liverpool, and Globe. Q. This correspondence about the canceling of policies which you say took place was in reference to the cancellation of policies which were issued as a continuation of the policies which expired November 25, 1892? A. Yes, sir. Q. And that correspondence was with Mr. Cobb, who was the agent for the companies whose policies had expired November 25, 1892? A. Yes, sir."

Again: "Q. In taking this additional insurance, what purpose, if any, had you? Did you explain that to the jury at the time you took the last \$2,500?

A. We had increased our stock of goods, and, of course, we wanted to increase our insurance also. Q. What was the purpose in corresponding with James F. Cobb in reference to it? A. We had more insurance than we thought was necessary to carry. We did not want to pay the premiums on it."

On a question of a waiver of an express condition of a written contract or a consent that such condition need not be complied with after a breach of the condition has been made by the insured, there must be evidence that the subject-matter of the waiver and consent was in the minds of the parties at the time, and that it was consciously and purposely done by the minds of the parties coming together upon the definite proposition. If there was a waiver by agent Cobb, for how much additional insurance was such waiver? Or was it a waiver of the entire condition as to additional concurrent insurance? The evidence not only fails to show the agreement of the parties as to the matter in question, but it shows the contrary. It shows that the matter in the mind of McBride was the burden of so much insurance from the payment of which he wanted to be relieved, and the matter in the mind of Mr. Cobb was, as he states it, to keep the policy in the Aetna, and the distinct matter of a waiver of the condition in the policy of the Hartford (the one in suit) or the consent to additional concurrent insurance as to the Hartford policy is not shown to have been in the contemplation or purpose of either of the parties at the time of the matters detailed in the evidence. The letters of Johnson and the assured to Cobb, admitted in evidence over the objection of counsel for the defendant company, were not competent; and, if they might be considered in connection with Cobb's testimony, the evidence, in any view, falls short of that measure of proof which can be held to justify the verdict and judgment in this case. This is made more clear by reference to the last clause of the policy:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

These stringent clauses in contracts of this kind are often made the subject of adverse comment, and, with whatever of justice this is often done, it must be borne in mind that courts do not make contracts for parties, and must enforce them, unless there is some valid reason for not doing so. On this subject the supreme court of the United States, in the case of *Insurance Co. v. Unsell*, 144 U. S. 450, 12 Sup. Ct. 671, quoting from the case of *Thompson v. Insurance Co.*, 104 U. S. 252, says:

"Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party on which to base a reasonable excuse for the default."

It is perhaps proper to say in this connection that the question of consent to additional concurrent insurance is not a mere technical one, but is based upon sound principles in the law of insurance. It is to discourage overinsurance where it would be to the interest of the assured to incur a loss, and so put a premium on fraud. We think the charges asked and refused for the defendant should have been given, and judgment of the court is reversed, and the cause remanded.

MATHIS v. RUNNELS COUNTY.

(Circuit Court of Appeals, Fifth Circuit. December 18, 1894.)

No. 252.

EVIDENCE—RECORDS—PAROL TESTIMONY TO VARY.

The constitution and statutes of Texas, relating to debts of municipal corporations, prohibit such corporations from contracting debts, unless payment thereof is provided for by taxes to be assessed and collected annually. In an action on certain county bonds it appeared that the record of the proceedings of the county commissioners' court, required by law to be kept, though not required to be made up in strict chronological order, contained a record of an order, in due form, providing for the issue of the bonds and for taxes to pay the same, which order purported to have been passed at a meeting held before the issue of the bonds, but was entered among the proceedings of another meeting, held after the bonds were issued. *Held* that, as against a bona fide holder of the bonds for value, parol evidence could not be received to show that the order was not passed at the time it purported to be, but at the time when it was entered on the record, after the issue of the bonds.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This is a suit to recover upon 50 interest coupon bonds, for \$60 each, executed by the defendant county, dated April 10, 1890. These coupons are for interest for two years upon an issue of \$20,000 bridge bonds issued by the defendant county under the provisions of an act of the legislature of the state of Texas entitled "An act to authorize counties to buy, construct, or contract for the use of bridges, and to issue bonds and levy taxes to pay for the same, approved April 4, 1887. The county had a contract for the building of three bridges with the Milwaukee Bridge & Iron Company, and from this company, Harris & Co. obtained the bonds and coupons for value, and plaintiff derived his title from Harris & Co. Default was made on the payment of the interest coupons due on the 10th day of April, 1891, and April 10, 1892, respectively, and this suit was commenced upon the 40 defaulted coupons, April 6, 1893. A number of exceptions are taken by the plaintiff to the rulings of the court below, but, in the view taken of the case, the only one necessary to be considered is the exception to defendant's original amended answer, and to the rulings of the court on the trial admitting evidence over the objection of the plaintiff. In the trial in the court below, the plaintiff, with other evidence shown by the record, offered a certified copy of an order bearing date February 10, 1890:

"The State of Texas: Be it remembered that on this, the 10th day of February, 1890, the county commissioners' court of Runnels county, convened in regular session at a regular term of said court, all the members of said, to wit, Hon. W. A. Proctor, Co. Judge, presiding, S. P. Brown, Com. Prec. No. 1, M. C. Bright, Com. Prec. No. 2, D. F. Higginbotham, Com. Prec. No. 3, E. W. Stokes, Com. Prec. No. 4, being present, the following order was made and duly entered on the minutes of said court, to wit: It is ordered by the county commissioners' court of said county that the bonds of said county to

the amount of twenty thousand dollars, with interest coupons thereto attached, be issued for the purpose of building and constructing bridges for public uses within said county, by virtue of and under the provisions of an act of the 20th legislature of the state of Texas, entitled 'An act to authorize counties to buy, construct or contract for the use of bridges, and to issue bonds and levy taxes to pay for same, and to repeal all laws in conflict herewith,' approved April 4, 1887. Said bonds shall be in denominations of (\$1,000) one thousand dollars each, numbered from one to twenty consecutively and inclusive, to become due and payable on the 10th day of April of each year, twenty years after date, to bear interest at the rate of 6 per cent. per annum, payable annually on the 10th day of April of each year. Interest and principal shall be made payable at the office of the treasurer of the state of Texas. Said bonds shall be signed by the county judge with the seal of the commissioners' court affixed, countersigned by the county clerk, and registered by the county treasurer. It is further ordered that a tax of fifteen cents on the one hundred dollars' valuation of all property situated in said county subject to taxation be annually levied and collected to pay the annual interest on said bonds, and to create a sinking fund of not less than four per cent. (4) or the full amount of said bonds for their redemption.

"The State of Texas, County of Runnels: I, W. L. Towner, clerk of the county court and ex officio clerk of the commissioners' court of Runnels county, Texas, do hereby certify that the above, foregoing, and attached instrument in writing contains a true and correct copy of the original, as the same appears of record in the minutes of the county commissioners' court of Runnels county in vol. 2, and at various terms. Given under my hand and seal of office, this, the 31st day of August, 1891.

W. L. TOWNER,

" { Seal
Runnels County. }

Clerk County Court and Ex Officio Commissioners' Court of Runnels County, Texas."

Plaintiff called as a witness W. L. Towner, who testified that he was clerk of the commissioners' court during the year 1890, was still clerk, that no bridge bonds were issued during the year 1890, except the Milwaukee bridge bonds, admittedly the bonds in suit, and rested his case. Thereupon defendant's counsel called the same W. L. Towner as a witness, who testified that he had the original record book of the commissioners' court of Runnels county, which began in August, 1889, and was not yet closed, and the defendant county offered the minutes as made and entered in the original minutes of the commissioners' court.

Horace S. Oakley, for plaintiff in error.

C. O. Harris, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

BRUCE, District Judge (after stating the facts as above). This case comes here on writ of error. No question is made but that if the order of February 10, 1890, was passed by the commissioners' court of the defendant county on that date, then the bonds, or rather the interest coupons, sued on in this suit, are not obnoxious to the clauses of the constitution of the state which prohibit municipal corporations from creating debts unless payment of such debt is provided for by taxes to be assessed and collected annually. Const. art. 11, § 5, and section 7 of the same article. The proposition of the defendant county is to show by parol proof that the order of February 10th was not passed by the court on that date, as it purports to have been passed, but that it was passed at a call term of the court in July following, and after the bonds were issued. The commissioners' courts are required by law to procure suitable books, in which shall be recorded the proceedings of each term of court,

"which shall be read over and signed by the county judge or the member of the court presiding at the end of each term, and attested by the clerk." The law does not require that the proceedings of the court shall be recorded in strict chronological order.

An inspection of the record shows that the order of February 10th was entered at special term in July, but the question remains, when was it passed? Upon this question, over the objection of the plaintiff, the court admitted the testimony of the witnesses Towner, Willingham, Higginbotham, and Brown, to supplement the record, and contradict it as to the date when the order was passed. The plaintiff's proposition is that the records of the proceedings of a municipal corporation, when they are required by law to be kept by such corporation, import absolute verity, and in a collateral proceeding, after the rights of third parties have accrued, cannot be impeached by parol. A number of authorities are cited to this proposition, among which is the case of *Bissell v. City of Jeffersonville*, 24 How. 288; Dill. Mun. Corp. § 299. The testimony in the record is to the effect that the plaintiff is a holder for value of the bonds in question and the coupons in suit, without notice of any infirmity in the title to them; and, as against an innocent holder of the coupons, we think it was error to admit the parol testimony which was admitted, and the judgment of the court must therefore be reversed; and it is so ordered.

CINCINNATI, N. O. & T. P. RY. CO. v. FARRA et al.
(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 208.

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

The view of a railroad from a highway crossing it at grade was obstructed for 400 feet from the crossing, by cuts through which both passed, and by undergrowth on the railroad right of way, which prevented one driving on the highway from seeing to either side until his horse was on the track. A woman, acquainted with the crossing, and knowing that by the schedule of regular trains no train was due from the north, driving with two small children in a carriage having its side curtains rolled up, approached the crossing at a walk, listening for but hearing no signals or sound of any train, and, having no view of the track until she was upon it, was struck by a special train from the north moving at extraordinary speed. *Held*, under all the circumstances of the case, that it was not error to submit to the jury the question as to whether the plaintiff was guilty of contributory negligence in not stopping to look and listen before driving upon the track.

In Error to the Circuit Court of the United States for the District of Kentucky.

The defendant in error Mrs. Maggie Farra, while driving across the tracks of the defendant railroad, at a public road crossing, came into collision with a rapidly moving passenger train, passing on said railroad, and received very serious injuries. She instituted suit for damages in the circuit court of Jessamine county, Ky., which was removed by the plaintiff in error to the United States circuit court for the district of Kentucky. Mrs. Farra's petition alleged that the collision was due to the negligence of the railroad company in

failing to give proper signals when its train approached the public road crossing at which the injury was received, and in neglecting to keep its right of way free from obstructions impeding the view of travelers crossing the road. These allegations of negligence were controverted, and contributory negligence upon the part of Mrs. Farra was pleaded as a defense to her right of recovery. There was a jury, and verdict for \$5,000 in favor of Mrs. Farra, and from the judgment thereon a writ of error was sued out by the plaintiff in error.

At the conclusion of the evidence offered by the plaintiff below, the defendant moved for instructions to the jury to return a verdict for the defendant. This was overruled and exception taken. At the conclusion of all the evidence this motion was renewed, and again overruled, and exception reserved.

The evidence disclosed by the record tended to establish the following facts bearing upon the alleged contributory negligence of the defendant in error: Mrs. Farra, on the afternoon of September 4, 1892, was returning from a visit to a neighbor's. She was driving along a country road which intersects the railroad of the plaintiff in error at a grade crossing. She was in a two-seated vehicle, and was driving a kind, gentle horse. She had two small children with her,—one a baby asleep upon her lap, the other a little girl seated next to her. All were on the back seat. Both the turnpike and the railroad approached the crossing through considerable cuts. Some 400 feet before reaching the crossing the turnpike begins a descent, which continues to the crossing. The grade of this turnpike appears to be about 12 feet to the 100 for the first 300 feet from the point where the descent began. The remainder of the road was upon a grade less than half so great. The railroad approaches the crossing from the north on a curve, through a deep cut, for perhaps 1,000 feet. The last point from which one traveling this turnpike could observe the railroad was 400 feet from the crossing, being the point at which the road began to descend the hill to the railroad. The railroad, from the beginning of the descent, was obstructed from the view of Mrs. Farra until within a few feet of the track. This was due to the effect of the cuts through which both the railroad and turnpike approached the crossing. To add to this obscurity, the right of way had been suffered to grow up in undergrowth and rank weeds, so that one driving could not see to the right or left until the horse pulling the barouche was over the first rail. The side curtains of the carriage were up, and there was no obstacle to prevent her seeing whatever could be seen from her vehicle. From the time she started down the hill she was attentive to the situation. Being acquainted with the turnpike, and aware of the dangerous character of the crossing, she was watchful and careful. She says in her evidence: "I was driving down the hill in a walk. My baby was asleep. The other little girl was on the other side of me. I was listening for the train. I knew it was a dangerous crossing. I had no view of the track until I got on the track." She says she then looked first to the south, because at that hour no train was expected from the north. Seeing no train in that direction, she then looked the other way, and saw an engine approaching, and so near that there was no time to cross over or to withdraw. The engineer on this engine says that on approaching the crossing "he saw a horse; the horse's mouth was open as though he was being pulled back"; and that he struck the horse before there was time to check up. Mrs. Farra says, though she approached the crossing in a walk and was listening, she heard no signals and did not hear the approach of the train. She was acquainted with the schedule of trains, and says no train was due from the north at that hour. The train which occasioned the catastrophe was a special passenger train from Cincinnati carrying several cars of excursionists en route to witness the Sullivan-Corbett fight. There was evidence tending to show that no signals were given on approaching this dangerous crossing, and that the train was moving at from 40 to 50 miles per hour.

The court refused the request made by the plaintiff in error for an instruction in these words: "The jury is instructed that a railroad track is of itself notice of danger and a warning to persons approaching a railroad crossing to look out for trains running on the railroad, and that it is the duty of a person approaching a railroad crossing to make a vigilant use of his senses in looking for a train approaching the crossing on the railroad, and to use care

commensurate with the character and apparent danger of the crossing in order to ascertain if a train is approaching a crossing on a railroad; and, if the view of the railroad is obscured by intervening objects, it is the duty of the traveler upon the highway, before going upon the railroad track, to stop and look and listen for an approaching train; and if such traveler, under such circumstances, fails to stop and look and listen, and without so doing goes upon the track and is injured by a train running on said railroad track, which injuries would not have been sustained except for the failure to stop and look and listen, then the jury must find for the defendant, even though the jury believes from the evidence that there was a failure by the employes operating the train to give notice by signals of the approaching train to the crossing."

The court, after charging the jury fully upon the alleged negligence of the railway company, gave the following instruction in respect to the contributory negligence of the defendant in error: "That was a public highway. She had the right to travel upon it and to cross this crossing, but she was under obligation,—in duty bound,—to the relative right which the company had of its right of way, to use care and prudence herself. She could not and cannot claim damage if she has herself been careless or imprudent in approaching and attempting to cross that right of way, and by that I mean such prudence and caution as reasonably careful persons would take under similar circumstances. Now, this crossing was, although in the country, dangerous,—dangerous because of the character of the public highway as well as the cut on the railroad, which highway is, as the evidence has it, rather a steep descent; somewhere between 7 and 8 feet descent, according to the evidence, to the 100 feet. The gentleman who testified said the last 100 feet before you came to the crossing is, I think he said, about 8 feet grade to the 100 feet. It was through a cut which was on a hillside, so that, according to the evidence, there is some contrariety. You, gentlemen, must consider that; it is not for the court. After they left the top there was no means of seeing an approaching train from this until very near the crossing. That was not because of the nature of the railway so much as the nature of the highway, but the two combined interfered with the vision, so that any one approaching it, after they had left the top of the hill,—according to the witnesses, some 100 or 150 yards from the top of the hill,—had no means of seeing an approaching train from around the curve until they were near the crossing. Now, the plaintiff owed that obligation not only to herself,—self-preservation would, of course, incline her to look and listen,—it was an obligation which she owed to the railroad company in the use of that crossing. The evidence is that she came down the hill slowly, in a walk, sitting in a buggy or a rockaway; that she had her children with her, one being with its head in her lap and the other by her side. The horse, according to the evidence, was gentle. She was listening and looking. She did not stop; that is to say, the horse, going in a walk, continued to go. She did not stop, but passed on, and by reason of that the collision occurred. Now, the query is just here, gentlemen, and it is for you to say, did she exercise such care and such prudence under the circumstances as a careful and prudent person should have done? If you believe she was guilty of contributory negligence, and that is a want of care and prudence which an ordinarily careful and prudent person should have taken under the circumstances, then, although the defendant may have failed to give the signal and may have been negligent itself, she cannot recover if the accident would not have occurred except for her own negligence. This law is universal in this class of cases, and the plaintiffs cannot recover for the negligence of another if they have been negligent when, except for that negligence, the injury would not have happened. So that, in considering this case, if you think that her driving down that hill, sitting on the back seat in the rockaway, as she was, or if you think her failure to stop and look and listen, was a want of care and prudence which an ordinarily careful and prudent person would have taken, and that that causes the accident, then you should find, in that event, for the defendant."

To this the court added: "Just on this subject the counsel for defendant have asked me to give instructions, and I give it in his language. I believe I have given them in substance, but I will give them in the language of the counsel who asked them: 'The court instructs the jury that, while it is the

duty of those in charge of a railway train approaching a highway crossing to give notice of the approach of the train to the crossing by the sounding of the whistle or the ringing of the engine bell, yet the neglect of the engineer of the locomotive of a railroad train to sound its whistle or ring its bell on approaching a highway crossing does not relieve a person traveling on a highway, approaching a railroad crossing, of the necessity of taking ordinary precautions for his safety. He is bound to use his senses, to look and listen, before attempting to cross the railroad track, in order to avoid any possible accident from an approaching train. And if he omits to use them, and goes upon the track, he is guilty of culpable negligence, and if he receives an injury he so far contributed to it as to deprive him of the right to recover for such injuries so inflicted or sustained.' This, gentlemen, is upon the idea of contributory negligence."

C. B. Simrall (Ira Julian, of counsel), for plaintiff in error.

J. R. Morton, G. R. Pryor, and John Welch, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The only question arising upon the errors assigned is as to the contributory negligence of the defendant in error. Were the circumstances so clear, and the inference of law so plain, that the court should have instructed for the plaintiff in error? That the defendant in error did not stop for the purpose of looking and listening was an admitted fact. If the omission of that precaution was negligence per se, then the instruction asked for at the conclusion of the evidence should have been granted. To have given the instruction in the language of the request respecting the duty to stop if the view was obstructed would have been equivalent to an instruction for the plaintiff in error, for there was no dispute as to the fact that Mrs. Farra's view of the track was obscured from a point 400 feet back on the road until her horse was upon the track, and in danger from a passing train. The request to charge as to the duty of stopping was rested upon the single fact that the view was obstructed. The learned trial judge thought that there were circumstances in evidence entitled to consideration in the determination of that question which were eliminated by the form in which the request was made. The case of *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, in most respects was like the one at bar. The decedent in that case was run over at a public street crossing. The view of the tracks to be crossed was obscured by houses and standing cars for several hundred feet before reaching the crossing. The contention of the railroad company was that when the deceased reached a point within 15 or 20 feet he had a clear view of the track to be crossed, and that it was his duty to have stopped there for the purpose of looking and listening, and the court was requested to so charge. This was declined, the court saying that "it is too much on the weight of the evidence, and confines the jury to the particular circumstance narrated, without notice of others that they may think proper." "This reason is a

sound one," said the supreme court when called upon to review the ruling of that trial judge. 144 U. S. 433, 12 Sup. Ct. 679.

The charge in that case was identical in substance with the one delivered by Judge Barr, and submitted to the jury the question as to whether, under all the circumstances, the conduct of the decedent had been that of a reasonably prudent and cautious man. "There is," said the supreme court in the case last cited, "no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under all circumstances. * * * It is only where facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is even considered as one of law from the court." 144 U. S. 417, 12 Sup. Ct. 679. It is true that in the Ives Case it did appear that the deceased had stopped some 80 feet before reaching the track, "presumably to listen." But it was also shown that from that place he had no view of the railroad, and could not get a view until he was within 15 or 20 feet of the track. He did not, therefore, avail himself of an opportunity to stop and look and listen at the only place near the crossing, familiar to him, which was available for observation. But where was Mrs. Farra to stop? An observation made from the top of the hill, 400 feet before she reached the crossing, would have been of no practical value. The train approaching, according to the contention of defendant in error, was traveling at the rate of 50 miles per hour. When she passed the brow of the hill it must have been a mile or more away, and the view from that point to the north is not shown to have extended beyond the whistling post, some 1,200 or 1,300 feet north of the crossing. It is not shown that she knew the obstructed condition of the right of way by undergrowth and weeds. Non constat but that for the negligent condition of that right of way she might have had a view of the approaching train without being obliged to drive her horse onto the track before getting a view of the track; and that, in reliance upon the absence of such obstruction, she continued to drive until she found she had reached the track before getting a view. To stop before actually reaching the track, with a view of looking, would have been idle, as the facts turned out, unless she got out and walked nearer the track. But she was a woman, and incumbered with a sleeping babe and another small child. Such a course, to say the least, would have been very inconvenient and quite extraordinary. Of course, there may be circumstances when ordinary prudence would demand even so unusual a precaution. But in this case were there circumstances which made that course imperative? She knew the running schedule of the regular trains, and says that no train was due at that hour from the north. The train with which she did collide turns out to have been a special train, moving at extraordinary speed. There was therefore no special reason to apprehend a train from the north at that hour. But it is said that the noise of her own vehicle impeded her hearing, and that by stopping her sense of hearing would have been more acute. She

was traveling at a walk. The curtains of her barouche were rolled up. She was conscious of the dangerous character of the crossing she was approaching, and listening for a train. Under all the circumstances, was she guilty of negligence per se in not stopping before she reached the track to listen? Was the omission of that precaution so culpable, under all the surroundings, "that all reasonable men must draw the same conclusion"? or was the question one which admitted of such different judgments as to her conduct as to make it a proper question to go to a jury? Under all these circumstances, was it the duty of the court to say that the single fact that her view of the railroad was obstructed made it her duty to stop, or might the court say, as in effect it did, "look to all the circumstances surrounding this plaintiff at the time, and say whether her failure to stop was such an omission of that care and prudence which an ordinarily careful and prudent person should have exercised under like circumstances"?

The fundamental rule concerning the care to be exercised at a public railroad crossing by a traveler is that he must exercise that degree of caution usually exercised by prudent persons, conscious of the danger to which they are exposed at such crossings. If a crossing is peculiarly dangerous, a corresponding increase of caution is required. The general rule would, of course, demand that a vigilant use should be made of the eye in looking and of the ear in hearing. The failure to exercise these faculties by one approaching a crossing would be such a departure from the observance of that degree of caution exercised by prudent persons at such crossings as to raise, under ordinary circumstances, an inference of negligence, about which reasonable men would not disagree. *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85; *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *Horn's Adm'x v. Railroad Co.*, 6 U. S. App. 381, 4 C. C. A. 346, and 54 Fed. 301; *Blount v. Railroad*, 9 C. C. A. 526, 61 Fed. 375.

We are not prepared to say that ordinarily it would not be the duty of one approaching a crossing to stop and look and listen, if the view of the crossing was obstructed and the sense of hearing was materially affected by the noise of the vehicle in which the person was traveling. The Pennsylvania rule, which seems to make it the duty to stop under all circumstances, regardless of obstructions to the view or obstacles to the hearing, has not met with general acceptance, and seems much calculated to condone carelessness and recklessness by railroad companies at public crossings, where the rights and duties of the public and of the company are reciprocal. Neither are we prepared to say that the duty of stopping is imperative in all cases where the track is obscured. There may be circumstances, as in the *Ives Case* and in the case at bar, where the duty is debatable and proper for the consideration of the jury. Mrs. Farra's case presented quite as many circumstances calculated to modify the duty of stopping as were presented in the *Ives Case*, and we think should be controlled by that case. Nothing decided by this court in the case of *Horn's Adm'x*

v. Railroad Co., cited above, conflicts in any way with the Ives Case, or the application of the Ives Case to the one now decided. It is true that the district judge who tried that case in the circuit court had charged that it was the duty of the deceased to have stopped and looked and listened. But the plaintiff had a verdict, and the writ of error was sued out by the railroad company. It could not and did not assign error upon that charge, and the propriety of the charge was not involved in the opinion of this court. The judgment must be affirmed.

McGHEE et al. v. WHITE.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1895.)

No. 230.

CONTRIBUTORY NEGLIGENCE—CROSSING RAILROAD TRACK.

One K. was driving towards a railroad crossing, at which, owing to the formation of the ground, an approaching train could be seen only for a short distance. When K. was about 40 yards from the crossing, a train passed. Immediately after, K. drove forward to cross the track, and, as the forward wheels of his wagon reached it, was struck by a second train following the first at a speed of about 20 miles an hour. It appeared that K. did not look before crossing the track to see if a second train was coming. *Held* that, in view of the unusual circumstance of a second train's following the first at so short a distance and so high a speed, the question of K.'s contributory negligence in failing to look, before crossing, was for the jury.

In Error to the Circuit Court of the United States for the District of Kentucky.

This was an action by William White, administrator of Green Kennedy, deceased, against Charles M. McGhee and Henry Fink, receivers of the East Tennessee, Virginia & Georgia Railway Company, to recover damages for negligence causing the death of said Kennedy. In the circuit court plaintiff recovered judgment. Defendants bring error. Affirmed.

Plaintiffs in error were receivers of the East Tennessee, Virginia & Georgia Railway Company, and as such operated the Louisville Southern Railroad under a lease from the Louisville Southern Railroad Company to the East Tennessee, Virginia & Georgia Railway Company. While the road was being operated by the receivers, Green Kennedy, the intestate of the defendant in error, was killed by one of their trains in Lawrenceburg, Ky. The accident occurred at the point where the railway is crossed by the main road from Lawrenceburg to Frankfort, which runs from north to south. The railway track crosses the road diagonally from southeast to northwest within the corporate limits of Lawrenceburg, but outside of the more densely settled portion of the town. For a quarter of a mile south of this crossing there are no houses on either side of the turnpike except that of Mrs. Caldwell, which stands about 40 yards south of the crossing, and 20 feet east of the pike, and has the railroad at its rear as well as on its north side. Three hundred yards before reaching the crossing the railroad makes a curve in a cut. Whether a train running in this cut is hidden from a traveler on the pike was in dispute. The pike before it reaches the crossing is below the level of the railway, and reaches the railway on a grade. From a point upon the turnpike 20 feet south of the crossing, the railway track can be seen about 40 yards eastwardly from the crossing. The track west of the crossing is straight and level and in open ground for half to three-quarters of a mile. On the 26th of

August, 1892, Green Kennedy, seated in a wagon, was driving a horse and mule northwardly on the turnpike road just described towards the railroad crossing. Holly Meux, a colored boy, was sitting on the seat with Kennedy. As they approached the railway, a work train crossed. Kennedy stopped the wagon in front of Mrs. Caldwell's house, 40 yards from the track, and, as the work train passed, went on slowly towards the crossing. The mule and the horse were upon the track when a second train, a freight train following the work train, struck the mule, killed Kennedy instantly, and injured the boy Meux. Suit was brought in the circuit court of Anderson county, Ky., to recover damages, and it was removed by defendants to the court below, where a verdict was rendered in favor of the plaintiff for \$4,500. Upon motion for new trial the court made an order granting the same, unless a remittitur was entered of \$2,000. This was done, and judgment was rendered for the \$2,500. Holly Meux, who was on the wagon with Kennedy, testified: "Just before we reached Mrs. Caldwell's house the work train passed over the crossing, and we slackened up, and stopped in front of Mrs. Caldwell's house. As soon as the train passed by, we drove up slowly to the crossing. I was looking at the train which had just passed, and it was going around the hill, as we approached the railroad crossing, and just before the mule on the right hand side was stepping on the track, I turned my head, and saw the train coming from the other side of the track, and hallooed to Green Kennedy to look out, and I was just about to jump out when the train struck the mule and wagon, and knocked me out on the ground near the fence." Henry Anderson testified for the plaintiff: "While I was looking in that direction I saw Green Kennedy and his team approaching the crossing from the south side, and it seemed to me that it was not more than a minute or two after the train passed, and before it got out of sight, until the second train appeared on the crossing and struck the team. I heard no whistle nor ringing of the bell on this last train. I am positive the whistle was not blown, and I did not see it at all until just about the time it struck the team. I immediately got up and walked down to the crossing, and when I got there I found that Green Kennedy was killed." Lula Kingston, who was approaching the crossing from the other side, from the north, and did not quite reach it before the second train passed, said: "I did not see at that time Green Kennedy nor his wagon and team near the railroad crossing, but after the train had passed I came back and saw where the wagon had been struck and a man was killed." Another witness, Mattie Sewell, testified that she was looking out of her window, through which she could see to the middle of the pike where the railway crossed it; that she followed the first train with her eye until a shadow came across in front of her, and she turned her head, and saw another train, which struck the wagon Green Kennedy was in. Claude Anderson, who was sitting on the fence just south of the crossing, said that he turned his head to look at the work train, and did not see the other train as it approached the crossing until just before it struck the wagon. "After Green Kennedy started in the direction of the railroad after the work train had passed, I did not notice him until just before the second train struck him. I do not know which way he was looking as he approached the crossing, as I was looking in the other direction, at the work train." For the defendant, Bertha Caldwell testified: "I heard the noise of the train and the bell ringing, and saw the train as it came around the curve. I looked to the pike, and saw a colored man driving a wagon with a horse and mule in it about twenty feet from the railroad track. I said to my mother, 'That man is driving his team onto the track; why don't he stop?' I saw him look around at the train as it was approaching the crossing, and I thought he would stop, but he whipped up his horses, and I screamed, and said to my mother, 'Why don't he stop?' Just then the mule went onto the track, and the engine struck the mule and fore wheel of the wagon on the right hand side, and I immediately ran out to see if the man was killed. If the colored man had tried to stop his team when I saw him look up at the approaching train, he could easily have avoided the accident, but he acted to me like he was trying to cross the track before the train reached him." This is substantially all the evidence as to the circumstances under which Green Kennedy approached the track. The evidence of most of the witnesses for the plaintiff tended to show that the train was running at the rate of about 20 miles an hour.

Edward Colston, George Hoadly, Jr., and C. A. Hardin, for plaintiffs in error.

John W. Rodman and James A. Violet, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts). It is contended on behalf of the plaintiffs in error that the uncontradicted evidence shows that Kennedy attempted, after seeing the freight train coming, to cross in advance of it. If this were true, it would have been the duty of the court below to charge the jury to return a verdict for the receivers. It is true that Bertha Caldwell is the only witness who testifies that she had in her sight Green Kennedy as he approached the crossing all the time until he was struck, and that she says that he saw the train, and attempted to get over before it, and whipped up his horses to do so. This is at variance with the statement of Holly Meux, who was in the wagon with Green Kennedy, and who says that they went slowly to the track. It is at variance also with the probabilities, for the evidence quite clearly establishes that Green Kennedy could not see the engine coming east until he was within 20 feet of the track, and until the engine was within 120 feet of the crossing. Miss Caldwell's story is that Kennedy, when 20 feet from the track with a locomotive rushing on him at the rate of 20 miles an hour and only 120 feet away, tried to cross in front of the engine with a mule team. The proof is that Kennedy's mule was stepping upon the track when the engine struck him. It is very improbable that, if Kennedy had seen the train coming, he would have attempted to cross when so far from the track that he could not reach it with his wagon wheels before the coming of the train. The presumption of fact, and of law, too, would be against the existence of such wanton and reckless negligence, and the plaintiff was entitled to have the jury weigh the credibility of Miss Caldwell's evidence in the light of the circumstances. If the jury found that Kennedy did not wantonly risk the danger, as Miss Caldwell testifies, then the only other explanation of the accident is that Kennedy did not look to see the train as it came. This is supported by Meux's statement that he hallooed to Kennedy to look out when he saw the train. The question which we have to decide is whether, if he did not look, he was necessarily guilty of contributory negligence. We think that the circumstances were such as to make this question one for the jury. The case is governed by the decision of this court in *Railway Co. v. Farra* (handed down Feb. 5, 1895) 66 Fed. 496, and by the decision of the supreme court in *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679.

The work train had passed over the crossing not more than one and a half minutes before Kennedy was struck, and he had good reason to believe, therefore, that another train was not following within so short a time and distance. The shortness of the time between the two trains is quite satisfactorily shown by a calculation based on the time it took Kennedy to reach the track from Mrs.

Caldwell's house, which he left as soon as the work train had passed. If Kennedy's team went at 3 miles an hour, and the train at 21 miles an hour, and they reached the crossing at the same time, Kennedy went in that distance but 40 yards, while the freight train must have gone seven times as fast, or 280 yards. This would indicate a distance of not more than a sixth or a seventh of a mile between the two trains, running at 20 miles an hour. This is very much less than the usual distance between trains running in the same direction, and is most dangerous. Kennedy might, therefore, reasonably presume that, in the 40 yards he had to go to reach the track, another train would not pass the crossing. At least, this circumstance prevents us from holding as a matter of law that his failure to look was contributory negligence. It required the submission of the issue to the jury. In *French v. Railroad Co.*, 116 Mass. 537, the plaintiff's evidence tended to show that she was driving with care, and in approaching a railroad crossing saw a train pass, and saw no flagman, and received no warning that another car was coming. At a point 46 feet from the crossing she could have seen 46 feet in the direction from which the car came. At 30 feet from the crossing she could have seen the track for more than half a mile, but she did not look in that direction, and gave as a reason that she did not suppose that one train would follow another so closely. She was struck by some cars which were detached from the train that had passed, and which, without warning, followed the train over the crossing. The supreme judicial court of Massachusetts held that whether she was careless in failing to look up the track at the points near the crossing where it was possible was a question for the jury to determine under the peculiar circumstances of the case. We reach the same conclusion in this case. This is a stronger case than that of *Railway Co. v. Ives*, and a stronger case than that of *Railway Co. v. Farra*, already decided in this court. The case of *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85, is not in conflict. There the foreman of a section gang, with 10 years' experience on a railway, in expectation of a coming freight train had placed his hand car on a siding. The train came from the west, and made a double flying switch at the station. After the first section had passed, the foreman, who was standing 4 or 5 feet from the track talking with one of his men, walked hastily on to the track without looking, and was struck by the rear section of the train, which was moving very slowly along the track. When he started to cross the track the approaching section was not 25 or 30 feet from him. It was held that he was guilty of contributory negligence as a matter of law, and the verdict directed for the defendant was sustained by the supreme court. The fact that the man was a section boss, well acquainted with the customs of the railroad company, and therefore charged with the knowledge that such a flying switch was possible or probable, made it his duty necessarily to look both ways upon the track before stepping across it. The case is a very different one from the one at bar, in that what caused the death there was something which the person

killed had reason to expect, whereas here the proximity of the two trains on the same track following each other was not only unusual, but was attended with much danger to the persons on both trains. Error is assigned to the action of the court in excluding an exclamation of the witness Bertha Caldwell, when she saw Kennedy driving upon the track. She testified that she said to her mother, "That man is driving his team onto the track; why don't he stop?" It does not seem to us that this evidence was very material, in any aspect of the case. It only showed that she was looking at Kennedy, but did not show where he was looking. The exclamation was quite consistent with his not seeing the train, and we do not think that its exclusion, even if erroneous, was material error. The judgment of the court below is affirmed.

CHICAGO, M. & ST. P. R. CO. v. WALLACE.

(Circuit Court of Appeals, Seventh Circuit. February 23, 1895.)

No. 180.

CARRIERS—COMMON AND PRIVATE.

The C. R. Co. made a special contract in writing with one W., the proprietor of a circus, to haul a special train, consisting of cars owned by W., containing the circus property, equipment, and performers, between certain points, on stated days, at prices specified, which were less than the regular rates of the company for transportation of passengers and freight. It was provided in the contract that, in consideration of the reduced rate and of the increased risks to the property of the railroad company in running such special train, said company should not be liable for any damage to the persons or property of the circus company from whatever cause. It was not the regular business or the custom of the railroad company to haul such special trains of private cars, or to transport persons, animals, and freight on the same trains. *Held*, that the railroad company in carrying W.'s property on such special train acted as a private, and not as a common carrier; that, as such, it had the right to make the contract, stipulating against liability for damage; and that such contract was binding upon the parties.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The facts in this case are fully and properly stated in the brief of counsel for plaintiff in error, as follows:

"This is a writ of error prosecuted by the Chicago, Milwaukee & St. Paul Railway Company, defendant below, to reverse a judgment of \$8,000 recovered against it in the lower court by Benjamin F. Wallace, the plaintiff below, for loss and injury to certain property comprising part of the belongings and equipment of a circus owned by Wallace, and for the loss of performances of the circus caused by two separate accidents happening upon the railroad company's road while it was transporting the circus in a special train composed of cars belonging to Wallace. Plaintiff's declaration is in trespass on the case for negligent violation by defendant of its duty as a common carrier. It contains two counts: The first count avers that on the 7th day of July, 1892, the defendant was possessed of and operating a certain railroad and railroad tracks in the states of Wisconsin and Iowa, and was operating and controlling certain locomotive power and engines up-

on and along its said railroad and tracks; that the plaintiff was the owner of a certain circus known and described as the 'Cook & Whitby Circus,' consisting, besides employes, of a large number of horses, wagons, tents, harnesses, and a large quantity of other property, effects, and paraphernalia, and was also the owner of twenty-four cars; that on the said 7th day of July, 1892, at the city of Prairie du Chien, in Wisconsin, the defendant then and there received, as common carrier, the aforesaid twenty-four cars of the plaintiff, containing the aforesaid property and effects of the plaintiff, constituting said Cook & Whitby's Circus, and the people connected therewith, to be safely transported to the town of Maquoketa, state of Iowa, and to be safely delivered there to the plaintiff on the 8th day of July, before 9 o'clock of the forenoon of that day. The plaintiff avers that it was the duty of the defendant to provide safe, strong, and efficient locomotive power for the transportation of said cars, with the property and effects of the Cook & Whitby Circus, and it was also the duty of the defendant to construct and maintain its tracks and roadbed, at and near the station known as 'Sny Magill,' in the state of Iowa, in a safe and suitable condition; that the defendant negligently failed to provide strong and efficient locomotive power, and negligently failed to construct and maintain its tracks and roadbed in a safe and suitable condition at said point near Sny Magill, and that in consequence four of said cars were damaged, twenty-four horses were killed, other horses injured, and a large amount of harness was damaged; also that by reason of the accident plaintiff was prevented from giving performances of the circus, which he had advertised, in the vicinity of the town of Maquoketa and the city of Davenport, in the state of Iowa, and thereby lost the profits he would have made had he been able to give said performances. The second count of the declaration avers that on the 6th day of July, 1892, the defendant was possessed of and operating and controlling a certain railroad and railroad tracks in the state of Wisconsin, and operating and controlling certain steam locomotive power and engines upon and along the said railroad and railroad tracks; that upon said day the defendant, at the city of Richland Center, in the state of Wisconsin, received as a common carrier the aforesaid twenty-four cars of the plaintiff, containing all the aforesaid property and effects of plaintiff, constituting said Cook & Whitby's Circus, to be transported, by means of fit and adequate locomotive engine power to be furnished by the defendant, over the railroad and tracks aforesaid, from said city of Richland Center, in the state of Wisconsin, to the said city of Prairie du Chien, in the state of Wisconsin, and to deliver the same at Prairie du Chien on the 7th day of July, 1892, at or before the hour of 9 o'clock in the forenoon of that day; that it was the duty of the defendant to have provided safe and proper appliances at a certain switch located at and near a point south of said Richland Center, and to keep proper and sufficient lights and signals placed at and near said switch to indicate whether said switch was open or closed; that the defendant negligently failed and omitted to perform its duty in this regard, and that by reason thereof the locomotive hauling plaintiff's cars was derailed; that the defendant failed to proceed with due and proper diligence to get its locomotive engine back onto the main track, and that in consequence plaintiff's cars were delayed so long that they did not reach the city of Prairie du Chien in time to give performances, which had been advertised there. The defendant pleaded the general issue to the entire declaration, and afterwards a special plea to the jurisdiction of the court, which was subsequently stricken from the files by order of the court.

"On the trial it appeared that the plaintiff's cars and property were hauled by the defendant under a special contract made and executed June 1, 1892, by the railroad company and by the plaintiff, Wallace, through their duly-authorized agents. This special contract reads as follows:

" 'This agreement, made and entered into this 1st day of June, A. D. 1892, by and between the Chicago, Milwaukee & St. Paul Railway Company, party of the first part, and Cook & Whitby Circus, party of the second part, witnesseth: The party of the first part agrees to run a special train, consisting of ten flat cars, six stock cars, six passenger cars, two advertising cars, in all twenty-four cars, to be furnished by the party of the second part, to run between as below, and as below:

Leaving:

Shakopee to Hastings, June 29th,.....	\$180
Hastings to Redwing, Jun. 30th,.....	180
Redwing to Faribault, Jul. 1st,.....	180
Faribault to Decorah, Jul. 2d,.....	225
Decorah to Boscobel, Jul. 4th,.....	200
Boscobel to Richland Center, Jul. 5th,.....	180
Richland Center to Prairie du Chien, Jul. 6th,.....	200
Prairie du Chien to Maquoketa, Jul. 7th,.....	200
Maquoketa to Davenport, Jul. 8th,.....	180

"Deliver to Chicago, Rock Island & Pacific Railway at Davenport, where they leave our line, and carry on said special train, as before described, the circus property of said party of the second part, together with the people properly connected therewith, so far as the same shall be loaded on said train. The said train to be run so as to arrive at its several destinations at or about 6 o'clock in the morning, provided the same shall be loaded and ready to start in time to reach its several destinations at said hour. In consideration thereof the said party of the second part hereby agrees to pay to the said party of the first part the sums as specified above per day in advance (which said sum is a reduction from the usual and regular rates charged by said party of the first part for transportation services of the kind and nature above specified), the sum to be paid to the agent of the said party of the first part at the station from which the next succeeding run is to be made, it being mutually understood that no charge will be made for the use of train or trainmen on Mondays, when the runs for those days are made on the Sunday immediately preceding; and said party of the second part also agrees to load and unload said cars. In consideration of the agreement of said party of the first part to run said special train as above specified, and at and for the reduced rates above named, and also in consideration that, by the running of said special train as above specified, the said party of the first part increases the risks and dangers of operating its railway, and subjects its own property to a greater liability of being damaged, and in further consideration of the premises, said party of the second part does hereby covenant and agree to release and discharge said party of the first part of and from any and all liabilities for claims and damages of every name and nature, by reason or on account of any accident or injury, from whatever cause, that may occur to, or may be suffered or sustained by, any one, or all, of the persons composing or attached to said circus company, or to the cars or other property of said party of the second part, while in or on said train or upon any of the premises belonging to or used by said party of the first part, or by reason or on account of any delays that may occur in the running of said special train, or by failure to reach the several points of destination at the specified time. And, in and for the consideration last above mentioned, said party of the second part does hereby further covenant and agree that he will protect, and forever hold free and harmless, the said party of the first part, from any and all damages or claims for damages that he or they may sustain or incur by reason of any accident or injury that may happen to or be received by any one or more of the several persons composing or attached to said circus company, or permitted by said party of the second part to ride upon said train, or upon any of the premises belonging to or used by said party of the first part. J. H. Hilland, for the Chicago, Milwaukee & St. Paul Ry. Co. J. M. Hamilton, for Cook & Whitby."

"The plaintiff offered evidence tending to show that at a point near Sny Magill, on the defendant's road, and while plaintiff's special train was being transported from Prairie du Chien towards Maquoketa, certain of plaintiff's cars were derailed and thrown down an embankment; that as a result twenty-four horses belonging to plaintiff were killed outright, and four others died afterwards from injuries received, and about forty other horses were permanently injured; also that serious injury was done to a large number of sets of harnesses belonging to the plaintiff, as well as to the cars derailed, and that the plaintiff was prevented from giving, and lost probable profits of, performances of his circus at Maquoketa and Davenport, which he had advertised at considerable expense. Plaintiff's evidence tended to show that the

derailment was caused by defective roadbed at the point of accident, and by reason of the fact that the locomotive used to haul plaintiff's train of cars was light and of insufficient power. Plaintiff's evidence also showed that, on the evening of the 7th of July, plaintiff's special train, after starting from Richland Center towards Prairie du Chien, was stopped by reason of the engine running off the track at a misplaced switch a short distance out of Richland Center; that this accident caused a delay of several hours, and thereby prevented the plaintiff from giving, and lost probable profits of, performances at Prairie du Chien, which he had advertised at considerable expense. His evidence tended to show that the accident was caused by negligence of the defendant, and that the delay was greatly aggravated by the failure of the defendant to take proper steps for replacing the locomotive upon the track. At the close of the plaintiff's case, defendant moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled by the court, and an exception to the ruling duly taken.

"The testimony of the defendant tended to show that the accident at Sny Magill was not caused by the defective condition of the roadbed, or by reason of insufficient power in the locomotive used in the hauling of plaintiff's cars, but was caused by the breaking of an axle under one of plaintiff's cars; and that the accident to the switch at Richland Center, and the delay there, was not caused by any neglect or misconduct of the defendant or its servants. At the close of the evidence, the defendant requested the court to give certain written charges to the jury, instructing them that the defendant was not a common carrier, or subject to the liabilities of a common carrier, in accepting and transporting plaintiff's train of cars, and the property therein contained; that the defendant was therefore not restrained or controlled by rules applicable to contracts made by common carriers in the transaction of their ordinary business; and that the agreement releasing and discharging the defendant from any and all liability for claims and damages, of whatsoever nature, must control the rights of the parties, and should be enforced in favor of the defendant. The court refused all these requests, to which rulings exceptions were duly taken. The court, in substance, instructed the jury that the clause of the special contract exonerating defendant from all responsibility for loss or damage to plaintiff's property from any cause whatever was contrary to public policy, and void, in so far as it covered loss or damage occasioned by the gross negligence of the defendant or its servants, but was valid in all other respects; that if the jury found from the evidence that the defendant was guilty of gross negligence in not furnishing sufficient motive power and in not keeping its roadbed in proper condition, and that the damage to plaintiff was caused thereby, they should find for the plaintiff, notwithstanding the clause in the special contract exonerating defendant from liability. The jury thereupon brought in a general verdict for the plaintiff for \$8,000, and the court, after overruling defendant's motion for a new trial, entered judgment on the verdict, and from that judgment the plaintiff in error, the defendant below, prosecutes this writ of error."

Edwin Walker and J. Ralph Dickinson, for plaintiff in error.

William H. Barnum, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts). Proper assignments of error having been made by plaintiff in error, the main question in this court, as it was below, is whether the railroad company, in carrying the plaintiff's circus people, animals, and outfit, under the special contract in evidence, assumed the relation of a common carrier for hire. If it did, then the verdict must stand. If it did not, then the contract itself was a good defense to the action; and the whole case seems to depend upon this question. The court is of opinion that the railroad company had a right to

make the contract with the defendant in error; that the contract was not against public policy, but was valid and binding upon the parties who made it, according to its terms and conditions. The railroad company is charged in the declaration as a common carrier of the persons and property named in the contract, but the contract itself is wholly ignored, and the declaration framed as though no contract had ever been made. If the plaintiff had the right thus to disregard the contract, and sue the railroad company as a common carrier, the recovery must stand, because in that case the company would be liable for any defect in its roadbed which common, or even extraordinary, prudence and foresight could remedy. It would also be liable for the negligence of its own employes, and for any insufficiency in the engine or engines employed to move the plaintiff's cars, which ordinary prudence and foresight may have remedied. But if the company, in carrying the plaintiff's property under the contract and in the circumstances in which the undertaking was entered into, was not acting as a common carrier of the plaintiff's goods, but in the capacity of an ordinary private carrier for hire, then the company had the right to make the contract, and both parties will be bound by its terms.

That the company, in carrying the goods under the contract, was a private, and not a common or public, carrier, is the conclusion which the court has reached. There was no evidence offered that the railroad company had ever carried similar goods for Wallace before in his own private cars, or that it had ever carried or held itself out to carry goods in that manner for others, and there is no presumption that railroad companies would do so. We know from common observation that they do not hold themselves out as common carriers of wild and domestic animals to be transported in the private cars of the owners, and loaded in a manner agreeable to the owners; persons, animals, horses, and other property being carried upon the same train, which is operated at irregular times and seasons, at the convenience of the owners of such cars. They ordinarily operate their freight trains and passenger trains separately, and upon time schedules, prepared in advance by experts for the company, and with a view to reduce the danger of accident to a minimum. Here was a special contract in writing, wholly different from the ordinary bill of lading, providing for the hauling of a special train of cars, belonging wholly to the defendant in error, to be loaded as he pleased with persons, wild animals, domestic animals, and other property, and to be run on special time, the hours of departure to depend upon the time when the plaintiff should have his cars loaded and ready to start. Wallace was to be wholly responsible for the loading and the unloading as well as for the care of the property while in transit, the only duty of the railroad company being to haul the cars. Another significant provision of the contract is that the property was to be carried at greatly reduced rates, in consideration of which the plaintiff was to assume all the risk of accidents, releasing the company therefrom. If this provision of the contract, as no doubt it was, was binding upon the railroad company, why not upon the plaintiff?

The obligation was mutual. Why could not the railroad company say: "You wish your property carried in your own private cars, which is contrary to our usual rules and regulations, and at greatly reduced rates. You wish your entire circus troupe, horses, animals, and all the paraphernalia and accompaniments of a circus, carried for less money than at our rates as common carriers it would cost you to have the persons alone of your company transported, and you desire that they be carried at special times, also contrary to our rules as common carriers, and which materially increases risks in our business. Now, here are our roadbed and our engines. They have answered our own purposes of transportation fairly well. If you wish to take upon yourself all risk of damage by accident, we will accept your proposition, and carry at the rates proposed." There is nothing unlawful in this, unless we assume that the railroad company cannot carry property or persons at all, except as common carriers, which is against all rule and precedent. No common carriers undertake to carry every species of property, in respect to which they have not held themselves out as common carriers. They may contract as private carriers, and in that case they may make any reasonable contract. The railroad company as a common carrier could not enter into such a contract as this, because it cannot as a common carrier limit the liability imposed upon it from considerations of public policy. But the case is different in respect to property of which it is not a common carrier. If any authority were needed upon so plain a proposition it is not difficult to find. In *Hutchinson on Carriers* (2d Ed.; § 44) it is stated:

"A common carrier may, however, undoubtedly become a private carrier or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. The relation in such a case is changed from that of a common carrier to that of a private carrier, and, where this is the effect of a special arrangement, a carrier is not liable as a common carrier, and cannot be proceeded against as such."

Again, at section 73, it is stated:

"And, even as to such carriers as are *prima facie* public or common carriers, it may be shown that in the particular instance, or under the circumstances of the case, they did not undertake to transport, and are not liable as common carriers."

Again, at section 56a, par. 2, it is stated:

"In the second place, in order to charge one as a common carrier of goods, the goods in question must be of the kind to which his business is confined. No carrier undertakes to carry all kinds of goods, but only such as are of the description which he professes to carry. A common carrier is therefore not liable as such, where, by special agreement, as a matter of accommodation, merely, he undertakes to carry a class of goods which it is not his business to carry."

Again, at section 56b, it is stated:

"Common carriers of goods do not undertake to carry by any or all means, but only by those means and methods, and over the route, to which their business is confined. * * * And even if a carrier should, in a particular instance, undertake, by a special contract, to carry goods by unusual and exceptional methods or routes, his liability would be based on his contract, and not on the ordinary rules governing common carriers."

In the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, at page 377, the court say:

"A common carrier may undoubtedly become a private carrier, or bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

There are also two recently decided cases, one before the supreme court of Michigan and the other before the supreme judicial court of Massachusetts, where a question almost identical with the one at bar was adjudged in the same way. *Coup v. Railway Co.*, 56 Mich. 111, 22 N. W. 215; *Robertson v. Railroad Co.*, 156 Mass. 525, 31 N. E. 650.

The declaration charges the defendant specially as a common carrier. The court held it was not a common carrier in respect to the property which it undertook to carry under the contract, but nevertheless instructed the jury that:

"The contract made it the duty of the defendant to furnish reasonable safe and sufficient motive power to haul the cars of the plaintiff over the specified portion of its road, and the defendant will be liable if it failed, while attempting to perform its contract, to furnish such character of engine or motive power, and damage resulted therefrom to the plaintiff's property or business. And under such contract defendant was bound to have a reasonable safe roadbed, over which the cars and property of the plaintiff could be transported. If its roadbed was not in a reasonably safe condition, but was out of repair, so as to be unsafe and dangerous, and the defendant knew this fact, or by reasonable diligence could have known it, and the derailment of plaintiff's cars, and injury and damages to his property, was occasioned by such insufficient and insecure track and roadbed, then the defendant would be liable for such injury and damage."

—Thus allowing a recovery upon a cause of action nowhere hinted at in the plaintiff's declaration. The plaintiff, if he recover, should recover according to his declaration. *Kimball v. Railroad Co.*, 26 Vt. 247; *White v. Railway Co.*, 2 C. B. (N. S.) 7.

But, independent of this principle, we do not think there is any middle ground upon which to rest a recovery in this case. The railroad company was either liable as a common carrier as charged in the declaration, or it was not, and, if not, then the contract it made with Wallace, by which he assumed the risk of accident, was valid and binding. By the contract the defendant in error assumed all risk from accident, and for a proper consideration released and exonerated the railroad company from all damage occasioned thereby. He has got what he bargained for, or, if not, can sue upon his contract, but he must abide by its conditions. The judgment of the court below should be reversed, and the cause remanded, with instructions to the court below to award a new trial.

RHODES v. UNITED STATES NAT. BANK.

(Circuit Court of Appeals, Seventh Circuit. February 23, 1895.)

No. 185.

1. PRACTICE—REVIEW OF GENERAL FINDING—REV. ST. § 649.

Where a case is submitted to the court without a jury, pursuant to Rev. St. § 649, and a general finding only is made, such finding cannot be re-

viewed by the appellate court, though an exception to it is taken, and the evidence is presented by bill of exceptions.

2. CORPORATIONS—LIABILITY OF STOCKHOLDERS—KANSAS STATUTE—SUIT IN ANOTHER STATE.

The constitution of Kansas provides that "dues from corporations shall be secured by individual liability of the stockholders." Gen. St. Kan. 1868, c. 23, § 32, provides that, if an execution has been issued against the property of a corporation, and no property is found on which to levy it, then, after motion in the court rendering the judgment, and notice, an execution may be levied on the property of the stockholders, "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment." The courts of Kansas hold that the statute creates a several liability in each stockholder, in the nature of a guaranty. *Held*, that an action may be maintained to enforce such liability in a court of the United States sitting in another state.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Anson B. Jenks, for plaintiff in error.

E. A. Otis, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This is an action of assumpsit, brought by the United States National Bank, a Kansas corporation, against J. Foster Rhodes, a citizen of Illinois, to enforce a stock liability under the constitution and laws of Kansas upon stockholders of insolvent corporations created under the laws of that state. The declaration charges that a corporation known as the United States Building Company was incorporated on the 21st of December, 1886, under and pursuant to the provisions of chapter 23 of the General Statutes of the state of Kansas, of 1868, and which afterwards became indebted to the defendant in error (the plaintiff below) in the sum of \$22,000, on which a judgment was recovered in the state court for the proper district in Kansas on December 9, 1890; that execution was issued upon said judgment, and returned unsatisfied; that Rhodes was a stockholder in the building company to the extent of 75 shares, of the par value of \$100 each, amounting in all to \$7,500; that the building company is insolvent, and has no property or means of paying its debts, except the stock liability of its stockholders; and claims judgment for the amount of \$7,500. The declaration also contains the usual common counts in assumpsit. The defendant pleaded the general issue, and also specially that the plaintiff was itself a stockholder in the building company, and liable with the other stockholders for its debts; and that he, the defendant, was not a stockholder, and so not responsible for its debts. There was a general replication put in to the several pleas, a jury trial waived, the cause tried by the court, and a general finding of facts upon all the issues in the case, and a judgment for the plaintiff for the amount claimed. A general exception only was taken to the finding of the court. There was no special finding, and no request to find specially upon the facts, and no exception taken by the defendant that no special finding was made. There was a bill of excep-

tions signed in the case and made a part of the record containing the evidence, but it is clear that this court cannot review the facts, but must take the finding of facts made by the court, general as it is, for the facts upon which to apply the law. The court has, moreover, had some difficulty in reaching the main question of law argued by counsel and relied upon by the plaintiff in error as to the liability of the defendant in an action at law brought outside the limits of the state of Kansas under the constitution and laws of that state, relating to the subject of the personal liability of stockholders in such a case, because of the state of the record as before set forth, the exceptions taken on trial, and the assignments of error not being properly framed for the purpose. Without looking into the evidence, it is difficult to see how the court can say that the judgment is based upon any particular count or cause of action in the declaration, upon the first count setting forth defendant's liability as a stockholder, or upon one or other of the common counts. The finding is general, and covers all the issues in the case. A finding by the court takes the place of a verdict of a jury, and a general exception to such finding is of no more avail than a general exception to a verdict. See Rev. St. § 649, which provides that:

"Issues of fact in civil cases in any circuit court may be tried and determined by the court without the intervention of a jury. * * * The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

And section 700 provides that:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

This statute was first given a construction by the supreme court in *Norris v. Jackson*, 9 Wall. 125, where the court in an opinion by Mr. Justice Miller say:

"The first thing to be observed in the enactment made by the fourth section of the act of the 3d of March, 1865, allowing parties to submit issues of fact in civil cases to be tried and determined by the court, is that it provides for two kinds of findings in regard to the facts, to wit, general and special. This is in perfect analogy to the findings by a jury, for which the court is in such cases substituted by the consent of the parties. In other words, the court finds a general verdict on all the issues for plaintiff or defendant, or it finds a special verdict. This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. The next thing to be observed is that, whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a general verdict, which includes, or may include, as it generally does, mixed questions of law and fact, it concludes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law. In the case of a special verdict, the question is presented as it would be if tried by a jury,

whether the facts thus found require a judgment for plaintiff or defendant; and, this being matter of law, the ruling of the court on it can be reviewed in this court on that record. If there were such special verdict here, we could examine its sufficiency to sustain the judgment; but there is none. The bill of exceptions, while professing to detail all the evidence, is no special finding of facts. The judgment of the court, then, must be affirmed, unless the bill of exceptions presents some erroneous ruling of the court in the progress of the trial."

This construction has always been adhered to in subsequent cases in the same court. *Miller v. Insurance Co.*, 12 Wall. 285; *Dirst v. Morris*, 14 Wall. 484; *Insurance Co. v. Folsom*, 18 Wall. 237; *Cooper v. Omohundro*, 19 Wall. 65; *British Queen Min. Co. v. Baker Silver Min. Co.*, 139 U. S. 222, 11 Sup. Ct. 523.

In *Miller v. Insurance Co.* the court say:

"The finding of the court, if general, cannot be reviewed in this court by bill of exceptions or in any other manner."

In *Insurance Co. v. Folsom*, 18 Wall. 237, the court say:

"Where the finding is general, the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial. * * * When a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial."

In *Cooper v. Omohundro*, the court reaffirm the former rulings, and say:

"When issues of fact are submitted to the circuit court, and the finding is general, nothing is open to review, * * * except the rulings of the circuit court in the progress of the trial, and the phrase 'rulings of the court in the progress of the trial,' does not include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general findings."

In *Martinton v. Fairbanks*, 5 Sup. Ct. 321, the cases are reviewed, and the same doctrine again asserted. The court say:

"The proposition that the general finding of the court in this case is open to review is in direct opposition to the rulings of the court in the cases cited. The plaintiff in error seeks to make the question whether the evidence set out in the bill of exceptions justified the finding by the court for the plaintiff of the issue of fact raised by the pleadings. This is, in defiance of the decision of this court that it cannot be done, an attempt upon a general finding to bring up the whole testimony for review by a bill of exceptions. The theory of the plaintiff in error seems to be that the general finding in this case, like a general verdict, includes questions of both law and fact, and that, by excepting to the general finding, he excepts to such conclusions of law as the general finding implies. But section 649, Rev. St., provides that the finding of the court, whether general or special, shall have the same effect as the verdict of a jury. The general verdict of a jury concludes mixed questions of law and fact, except so far as they may be saved by some exception which the party has taken to the ruling of the court upon a question of law. * * * But the plaintiff in error has taken no such exception. By excepting to the general finding of the court it is in the same position as if it had submitted its case to the jury, and, without any exceptions taken during the course of the trial, had, upon a return of the general verdict for the plaintiff, embodied in a bill of exceptions all the evidence, and then excepted to the verdict because the evidence did not support it."

We have on several occasions followed these rulings of the supreme court, and declared the like doctrine. *Jenks' Adm'r v. Stapp*, 9 U. S. App. 34, 3 C. C. A. 244, 52 Fed. 641; *Farwell v. Sturges*, 9 U. S. App. 405, 6 C. C. A. 118, 56 Fed. 782; *Skinner v. Franklin*

Co., 9 U. S. App. 676, 6 C. C. A. 118, 56 Fed. 783. The situation of the plaintiff in error in the case now before the court is accurately described by the above language of the supreme court. He has embodied the evidence to support the allegations of his pleas in a bill of exceptions, and excepts to the finding of the court because the evidence does not support such finding. The court, by the general finding, for instance, has found that the plaintiff in error (defendant below) was the owner of stock in the United States Building Company, as is alleged in the declaration, and that the plaintiff bank was not the owner of stock in that company. This the plaintiff in error seeks to dispute, but the question is foreclosed by the finding. The plaintiff is in almost, if not quite, as bad a situation in regard to the conclusion of law implied in the finding to the effect that upon the facts alleged in the declaration, and found by the court, there was a personal liability at law on the part of the defendant to the plaintiff on account of his ownership of stock in the insolvent corporation, which might be enforced by action in the United States circuit court sitting in Illinois, there being no exception or assignment of error upon which the question properly arises. But, as this question, by common consent, has been argued by counsel, and submitted to the judgment of this court, the court having jurisdiction of the case, we shall not decline to consider it. It is not a difficult question under the authorities. The constitution of Kansas provides that:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railway corporations nor corporations for religious or charitable purposes."

Pursuant to this constitutional provision, the legislature, by section 32 of chapter 23 of the General Statutes of the state of Kansas of 1868, provided as follows:

"If any execution shall have been issued against the property or effects of a corporation, except a railway or religious or charitable corporation, and there can be found no property whereon to levy such execution, then execution may be issued against any of the shareholders to an extent equal in amount to the amount of stock by him, or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which such action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

There have been several decisions by the supreme court in Kansas giving construction to these provisions, which are binding upon this court. It is contended by the plaintiff in error that they create no liability whatever, but that the statute merely provides a remedy, which cannot be enforced outside of that state, or, if there be any liability, it can only be enforced in equity. This contention cannot be maintained if regard is to be paid either to the decisions of the supreme court of Kansas, or to the ruling of the United States supreme court under similar enactments of other states. The

effect of the decisions in Kansas is that the statute creates and enforces a personal liability upon every stockholder to an amount equal to the amount of stock owned by him, that such liability is several and not joint, that it exists in favor of each creditor of the corporation severally against each shareholder, and that the obligation is by contract in the nature of a guaranty, and may be enforced by action in any tribunal where proper service can be had. The matter came before the court in *Hentig v. James*, 22 Kan. 326. In that case the court say:

"Under this statute the judgment creditor of the corporation has two modes of procedure against a stockholder upon the return of his execution against the corporation nulla bona. He may obtain by motion, after reasonable notice, the issuance of an execution from the court in which the action is brought against the stockholder; or he may proceed by action to charge the stockholders with the amount of his judgment. The former is a summary proceeding; the latter is a more formal one."

The court, on page 329, use the following language:

"The concluding provision of said section 32 plainly prescribes that if the creditor wishes to make the stockholder a judgment debtor with all that term implies, he may proceed by action, and charge the stockholder with the amount of his judgment against the corporation."

Afterwards, in *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759, after quoting the above statutory provision, the court say:

"It will be observed that two remedies for enforcing the individual liability of stockholders are prescribed in the statute above quoted. In the one case the judgment creditor of an insolvent corporation may proceed by a summary action on a motion in the court where the judgment was rendered against the corporation; in the other by an ordinary action, to be instituted wherever personal jurisdiction of the stockholders can be acquired. Before the summary proceeding by motion can be maintained, notice to the stockholder must be given, in order that he may appear, and make such defense as can be made, and as is necessary to protect his interest. * * * His liability to the creditors of the corporation is in the nature of a guaranty. The action or proceeding to enforce the same does not accrue until the execution upon the judgment against the principal is returned unsatisfied. We think that the proceeding against the stockholder, whatever remedy may be employed, is an independent one."

And in *Abbey v. Dry Goods Co.*, 44 Kan. 415, 24 Pac. 426, the court hold that "the liability of stockholders to the creditors of a corporation is several, and not joint, and each must be sued separately," and that judgment against several shareholders in one proceeding must be reversed. In this case the court further say:

"The nature of this liability is peculiar. It seems to have been created for the exclusive benefit of corporate creditors. The liability rests upon the stockholders of a corporation to respond to the creditors for an amount equal to the amount of stock held by each, and it has been held that an action to enforce this liability can only be maintained by the creditors themselves in their own right and for their own benefit. *Cook, Stock & S.* par. 216."

And in *Howell v. Manglesdorf*, above quoted, which was a proceeding for a summary remedy under the statute without action brought, the court say, on page 199, 33 Kan., and page 759, 5 Pac.:

"This ruling does not deprive a creditor of an insolvent corporation of a remedy against the stockholder residing in another state and upon whom service can not be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the cor-

poration, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder. *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263; *Dennick v. Railroad Co.*, 103 U. S. 11; *McDonough v. Phelps*, 15 How. Pr. 372; *Seymour v. Sturgess*, 26 N. Y. 134."

As this is a question of the proper construction to be given to a constitutional and statutory provision of a state, the decisions of the highest court of that state are binding upon this court. *Fairfield v. County of Gallatin*, 100 U. S. 47. But, if still higher authority were necessary, it will not be found wanting. A similar statute of the state of New York was before the United States supreme court in *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, in a suit brought against a stockholder of a New York corporation in the United States circuit court for the Northern district of Florida, where the supreme court held that:

"The liability created by a provision in a general act of the state of New York for the formation of corporations, that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified, is a contract, and not a penalty; and can be enforced by an action sounding in contract against a stockholder found in another state."

It was declared also that, the courts of New York having held that a liability of a stockholder to creditors arising under one of its general statutes for forming corporations was a contract, when the attempt was made to enforce it in New York, the supreme court would follow that interpretation in a suit to enforce such a liability in another state, and that the liability may be enforced by action at law, without resort to a court of equity. This case is an authority upon the case at bar, and answers all the contentions made upon the question of liability except such as are founded upon the evidence, which this court cannot review. A case similar to the one at bar arose and was heard on demurrer by the United States circuit court for the Southern district of California in 1893, under the same provisions of the Kansas statute and constitution, and the same ruling was made, the court following the decisions of the supreme court of Kansas. *Bank of North America v. Rindge*, 57 Fed. 279.

The judgment of the circuit court is affirmed.

UNITED STATES NAT. BANK OF NEW YORK v. FIRST NAT. BANK OF
LITTLE ROCK et al.

(Circuit Court of Appeals, Eighth Circuit. January 28, 1895.)

No. 507.

APPEAL—MOTION FOR REHEARING—FACTS NOT CONSIDERED—MISTAKE OF COUNSEL.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action by the United States National Bank of New York against the First National Bank of Little Rock, Ark., and S. R. Cockrill, its receiver, upon five notes indorsed by the Little

Rock Bank. At the trial a verdict was directed for the defendants. On writ of error sued out by plaintiff, the judgment entered by the circuit court was reversed, and the case remanded, with directions to award a new trial. 64 Fed. 985. Defendants move for a rehearing.

William C. Ratcliffe, for plaintiff in error.

Sterling R. Cockrill, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. A motion for a rehearing has been filed in this case. In support of the motion it is urged that the defendants in error asked an instruction in the nature of a demurrer to the testimony, which raised the question of the adequacy of the proof offered to fix the liability of the defendant bank as an indorser, and that this court in its decision overlooked the fact that such an instruction had been asked, and therefore erred in holding that the defendant bank waived or abandoned the defense of a want of proper demand and notice. It is only necessary to say that counsel are themselves mistaken in supposing that the record lodged in this court shows that such an instruction was asked. The record shows that at the conclusion of all of the evidence the plaintiff in error asked 10 instructions, all of which were refused, and that "the court, of its own motion," gave the instruction which is quoted in full in the opinion. 64 Fed. 985. It nowhere appears in the record that the defendant bank asked any instructions, or that it attempted, by instructions or otherwise, to avail itself of the defense that a proper demand was not made upon the makers of the several notes in suit to fix its liability as an indorser. That is a defense we think, that was neither considered nor determined by the trial court. We must adhere, therefore, to the conclusion announced in the opinion that the supposed defect in the proceedings taken to fix the liability of the defendant bank as an indorser is, upon the record now before us, insufficient to support the judgment.

The other points urged in support of the motion for a rehearing were sufficiently considered in the opinion now on file, and we find nothing in the argument of counsel that is adequate to alter the views heretofore expressed.

GULF, C. & S. F. RY. CO. v. CURB et al

(Circuit Court of Appeals, Eighth Circuit. January 7, 1895.)

No. 425.

PRACTICE—REMARKS OF COUNSEL IN ARGUING TO JURY—NEW TRIAL.

A new trial will not be granted on the ground of improper argument to the jury because plaintiff's counsel, in an action against a railroad company for personal injuries, said to the jury: "J. tells you that this woman is suffering from common female troubles. If J. believes this, why did he not have Dr. B. examine this woman?"—though the defendant had no

right to require the plaintiff to submit to an examination; nor because such counsel stated in his argument that the defendant's counsel had outraged decency, and purposely humiliated the plaintiff and her husband by inquiring into their marital relations, especially when the cross-examination of the plaintiff has been carried beyond the bounds of propriety, if not of decency.

In Error to the United States Court in the Indian Territory.

J. W. Terry, P. L. Soper, and C. L. Jackson filed brief for plaintiff in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was commenced in the United States court in the Indian Territory by W. R. Curb and Rosella Curb, husband and wife, against the Gulf, Colorado & Santa Fé Railway Company, to recover damages for a personal injury received by Mrs. Curb while a passenger on one of the defendant's trains. The plaintiff recovered a judgment below, and the defendant sued out this writ of error. But two errors are assigned, and they both relate to remarks of plaintiff's counsel in addressing the jury. In the course of his argument, plaintiff's counsel said to the jury: "Cliff Jackson tells you that this woman is suffering from common female troubles. If Cliff Jackson believes this, why did he not have Dr. Booth and Dr. Bogie examine this woman?" Exception was taken to this remark, and the court asked to inform the jury that they should not consider it, because the defendant had no right to require the plaintiff to submit to an examination at the hands of its physicians. To this request the court replied that it was legitimate argument in answer to the argument of the defendant's counsel, but could not be considered as evidence. The other remark to which exception is taken is thus stated in the bill of exceptions: "Counsel for plaintiff, Mr. Cruce, in his closing argument, stated that, not only had this railroad company injured Mrs. Curb, but that their attorney had outraged decency, and purposely humiliated this woman and her husband before the jury by inquiring into their personal and marital relations." Defendant's counsel objected to this remark, which objection was by the court overruled. In reference to the last exception, we remark that the cross-examination of Mrs. Curb was carried much further than was necessary to a full elucidation of the facts about which she was examined, and, in our opinion, beyond the bounds of propriety, if not of decency, and merited the criticism passed upon it by plaintiff's counsel.

In recent years the reversal of cases for supposed improper remarks of counsel has sometimes been carried to very extravagant lengths. The grounds upon which such rulings are supported are: First, that it is the duty of the court, by such discipline, to compel lawyers to conform to a high and elevated standard in the advocacy of their clients' causes; and, second, that juries are composed of ignorant and credulous men, who will believe every false, fallacious, or extravagant statement of counsel, unless they are admonished by the court not to do so. An elevated standard of advocacy on the

part of the bar is certainly desirable, but, if any one is to be punished for falling below the ideal standard, it should be the lawyer, and not his client. By the time the questionable arts of the advocate, which are practiced to persuade and delude the judge as well as the jury, are eliminated from the profession, there will be little use for lawyers; the millennium will have come. The assumption of the courts that jurors are so weak, ignorant, and inexperienced as to fall an easy prey to the arts of the unscrupulous counsel is a grave error. They are as little liable to be played upon by false logic and misrepresentations of the evidence as the judge on the bench. There is no occasion "for a refining machine at their elbow" to sift the false from the true in the evidence, or to detect chicanery, falsehood, or fallacy in the argument of counsel. The jurors are quite as able to protect themselves from such influences on the facts of the case as the court is on the law, and every ruling which proceeds upon the idea that juries are destitute of common sense, unacquainted with the affairs of the world, and ignorant of the arts and methods of lawyers, is unsupported by fact or experience. A trial has relation to a dispute between the parties to the suit, growing out of their acts or contracts. It commonly concerns the ordinary affairs of life. It should not, therefore, be a mysterious or refined proceeding. It ought to be a very practical thing, and within the comprehension of men possessed of common sense and practical knowledge of the affairs of life; and, when properly conducted, it is so. Whenever a trial is conducted on any other theory, there is apt to be a miscarriage of justice. A verdict ought not to be set aside because the winning party did not have an ideal lawyer to argue his cause, or on the false assumption that the jury was destitute of common sense, and had such slight knowledge of the methods of lawyers as to fall an easy prey to their fallacious or false suggestions. But, however this may be, the trial judge, who hears and sees all that occurs at the trial, is in a much better position than the appellate court to determine whether he should interfere because of alleged improper acts or remarks of counsel. It is a matter relating to the decent and orderly conduct of the trial, and as such within the sound discretion of the trial court; and it is only when such discretion has clearly been abused, to the prejudice of the complaining party, that the appellate court will interfere. *Huckshold v. Railway Co.*, 90 Mo. 548, 2 S. W. 794. "It will not, in any case, be presumed that the discretion over this subject, committed to the trial court, has been abused." *Railroad Co. v. Myers*, 11 C. C. A. 439, 63 Fed. 793, 798. The judgment of the court below is affirmed.

LITTLE ROCK GRANITE CO. v. DALLAS COUNTY.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1894.)

No. 311.

EVIDENCE—BOOKS OF ACCOUNT.

For the purpose of proving the amount expended by a county in remedying defects in material supplied to it by a contractor, the county introduced in evidence a ledger or time book, kept by one S., and purporting to show the time during which laborers worked and the sums paid them, supplemented by the evidence of one T., the deputy clerk of the county court, to the effect that S. was in charge of the laborers, and it was his duty to keep such book; that S. was a careful bookkeeper, and kept correct books; and that S. was living in another state. *Held*, that the admission of the book, without the evidence of S. as to the correctness of the entries, was error.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This action was brought in the circuit court by the Little Rock Granite Company against Dallas county, in the state of Texas, to recover the balance of price of certain stone furnished by the granite company, and used by the county in the erection of a courthouse. The first amended original petition contains two counts, one to recover the balance of the contract price for certain granite furnished under a contract originally entered into between the granite company and one R. L. James, which, after partial performance, on the insolvency of James, was assumed by Dallas county; and the other to recover the value of certain stone furnished Dallas county at its special instance and request. Dallas county answered—First, by a general denial; second, by pleading a contract between the county and R. L. James to furnish all the material and erect a courthouse, a contract between the granite company and James to furnish all the granite for the building in accordance with plans and specifications, the partial compliance of the granite company with its contract with James, the abandonment by James of the contract to build the courthouse, and the assumption by the county of the contract between James and the granite company, with an understanding between the parties that at the time of the assumption there was only the sum of \$22,000 due the granite company; which sum was to be credited with certain payments, whereby the county, in fact, assumed only the sum of \$6,669.75, which amount the county averred it had overpaid to the extent of \$1,280.05; third, that the granite furnished by the granite company was not properly cut, and to cut and finish the same the county paid the sum of \$2,214.10, as per an itemized statement attached, and also the further sum of \$624.12 for sharpening tools used by the stone cutters in finishing the granite; fourth, that under the contract between the granite company and James, which was assumed by the county, the granite company was required to furnish certain archivolt, which said company failed and refused to furnish, and for which the county was compelled to and did expend the sum of \$5,000; and, fifth, that by reason of the neglect and refusal of the granite company to furnish the archivolt, which neglect and refusal continued for more than 100 days thereafter, the granite company, under and by virtue of its contract with said James and assumed by Dallas county, had forfeited, and was obligated to pay, to the defendant county the sum of \$50 per day, amounting to the sum of \$5,000. For all of the sums, to wit: Overpayment, \$1,280.05; cost of sharpening tools, \$624.12; cost of cutting granite, \$2,614.10; failure to furnish archivolt, \$5,000; and forfeiture for delay, \$5,000,—Dallas county prayed judgment in re-convention.

The trial of the case resulted in a verdict in favor of the county for \$281.42, from which judgment the granite company prosecutes this writ of error, assigning errors as follows: "First. The court erred in refusing the first special instruction requested by the plaintiff, for the reason that said instruction was demanded by the testimony in the case. Second. The court erred in refusing

the second special instruction requested by plaintiff, because said instruction was pertinent to the issues presented by the pleading and the proof. Third. The court erred in refusing the third special instruction requested by the plaintiff, because the proof showed that the memorandum mentioned in said special instruction was delivered to the Little Rock Granite Company as embracing all of the granite which it was to cut under the contract, and said contract should have been construed in connection with said memorandum. Fourth. The court erred in not submitting to the jury the plaintiff's right to recover upon a quantum meruit, as stated in its petition. Fifth. The court erred in instructing the jury that, under the contract, the plaintiff was required to furnish the archivolt. The testimony shows that the word 'archivolt' is not in either of the contracts made between James and the Little Rock Granite Company, or between James and Dallas county, and that there is nothing on the blue prints or specifications indicating that the archivolt is even to be made of stone. Sixth. The court erred in admitting in evidence a book purporting to be a ledger, and kept by one Tap Scott, to establish and prove the amount of money paid for sharpening tools, because it was shown that Tap Scott was living, and that his testimony could be procured, and no offer was made to prove the correctness of the account mentioned in said book otherwise than the book, as shown by the eleventh paragraph of the bill of exceptions. Seventh. The court erred in admitting in evidence the time book kept by Tap Scott to prove the amount paid for cutting granite between August 24, 1891, and September 26, 1892, for the reasons stated in the sixth assignment of error, and as fully shown in the twelfth paragraph of the bill of exceptions."

M. L. Crawford, for plaintiff in error.

A. T. Watts, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). The first to fifth assignments of error, inclusive, refer to the refusal of the court to charge the jury as requested by the plaintiff in error, to the charge of the court as given to the jury, and to the failure of the court to submit to the jury the right of the plaintiff in error to recover upon a quantum meruit. We are unable to consider these assignments of error, because the exceptions were not fully saved in the circuit court. The bill of exceptions shows that the plaintiff tendered three separate propositions to be given by the court to the jury, which the court refused to give; and that the court then charged the jury, the charge being set forth in full; but the bill does not show that any exception was taken to the refusal of the court to charge as requested, or to the charge as given, or to any part thereof. *Phelps v. Mayer*, 15 How. 159. See, also, rule 10 of this court, 47 Fed. vi.

The sixth and seventh assignments of error are to the effect that the court erred in admitting in evidence, over the objections of the plaintiff in error, the time book kept by one Tap Scott, to prove payments by the county to the extent of the amounts respectively claimed for the necessary sharpening of tools and for recutting stone. In relation to this ruling of the court the bill of exceptions recites:

"The defendant, to maintain the issue on its part, offered testimony tending to prove that the granite cut and furnished by the plaintiff was not cut in a good and workmanlike manner, and that in order to fit the same the de-

fendant was compelled to have the same recut, and in this recutting and refitting the defendant expended the sum of \$2,641. The defendant also offered testimony tending to prove that it expended the sum of \$624.12 in sharpening and repairing tools, which work was made necessary by the defective cutting of said granite. * * * And be it remembered that during the progress of the trial the defendant proved by J. E. Turner that he was the deputy clerk of the county court of Dallas county, and kept the minutes of the commissioners' court; that one Tap Scott was employed by the county court of Dallas county to keep the time of the men employed as laborers upon said courthouse; that the said Tap Scott was a careful bookkeeper, and kept correct books of account; that the said Tap Scott was in New Orleans, in the state of Louisiana, and had been for over eighteen months; there having been no direct proof offered as to the amount of money expended in the sharpening of tools above referred to, and no proof from which the amount paid for such work could be inferred in evidence, a book in the handwriting of the said Tap Scott, which purported to be a ledger, showing that from February 15, 1891, to August 15, 1892, the county judge paid for work, drills, anchor chains, and sharpening and grinding tools, made necessary in the cutting of the granite placed in said courthouse, the sum of \$644.12. To the introduction of this testimony the plaintiff objected: (1) Because it was not shown that the said Tap Scott was dead, but, on the contrary, it was shown that he was living, and that his testimony could be produced; (2) no effort was made to prove the correctness of said account by other evidence than the time book kept by said Tap Scott, and there was no other evidence as to the correctness of said account. But the court overruled said objections, and permitted the book to be read in evidence, to which the plaintiff excepted. And be it further remembered that, on the trial of the above-entitled cause, the defendant having proved by J. E. Turner that he was deputy clerk of the county court of Dallas county, and was charged with keeping the minutes of the commissioners' court; that one Tap Scott was in charge of the laborers employed by Dallas county in working upon the courthouse for said court from August 23, 1891, to September 26, 1892: and that it was the duty of said Tap Scott to keep an account book showing the time during which each man labored and the rate at which he was paid per day, and the amount earned by him for the time labored; and it was further proved that said Tap Scott was a careful bookkeeper, and that Tap Scott was in New Orleans, and had been for more than eighteen months. It was shown that, in addition to the laborers employed in cutting granite for said courthouse, there were other laborers employed in laying brick, plastering, and various other kinds of work, more men being employed in the last-named vocation than there were employed in cutting stone. It was further proved by Turner, deputy clerk as aforesaid, that from the time book kept by said Scott he picked out the names of the various parties employed in cutting stone, and from the names so selected from said time book the said Turner made up an account for cutting stone in favor of Dallas county, and against the said Little Rock Granite Company, for the sum of \$2,614.10, for the time embraced between August 24, 1891, and September 26, 1892. It was proved by the said Turner that the men thus employed had been paid by the county of Dallas the aggregate sum above stated; that the said Turner testified that he had no personal knowledge as to whether or not said account was correct, although he knew some of the men, and knew that they were employed in cutting stone for said courthouse. Two of the men employed in cutting stone for said courthouse were introduced as witnesses. They testified that they were cutting stone for the first story of the courthouse, which was completed before Dallas county assumed the contract between James and the Little Rock Granite Company. The two witnesses thus examined testified that all the work they did in cutting stone after the said county assumed the contract was to cut some finials, and it was shown that Orlopp, the supervising architect, ordered the finials shipped in the rough or uncut. Thereupon the defendant offered to read in evidence the time book of the said Tap Scott as evidence of the fact that the work had actually been performed by the man therein designated, to which the plaintiff objected: (1) Because it was not shown that Tap Scott was dead, or that his testimony could not be obtained. (2) It was not shown that Scott kept accurate books of account. (3) It was not shown that the

men employed to do the work, and who actually did the work, were not accessible, and that their testimony could not be obtained. (4) Because no effort was made to prove the correctness of said account except by the books kept by the said Tap Scott as aforesaid. But the court overruled the objections, and permitted the time book to be read in evidence, to which action and ruling of the court the plaintiff then and there excepted."

On the showing made, we do not consider that the time book kept by Tap Scott was an official or public record, or a record in any wise importing verity, but, rather, that the book stands on the same footing as the account books of a merchant. In *Chaffee v. U. S.*, 18 Wall. 516-541, where the question was as to the admissibility of certificate books of certain collectors of tolls on the Miami Canal, the court, after declaring that the books were not public records, said:

"Their admissibility must, therefore, be determined by the rule which governs the admissibility of entries made by private parties in the ordinary course of their business. And that rule, with some exceptions not including the present case, requires, for the admissibility of the entries, not merely that they shall be contemporaneous with the facts to which they relate, but shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or beyond the reach of the process or commission of the court."

Instructive cases in the matter of the admission of books in evidence are *Nicholls v. Webb*, 8 Wheat. 326; *Bates v. Preble*, 151 U. S. 149, 14 Sup. Ct. 277; *Glenn v. Liggett*, 47 Fed. 480; *Kent v. Garvin*, 1 Gray, 148; *Jackson v. Evans*, 8 Mich. 476. The latest case by the supreme court of Texas on the subject to which we have been referred is *Werbiskie v. McManus*, 31 Tex. 116-123. It is there said: "This court has invariably decided that the best testimony that it is within the power of the parties to procure by ordinary or extraordinary means shall be exhausted before the books of a party shall be given in evidence." We think it is clear that the admission of the time book kept by Tap Scott, without the production of Tap Scott to prove the same, when, as it appears, the evidence of Tap Scott could have been obtained, was erroneous; and that the evidence of Turner, the deputy clerk, as to the duty of Tap Scott to keep an account book, and that Scott was a careful bookkeeper, was wholly insufficient to excuse the defendant county from producing the evidence of Scott himself to verify his own record. It is contended by the learned counsel for the defendant in error that as it was proved that it was the duty of Scott to keep the book and to make the entries, that he was a careful bookkeeper, and that at the time of the trial he was beyond the jurisdiction of the court, the entries in the book should be considered as made in due course of business, by a party whose duty it was to make them, and is made contemporaneous with the transaction, and therefore the book was admissible as part of the *res gestae*. In relation to evidence of this kind meeting all the requirements here recited, Mr. Greenleaf lays down the rule, supported by adjudged cases, that, if the party who has made the entries is living and competent to testify, it is necessary to produce him. *Greenl. Ev.* (5th Ed.) § 1115. The defendant in error further contends that the claim of the county

in the two respects mentioned was sufficiently established upon other evidence to entitle the county to recover, and therefore that the admission of the time book of Tap Scott, if erroneous, was not reversible error. We are not informed by the bill of exceptions of all the evidence offered in the case, and therefore cannot say whether the defendant county was entitled to a recovery for the amount of the two items in question, irrespective of what is shown by Tap Scott's time book. The bill of exceptions shows that while evidence had been offered tending to prove that the county had been compelled to expend in recutting and refitting stone the sum of \$2,614.10, and tending to prove that it had expended the sum of \$624.12 for sharpening and repairing tools, yet there had been no direct proof as to the amount of money expended in sharpening tools, and no proof offered from which the amount paid for such work could be inferred; and, as to the item of \$2,614.10, the proof was that Turner, deputy clerk, picked out from the time book kept by Scott the names of the parties employed in cutting stone, and from the names so selected the said Turner made up an account for cutting stone in favor of Dallas county and against the Little Rock Granite Company for the sum of \$2,614.10; and that while the said Turner testified that the men thus employed had been paid by the county of Dallas he had no personal knowledge whether or not said account was correct, although he knew some of the men, and knew that they were employed in cutting stone for said courthouse; and, further, that two of the men employed in cutting stone for said courthouse testified that all the work which they did was to cut some finials, which it was shown had been ordered by the supervising architect to be shipped in the rough or uncut. As we understand the showing made in the bill of exceptions, the amounts which the county was seeking to recover for sharpening tools and recutting stone were wholly indefinite, except for the evidence furnished by Tap Scott's time book, and we are forced to conclude that the error of the court in admitting the time book in evidence was material, and affected prejudicially the interests of the plaintiff in error. The judgment of the circuit court is reversed, and the cause is remanded, with instructions to grant a new trial.

LLANO IMPROVEMENT & FURNACE CO. v. PACIFIC IMP. CO.

(Circuit Court of Appeals, Fifth Circuit. February 19, 1895.)

No. 338.

CONTRACTS—CONSIDERATION—SETTLEMENT OF DISPUTE.

The L. Co., a corporation organized for various specific purposes, comprehended in the general purpose of developing a populous business center in a new country, made a contract with the P. Co., by which, in consideration of the P. Co.'s procuring the construction of a railroad to the L. Co.'s town site, it agreed to donate a right of way and land for terminal facilities, and to pay a cash bonus. In order to procure the making of this contract, certain stockholders of the L. Co. gave to it their notes for certain treasury stock, upon the agreement that, if the contract was carried out, such notes should be paid, and the stock become the property of the

makers; otherwise the notes to be returned to the makers, and the stock to the L. Co. These notes and certain others, made by subscribers to a donation to secure the railroad, were turned over to the P. Co. as collateral for the agreed bonus. The P. Co. fully performed its contract, but the L. Co. was unable to pay the bonus, and the amount collected on the notes fell short of the amount due to the P. Co. The P. Co. then offered to accept a note made by the L. Co., and to return to it the uncollected notes and the stock for which they were given, which was attached to them as collateral, and such offer was accepted by the L. Co., and the note given. Most, but not all, of the stockholders of the L. Co. knew and approved all these transactions. In a suit by the P. Co. on the note, it was claimed that the contract, and all transactions relating to it, were ultra vires and void. *Held* that, whether such contract was in fact valid or void, there was, at the time the note was given, sufficient ground for litigation, if the L. Co. had chosen to treat it as void and refuse performance, to constitute a good consideration for the note, and that the P. Co. was entitled to recover on such note.

In Error to the Circuit Court of the United States for the Western District of Texas.

William J. Moroney, for plaintiff in error.

R. S. Lovett, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

McCORMICK, Circuit Judge. This action is founded on a promissory note. The parties to it are the Pacific Improvement Company, which we will call the plaintiff, and the Llano Improvement & Furnace Company, the defendant. The pleadings follow the Texas system of petition and answer. The plaintiff in its original petition averred the status of the parties; the making by the defendant of the note; its terms, substantially, and legal effect; the failure of the defendant to pay the same at or after maturity; and prayed for process and judgment. The defendant in its amended answer, on which the case was tried, besides other pleas that we do not deem it necessary to notice, pleaded that it never made the note. The real ground of this plea is the claim by the defendant that a previous contract, and the transactions both prior thereto and subsequent, resulting in the execution and delivery of the note by the president of the defendant, and its making, were all beyond the corporate powers of the defendant. In accordance with section 649 of the Revised Statutes, the case was tried by the circuit court without a jury. The trial court made special findings of facts, and gave judgment in favor of the plaintiff for the amount of the note. It appears that the defendant was incorporated March 16, 1889, under the general laws of Texas. It is expressed in its charter that:

"This corporation is formed for the following purposes and objects: The transaction of any manufacturing or mining business in the counties of Llano and Mason, state of Texas; the supply of water to the public; the manufacture and supply of gas, or the supply of light or heat, to the public by any means; the transaction of a printing or publishing business; the establishment and maintenance of hotels; the construction and maintenance of street railways; the erection of buildings and accumulation and loan of money; the construction and maintenance of bridges across the Llano river; and the con-

struction and maintenance of canals for the purpose of irrigation and manufacturing,—any or all of the said proposed operations of this corporation to be located in cities, towns, or villages in Llano or Mason counties, state of Texas.”

The county of Llano is located on the river of that name, partly on each side of the river. The county town bearing the same name is situated on the south side of the river, at a point about 100 miles northwest from the city of Austin. In 1889 it was not incorporated. It then had about 1,000 inhabitants. The defendant purchased several thousand acres of land just across the river from the town of Llano for a town site. It purchased certain iron mineral lands, and leased others, situated 10 miles or more from the town. It erected and established two hotels in or near the town. The promoters of defendant contemplated extending short lines of railroad from the owned and leased mineral lands into the town. In 1891 the Austin & Northwestern Railroad Company had extended its line of road only to a point in Burnet county about 30 miles distant from the town of Llano. There was and is no other railroad nearer Llano. The stockholders, directors, and officers of the defendant were all and equally desirous of having a railroad built to the lands of that company on the north side of the Llano river. The defendant then held 10,000 shares, of the par value of \$100 each, of what it styles its “treasury stock.” To the extent of the defendant’s power to take such action, the stockholders and directors authorized the president and a majority of the executive committee of the directors to use these 10,000 shares of treasury stock to secure the building of a railroad to its lands across the river from the old town of Llano. The plaintiff, in some of the ways familiar to such parties, had a controlling influence in or over the Austin & Northwestern Railroad Company. The president and executive committee of the defendant opened negotiations, therefore, with the plaintiff, and endeavored to secure a contract with the plaintiff to extend the railroad as desired for such portion of the defendant’s treasury stock as might be agreed on by the parties. The plaintiff would not accept the stock as a consideration for such a contract to extend the railroad, but expressed a willingness to contract to make the extension by the 1st day of July, 1892, if the defendant would contract with satisfactory security to donate the required right of way, grounds for terminal facilities at Llano, and a certain cash bonus, to be paid within 30 days after the completion of the road by or before July 1, 1892. Thereupon the president of the defendant, with the full knowledge and actual individual approval of all of the directors and of a majority of the stockholders, induced certain of the stockholders of the defendant to execute their several promissory notes, aggregating \$120,000, in favor of the defendant, for the 10,000 shares of the defendant’s treasury stock, estimated at 12 cents on the dollar of its par value, attaching to the respective notes as collateral security the equivalent amount of the stock taken by each maker, with the distinct oral agreement at the time that if the contemplated contract for the extension of the road was not made these notes should be

returned to the makers, and the stock restored to the corporation; otherwise, on the securing of the contemplated contract for the extension of the railroad, these notes were to become absolute. The president of defendant, and others of its stockholders and directors, procured to be made by certain citizens of the city of Austin subscriptions to the donation required to secure the desired railroad extension. These Austin subscription notes were drawn payable to the order of Charles Dillingham, who was then president of the Austin & Northwestern Railroad Company, and connected in some way with the plaintiff, but were delivered by the makers to the president of the defendant. He thereupon made the contract of 6th October, 1891, with the plaintiff, which purports to bind the plaintiff to build the road by the 1st of the next July, and to bind the defendant to furnish the required right of way, ground for terminal facilities at Llano, and a cash bonus of \$72,000, to be paid within 30 days after the completion of the road; and, to secure the purported obligation of the defendant, its president indorsed and delivered to the plaintiff the notes, with the treasury stock attached, to the aggregate amount of \$73,200, and also delivered to the plaintiff the Austin subscription notes, to the aggregate amount of \$29,149. The remainder of the treasury stock notes, to the aggregate amount of \$46,800, now become absolute by the making of the contract of 6th October, 1891, were retained for the account of the defendant, and used by it as its bills receivable. At the request of the president of the defendant, the plaintiff placed the Austin subscription notes with J. H. Raymond & Co., bankers at Austin, and the treasury stock notes, transferred to it, with the First National Bank of Llano, under the following letter of instructions:

"These notes are placed in your hands with the following instructions: Until notes are paid, they are held subject to my order. When the notes are collected, the amounts paid are to be held in trust for the Pacific Improvement Company and the Llano Improvement & Furnace Company, and in accordance with the terms of an agreement made and entered into on the 6th day of October, 1891, by and between said parties."

The plaintiff fully performed its part of the contract of 6th October, 1891. The defendant furnished the right of way and ground for terminal at Llano, but was not able to pay the cash bonus within 30 days after the completion of the road. Negotiations were then opened between the managing officers of the defendant and the plaintiff for an extension of time or an adjustment, and just prior to November 21, 1892, the president of the defendant informed the directors that he believed he could induce the plaintiff to accept the defendant's note for \$25,000 in settlement of its obligations under the contract of October 6, 1891, and release the notes yet remaining with the Austin and Llano banks, provided the defendant would give its note for that amount, and let the \$20,000, which the Austin bank had collected on the notes placed with it, and the \$27,000, which the Llano bank had collected on the notes placed with it, be at the same time paid to the plaintiff. The majority of the directors, and all spoken to on the subject, individually expressed their satisfaction with such an arrangement, if it

could be made. It was made, and the note sued on, bearing date 21st November, 1892, was given the plaintiff. On the same day that this note bears date there was a called meeting of the stockholders of the defendant, at which a majority was present, and it was unanimously "resolved, that any of the makers of the notes, amounting to \$46,200, which were held by the Pacific Improvement Company, and are now held by the Llano Improvement & Furnace Company, be permitted, if they so elect, to take up their notes by delivering to said L. I. & F. Co. the stock which is attached to said notes, which stock is to be accepted as full payment of such notes; and, further, that the president of the company be instructed to enforce payment of such notes as are not paid by voluntary delivery of attached stock." The twenty-first paragraph of the special finding is in the following words:

"A majority of the stockholders and directors fully acquiesced in all of the aforesaid transactions, and among those cognizant of the transaction there was no expression of dissatisfaction at any time prior to the institution of this suit. Some of the stockholders, however, did not know of said contracts with the plaintiff; did not know that the defendant had incurred any personal liability to the plaintiff; did not know of the execution of the note sued upon in this case; have not expressed their approval of the same; and would not have approved the same had they been advised of said transactions."

During the negotiations between the parties, after the completion of the road, "there was no question as to the validity or invalidity of the original contract of date October 6, 1891, or as to the extent of defendant's liability under said contract; the only question being as to the financial ability of defendant company to pay the obligations then admitted by the officers of the defendant company to be due under said original obligation." It cannot be seriously disputed that, if the original contract was within the power of the defendant to contract, the plaintiff is entitled to all it claims in this action, and the defendant has no support for its defenses or for its counterclaims. All of the constituents of the defendant appear to have from its organization and all along construed its charter powers to authorize the development of a populous business center at the selected seat of its expressly authorized operations. Many features in the group of its purposes and objects set out in its charter strongly support that construction. It cannot be questioned at this time of day that, at an inland situation like the county of Llano, many of the purposes and objects of the defendant could not be successfully pursued, or its express powers exercised, without facilities of railroad transportation. Its express powers charge the defendant with no duty to the public which the contract of 6th October, 1891, in any degree disabled it to perform. It is contended, and it is found to be true, that at that time the defendant was insolvent, and has been so ever since. The want of opportunity or the failure to make such a contract at or soon after its organization may have produced or promoted this condition of its being, but the contract of 6th October, 1891, certainly did not either produce or promote that condition. Being, then, insolvent, what it called its "treasury stock" was in fact without value. The oral agreement on which certain of its stockholders gave their sev-

eral notes for this treasury stock shows that they each considered it valueless until the contract to build the road could be secured, and that then it would be worth 12 cents on the dollar of its par value. These notes, aggregating \$120,000, must, in the absence of any proof showing a different actual value, be taken to be of their face value. Out of less than two-thirds of them in amount, selected by the defendant for the satisfaction of the plaintiff's demand for collateral, there was collected in a few months the sum of \$27,000. The remainder, \$93,000 in amount, remained for account of defendant as its bills receivable, against which the defendant expended \$3,000 in securing right of way through the property of others, and parted with certain of its own lands, of the value, in June, 1892, of \$5,000, showing an apparent net gain to the defendant on the actual transactions of \$85,000. It is not apparent, therefore, that there was any actual diversion of the funds of the defendant by reason of the original or subsequent negotiations with the plaintiff. In the view we take of this case, we find it unnecessary to decide whether or not the contract of 6th October, 1891, was void for want of power in the defendant to so contract. It appears that at and prior to the 21st of November, 1892, there was in bank in Austin and Llano the sum of \$47,000 in cash, held in trust by the respective banks for the plaintiff and the defendant, in accordance with the terms of the contract of 6th October, 1891; and there were at the same time in the hands of those banks, and severally held by them, subject to the order of the plaintiff, promissory notes that had been transferred and delivered by the defendant to the plaintiff of the aggregate face value of about \$53,000, to the larger portion of which, aggregating the sum in face value of \$46,200, there were attached as collateral security 3,850 shares of the stock of the defendant. The plaintiff had fully performed its part of the contract of 6th October, 1891. Now, whether that contract was in truth void or valid, if the defendant had then decided to treat it as void, and refuse performance, here was abundant subject for litigation, and sufficient consideration for making the note on which this action is brought. *Cook v. Wright*, 1 Best & S. 559; *Tuttle v. Tuttle*, 12 Metc. (Mass.) 551; *Market Co. v. Kelly*, 113 U. S. 199, 5 Sup. Ct. 422. We conclude that this case comes within the authority of the cases just cited, and is subject to the recognized rules which underlie those decisions. We are of opinion that the special findings support the judgment of the circuit court, and that judgment is affirmed.

RUHM v. UNITED STATES.

(Circuit Court, D. Tennessee, M. D. April 10, 1895.)

No. 3,035.

1. DISTRICT ATTORNEY—EXTRA COMPENSATION.

Act June 20, 1874, § 3, declaring that no civil officer shall hereafter receive any compensation from the United States, beyond his salary allowed by law, provided that this shall not be construed to prevent the employment and payment by the department of justice of district attorneys, as allowed

by law, for the performance of services not covered by their salaries or fees, gives to a district attorney no new rights to extra compensation, but, at most, merely preserves such as the law theretofore gave.

2. SAME—RECOVERY OF PENSIONS.

It being declared the duty of a district attorney, by Rev. St. § 771, to prosecute in his district all civil actions in which the United States is concerned, he is not entitled to extra compensation for conducting a suit to recover a pension fraudulently received.

3. SAME—EXAMINING TITLE TO POST-OFFICE SITE.

He cannot recover extra compensation for examining title to post-office site, or clerk hire and travel of clerk in connection with such examination; there being no law allowing special clerk hire in such a case, and district attorneys being required by Act March 2, 1889 (25 Stat. 939), to render all legal services connected with procurement of titles to sites for public buildings.

4. SAME—SERVICES IN CIRCUIT COURT OF APPEALS.

He cannot recover extra compensation for services in a case which went to the circuit court of appeals, in performing which he had to go out of his district; for, though performance of such services is not a duty belonging to his office, there is no law authorizing compensation therefor.

5. SAME—EXPENSES OF DOCKETS.

If the cost of dockets can be allowed a district attorney, as a proper office expense, it should be allowed out of the fees and emoluments earned for the years during which the expenses were incurred, and not otherwise.

Action by John Ruhm against the United States.

Lee Brock and John Ruhm, Jr., for petitioner.

Tully Brown, U. S. Dist. Atty., and John W. Childress, Asst. U. S. Dist. Atty.

CLARK, District Judge. This suit is brought under the act of congress of March 3, 1887 (24 Stat. 505), to enforce certain claims against the United States. Claimant was district attorney of the United States from May, 1889, to February 1, 1894, for the Middle district of Tennessee. The claims are for expenses incurred and special services rendered during his term of office. The fees sued for are alleged to be for services performed under the direction of the attorney general, not connected with the duties of the office of the district attorney, and not, therefore, covered by the salary and fees belonging to the office. The fees and expenses are (1) for service in what is called the "Williams Pension Case"; (2) expenses and service in the matter of the Clarksville post office; (3) fees in case of Hill et al. v. U. S., before the United States circuit court of appeals for the Sixth circuit; (4) compensation for service in Cumberland River Improvement Cases; (5) fees for service in same cases as preceding; (6) special counsel fee as extra allowance in Porterfield Case; (7 and 8) expenses for certain dockets for use in the district attorney's office.

It is made the duty of the district attorney to defend the government in all suits under the act; and the court is required to state in writing the findings of fact and conclusions of law, and file the same in the cause. It will be well, before taking up the particular claims separately, to bear in mind certain statutes, and the principles established by recent decisions which bear upon the subject. The opinions expressed on the circuits are not in harmony, and those

of the attorneys general are in conflict. 19 Opp. Attys. Gen. 123. This is due in part, probably, to changes in legislation. So far as the subject has been before the supreme court of the United States, the cases are in accord, and give out no uncertain sound. The position taken by claimant is that the fees claimed as special compensation are authorized, and may be allowed, under the proviso to section 3 of the act of congress of June 20, 1874 (18 Stat. 85), which is as follows:

"That no civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the treasury or property of the United States beyond his salary or compensation allowed by law; provided, that this shall not be construed to prevent the employment and payment by the department of justice of district attorneys as allowed by law for the performance of services not covered by their salaries or fees."

This section, however, clearly enacts a general stringent rule against any compensation, beyond the salary and fees specifically authorized by law as belonging to the office, and the proviso simply saved from repeal by implication any existing law which allowed the department of justice to pay district attorneys for services not covered by the salary and fees belonging to the office. The proviso occurs in a restrictive act, and affirmatively authorizes nothing. The question is left to depend on the existence of other laws under which the department of justice may act. If a statute existed, authorizing the department to employ and pay for special services, it would by no means follow necessarily that the courts could, in suit, enforce such claim as a general obligation against the government. Examination of the appropriation acts for recent years discloses apparently that it has been the custom of congress to appropriate a sum to the department of justice, and place the same practically under the control and discretion of the attorney general, to be applied as compensation for special services of the district attorneys; and this is referred to by Judge Hanford as having been so since 1889, in *Winston v. U. S.*, 63 Fed. 692. In the absence of specific authority, it could not be maintained, however, that this would authorize the attorney general to contract a debt against the government which could be put in suit, and enforced as a legal obligation. The most that could be said of such practice is that it vests in the attorney general a power, coupled with judicial discretion, under which he might employ and pay for special services in view of the fund at his disposal, but his discretion could not be controlled by the courts. Section 363, Rev. St., authorizes the attorney general to employ counsel to assist the district attorney. Before compensation is allowed, the attorney general must certify that the service was rendered, and could not be performed by the district attorney (section 365), and, by section 368, the attorney general exercises general supervisory power over the accounts of the district attorney. The court has been referred to no statute which distinctly authorizes the employment and compensation of the district attorney for services of the kind now in question. The district attorney is allowed salary at the rate of \$200 a year (Rev. St. § 770); and, out of the fees and emoluments of his office, he may be al-

lowed by the attorney general to retain \$6,000 a year, besides office expenses (section 835). And the allowance for personal compensation for each calendar year "shall be made from the fees and emoluments of that year and not otherwise" (section 843), and any surplus above what may be retained must be paid into the treasury (section 844), and all fees for which the United States is liable must be paid on settling the district attorney's accounts at the treasury (section 856). The compensation is liberal. Among the duties which belong to the office of district attorney by law are those enumerated in section 771, Rev. St., to prosecute all crimes and offenses and all civil actions in which the United States is concerned; and, by section 355, upon application of the attorney general the district attorney is required to furnish any assistance or information in his power, in relation to title of public property within his district. Other parts of the Revised Statutes are set out in full in the opinion of the court in *Gibson v. Peters*, 150 U. S. 342, 14 Sup. Ct. 134, and here referred to, for the purpose of this case, without repeating the same. Mr. Justice Harlan, delivering the opinion, says:

"It ought not to be difficult, under any reasonable construction of these statutory provisions, to ascertain the intention of congress. A distinct provision is made for the salary of a district attorney, and he cannot receive, on that account, any more than the statute prescribes. But the statute is equally explicit in declaring, in respect to compensation that may be 'taxed and allowed,' that he shall receive no other than that specified in sections 823 to 827, inclusive, 'except in cases otherwise expressly provided by law.' It also declares that no officer in any branch of the public service shall receive any additional pay, extra allowance, or compensation, in any form whatever, for any service or duty, unless the same is expressly authorized by law, or unless the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation. No room is left here for construction. It is not expressly provided by law that a district attorney shall receive compensation for services performed by him in conducting suits arising out of the provisions of the national banking law, in which the United States or any of its officers or agents are parties. Without such express provision, compensation for services of that character cannot be taxed, allowed, or paid. Nor can the expenses of the receivership be held to include compensation to the district attorney for conducting a suit in which the receiver is a party, for the obvious reason that the statute does not expressly provide compensation for such services. Congress evidently intended to require the performance by a district attorney of all the duties imposed upon him by law, without any other remuneration than that coming from his salary, from the compensation or fees authorized to be taxed and allowed, and for such other compensation as is expressly allowed by law, specifically, on account of services named."

And in *U. S. v. Bashaw*, 152 U. S. 436, 14 Sup. Ct. 638, construing Rev. St. §§ 838, 3085, under which the district attorney was to receive for expenses and services in certain prosecutions such allowance as the secretary of the treasury might deem just and reasonable, it was held that an action could not be maintained by the district attorney for services and expenses until the secretary of the treasury first determined what sum was just and reasonable. Mr. Chief Justice Fuller, in delivering the opinion, said:

"But, without further remark on this branch of the case, it must be admitted that even if the rulings of the department were erroneous, and its practice not controlling,—upon which we express no opinion,—whatever sum was

to be paid was left to be determined by the secretary of the treasury, as he should deem reasonable and just, and this involved the exercise of judgment and discretion on his part. The courts cannot control, though in proper cases they may direct, the exercise of judgment or discretion in an executive officer. In this case, as we have said, the exercise of discretion was not properly invoked, and the party had no right to ask the court to substitute its judgment for the judgment of the secretary."

In *U. S. v. Shield*, 153 U. S. 91, 14 Sup. Ct. 735, Mr. Justice Jackson, speaking for the court, said:

"Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts, nor to any discretionary action on the part of the officials."

In respect to claims of the kind now considered,—by public officials for special personal compensation or expenses,—it is clear that nothing like an implied obligation can be relied on, and that claimants must distinctly point out a statute clearly authorizing the claim. The cases just cited are recent, and clearly establish this proposition, and are absolute authority for this court, and consonant with reason and sound public policy. Under equitable construction, these claims would rapidly assume immense proportions. Whatever may be the practice of the heads of departments, when the claim is put in suit the question is one of strict legal right. It is the purpose of congress, clearly disclosed in the statutes referred to, that compensation for service and expenses for any given year shall be paid out of the fees and emoluments of that year, and the same rule obtains as to expenses of any year to be met by appropriations for such year. This prevents large accumulation of claims going over against appropriations in other years. And if such claim can be allowed, in view of the positive provisions of Rev. St. §§ 834, 843, it should be shown that a reasonable effort was made to have the claim allowed and settled at the proper time, as the delay, to an extent, discredits the claim. The elements necessary to entitle a claim of this kind to allowance are well stated by Atty. Gen. Garland (19 Op. Attys. Gen. 125). He says:

"From these authorities it may be derived that the elements necessary to justify the payment of compensation to an officer for additional services are, that they shall be performed by virtue of a separate and distinct appointment authorized by law; that such services shall not be services added to or connected with the regular duties of the place he holds; and that a compensation, whose amount is fixed by law or regulation, shall be provided for their payment. See *Stansbury v. U. S.*, 8 Wall. 34."

Without pursuing the general subject further, the items of the account are now taken up and passed upon:

Item 1 is claimed as fee for conducting a suit to recover a pension fraudulently received. This suit must have been in the courts of the district for which claimant was district attorney. It was his duty, as such official, under section 771 of the Revised Statutes, to attend to this suit, and he is entitled to no extra compensation therefor. Certain files and correspondence are referred to, but these were not offered on the hearing; and statements of the witness on this, as well as other items, consist of conclusions merely, and give no facts in detail, with dates, so that the court may fully

understand the case. So that, apart from the legal objection, I would hold that this item is not sustained by satisfactory proof.

Second item claimed consists of fee of \$250, and clerk hire and travel of clerk in regard to title to post-office site at Clarksville; the service being an examination of title. The proof is here, again, meager. There is no law authorizing special clerk hire in a particular case like this, and none allowing the fee. This post-office site is within the Middle district, and this examination of title was a duty attached by law to the office of district attorney. Rev. St. § 355. And the act of congress of March 2, 1889, 25 Stat. 939 (1 Supp. Rev. St. p. 698), provides, among other things, "that hereafter all legal services connected with the procurement of titles to site for public buildings, other than for life saving stations and pier-head lights, shall be rendered by United States district attorneys." "Provided further, that hereafter, in the procurement of sites for such public buildings, it shall be the duty of the attorney-general to require of the grantors in each case to furnish, free of all expenses to the government, all requisite abstracts, official certifications, and evidences of title that the attorney-general may deem necessary." This item is therefore disallowed.

Item 3 is for fee in a suit which went to the United States circuit court of appeals. I quite agree with the ruling of Judge Hanford in *Winston v. U. S.*, 63 Fed. 690, that no compensation is provided by law for such services, although it is true that as claimant went out of his own district, it was not a duty belonging to his office to perform such service. It is said the attorney general allowed \$200, arbitrarily fixing half thereof for each of the years 1892 and 1893, presumably as part of the fees and emoluments received for those years. Here, again, for want of facts, it is difficult to understand just what did take place. There being no law which authorizes this compensation, the action of the attorney general is conclusive, and cannot be controlled or set aside by the courts. While this question was reserved in *U. S. v. Bashaw*, supra, I think there is little or no doubt what the answer must be. *Schloss v. Hewlett*, 81 Ala. 270, 1 South. 263; *Carrick v. Lamar*, 116 U. S. 423, 6 Sup. Ct. 424. Whether the attorney general could lawfully allow the claim at all is a question not calling for decision, as the case is presented. The claim was not allowed generally, but only as payable in a particular way, and not otherwise. It was agreed in argument that claimant earned and received the maximum compensation allowed by law during the years he was district attorney, except the month of January, 1894, and for this month claimant says he received \$205.

Items 4 and 5 are disallowed. What was said in regard to item 2 applies to these, and need not be repeated.

I have been referred to no law providing for the compensation claimed in item 6. The service was a duty clearly belonging by law to claimant's office, and he was entitled to no extra compensation.

Items 7 and 8 are not warranted by any law of which I am aware. No authority from the department to supply these dockets is shown. If it could be allowed as a proper office expense, this should have

been done out of the fees and emoluments earned for the years during which the expenses were incurred, and not otherwise. These, as stated, exceeded the limit of compensation allowed by law.

The result is that I find in favor of the government, and against claimant, on every item in the claim. The petition will therefore be dismissed, with costs. Ordered accordingly.

UNITED STATES v. McGLASHEN et al.

(Circuit Court, E. D. Wisconsin. March 23, 1895.)

ACTION ON FORFEITED RECOGNIZANCE—DEFENSE.

In an action on a forfeited recognizance, only a legal defense can be heard; and the fact that there was an appearance or discontinuance after forfeiture is not a legal defense, though it would constitute matter for application, under Rev. St. § 1020, to the court which adjudged the forfeiture, to have the penalty remitted.

Action by the United States against Guy S. McGlashen and others.

This is an action at law upon a forfeited recognizance, in which Guy S. McGlashen is the alleged principal, and R. E. McGlashen and J. W. Surfis the sureties. R. E. McGlashen is the only defendant found in this district, and the only one before the court. A jury was waived, and the cause submitted to the court upon stipulated facts to the effect that the allegations of the complaint are true; that an indictment for subornation of perjury, and transmitting and presenting a false and forged affidavit, with intent to defraud the United States, was found and filed at a term of the United States district court for the district of Kansas, on September 14, 1889; that the recognizance alleged was duly entered into by the defendants for the appearance of said principal at the next term of said court; that at such next term, for September, 1890, the said principal failed to appear, and on September 6, 1890, it was thereupon adjudged by said court "that said recognizance be forfeited against said principal and sureties, and that the obligation and security be prosecuted." It is further stipulated that the records of said court show subsequent entries in the cause against Guy S. McGlashen as follows: Of continuances to the next term, on motion of the district attorney, October 5, 1891, March 14, 1892, and September 12, 1892, respectively; and on March 6, 1893, that a nolle prosequi was entered, and the defendant discharged. There is no showing or pretense that any application was made to that court, or action had, to remit the penalty or forfeiture, under section 1020, Rev. St.

J. H. M. Wigman, U. S. Atty.

H. L. Eaton, for defendant R. E. McGlashen.

SEAMAN, District Judge (after stating the facts). The facts which are material for determination of liability in this case are all undisputed and conceded, and the only question presented is whether the surety can or must be relieved because of the proceedings subsequent to default and forfeiture. It is insisted in behalf of the surety who is defendant here that the entries of continuance which followed the forfeiture import that the principal was present and ready for trial at the subsequent terms, and the nolle prosequi deprived the sureties of a right to further produce the person of the principal, and rendered performance of their obligation impossible; that the sureties are therefore absolved from liability. This

contention is without force for a defense at law against a forfeiture of the recognizance, even if it be assumed that the principal was in attendance at the subsequent terms. It would constitute matter for an application, under section 1020, Rev. St., to have the penalty remitted, in whole or in part; but that must be addressed to the court which adjudged the forfeiture, and where alone is lodged a discretion to grant relief when it appears that "there has been no wilful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced." This court can only hear a legal defense. The inquiry is not open upon this issue, and in this forum, to ascertain whether the prosecution was actually prevented, and discontinuance made necessary, by the absence of the principal at the time appointed, or whether the principal was produced at a later term, and, if so, whether the prosecution was then enabled to proceed. The fact that there was an appearance or a discontinuance after forfeiture is not a legal defense. The recognizance is "a contract between the cognizors and the government that if the latter would release the principal cognizor from custody the former would undertake that he should personally appear at the specified time and place to answer the indictment." *U. S. v. Van Fossen*, 1 Dill. 406, Fed. Cas. No. 16,607. The obligation is peremptory, and the penalty accrues on the failure to appear according to its condition. The parties become absolute debtors to the obligee for the amount, and "must be held liable to pay the same, unless they can show some matter legally sufficient to excuse the failure." *Id.* The opinion in the *Van Fossen* Case is by Judge Dillon, concurred in by Judge Delahay; and the report shows (page 412) that a subsequent application was made, upon showing that the principal died after the forfeiture, and while imprisoned upon charge for another offense, committed prior to the date of the recognizance in suit, and Mr. Justice Miller thereupon concurs in holding that the sureties were not exonerated. I think the authorities are uniform in thus placing liability, and the following citations are well in point, in addition to the *Van Fossen* Case: *Taylor v. Taintor*, 16 Wall. 366; *State v. Traphagen*, 45 N. J. Law, 134; *State v. Scott*, 20 Iowa, 63; *People v. Anable*, 7 Hill, 33. Those cited in behalf of the defendant are not applicable to a forfeited recognizance, except the Louisiana cases; and the latter can only be reconciled with the rule of absolute liability above stated by the assumption that there was some discretion vested in the courts of that state by statute. The adjudication of forfeiture here shown must be accepted in this forum as conclusive against any matters asserted in the defense. *U. S. v. Ambrose*, 7 Fed. 554. I am therefore constrained to hold that this court is without power to grant relief under section 1020, Rev. St., and that there is failure to show any legal defense. Findings must be given in favor of the plaintiff, and judgment accordingly, but binding only the defendant served, *R. E. McGlashen*, as provided by section 737, Rev. St. So ordered.

LOWREY v. KUSWORM.

(Circuit Court, N. D. Illinois. March 27, 1895.)

DEPOSITIONS DE BENE ESSE—RIGHT TO EXAMINE ADVERSARY.

Under Rev. St. § 863, authorizing the examination of witnesses de bene esse when they reside out of the district in which the cause is to be tried, and at a greater distance than 100 miles from the place of trial, and section 858, making parties to civil actions competent witnesses therein, in an action on promissory notes, defendant may examine plaintiff de bene esse, even before issue joined, where plaintiff resides out of the district and more than 100 miles from the place of trial. Ex parte Fisk, 5 Sup. Ct. 724, 113 U. S. 713, distinguished.

Action by William J. Lowrey against Mollie Kusworm on promissory notes. Plaintiff was examined de bene esse before issue joined, but refused to produce the notes on which the action was brought, on the ground that such examination was unauthorized. Defendant applied for an order to compel production of the notes.

Hamline, Scott & Lord, for Lowrey.

Moran, Kraus & Meyer and J. P. Langworthy, for Kusworm.

JENKINS, Circuit Judge. The plaintiff brought suit in the United States circuit court for the Southern district of Ohio to recover of the defendant upon certain promissory notes alleged to have been made by her. Before answer to the declaration, the defendant undertook to examine the plaintiff as a witness de bene esse at the city of Chicago, the residence of the plaintiff, under Rev. St. § 863, upon the ground that the plaintiff resided out of the district in which the cause is to be tried, and at a greater distance than 100 miles from the place of trial. The plaintiff appeared before the commissioner in obedience to the process, and submitted to examination, in the progress of which he was required by counsel for the defendant to produce the notes upon which the suit was brought, and which were under his control. This, under advice of counsel, he declined to do, and application is now made to compel the witness to comply with the demand.

It is objected that the proceeding is wholly unauthorized, and that there is no provision of law authorizing the examination of an opposite party, and especially before issue joined. The statute under which the proceeding is had authorizes the taking of the testimony of any witness in any civil cause, under the circumstances stated in the statute. This act was passed in 1789, and at a time when parties and persons interested in the event of a suit were disqualified as witnesses in the cause. In 1864 an act was passed, incorporated in the Revised Statutes as section 858, providing that in the courts of the United States no witnesses shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried, with certain exceptions in respect of actions by or against executors, administrators, or guardians. The question whether, under this statute, a party could be required to testify by the other party, received solution in the

case of *Texas v. Chiles*, 21 Wall. 488. In that case the court held that any doubt should be resolved in a liberal spirit, in order to obviate, as far as possible, the existing evil sought to be remedied by the act; and it was held that the purpose of the act in making parties competent was, except as to those named in the proviso, to put them upon a footing of equality with other witnesses, and to be admissible to testify for themselves and compellable to testify for the others. This decision was followed in *Railroad Co. v. Pollard*, 22 Wall. 341. These decisions place it beyond doubt that a party may be examined at the instance of the opposite party if the case comes within the conditions of the statute, as here it does. It has been supposed, however, that the case of *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, is opposed to the prior decisions referred to. A careful examination of that case discloses that the notion is unfounded. There one party to a suit sought to examine the opposite party, in advance of the trial, under the Code of Civil Procedure of the state of New York. The court held that the statute of New York is in conflict with the provisions of the Revised Statutes of the United States, which provide that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court except as hereinafter provided." Section 861. The court, however, while making no reference to the case of *Texas v. Chiles*, was careful to state that the ground for the examination of the party did not fall within the conditions required by the act of congress. It referred to the fact that the statute of the United States with great particularity prescribed the circumstances under which depositions might be taken in advance for use at the time of trial; that they were circumstances relating to the conditions of the witnesses, to residence more than 100 miles from the court, or bound on a voyage to sea, or going out of the United States, or out of the district in which the cause is to be tried, and to a greater distance than 100 miles of the place of trial, before the trial, or when he is ancient or infirm. The court then declares that none of these things are suggested, nor were they thought of as foundation for the order under which the examination in that case was sought to be had. So that the case in no way conflicts with or limits the doctrine of the case of *Texas v. Chiles*. Since that decision, congress has provided (27 Stat. 7, c. 14, approved March 9, 1892):

"That in addition to the mode of taking the depositions of witnesses in causes at law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

Whether this act does not, as touching the examination of an adverse party as a witness, when such examination is allowed by the law of the state in which a suit is depending in a federal court held within such state, or by the law of the state in which a party may reside, do away with the effect of the ruling in *Ex parte Fisk*, is a question which is unnecessary here to be determined. It is sufficient to say that the conditions under which the examination of the plaintiff is sought fall within those mentioned in section 863,

Rev. St. He lives at a greater distance from the place of trial than 100 miles, and the examination is sought at his place of residence. The defendant had, therefore, clearly a right to take his testimony as a witness.

The objection that the evidence is sought to be had before a plea to the merits might be of weight, were it not that the statute has failed to make any exception with respect to the time when the testimony shall be taken, and there is lacking power in the court to limit the authority to take the testimony to a time subsequent to an issue upon the merits. Indeed, such a limitation might, with respect to some of the conditions mentioned in the statute, render nugatory the statute. For example, if a witness is bound on a voyage to sea, or about to go out of the United States, or is ancient and infirm, the delay in taking his testimony, if such taking be postponed until issue joined in the suit, might render impossible the procuring of his testimony. The witness might then be beyond the jurisdiction of any court in the land, or might not survive until issue joined. The court has no more right to impose such a limitation in respect to one condition than it has to another. The intention of congress is clearly expressed that within any of the conditions mentioned in the statute a party to a cause may at any time, without respect to the status of the suit in respect to pleadings, avail himself of the right granted, and procure the testimony of the witness to be read at the trial.

The witness was served with a subpoena duces tecum to produce the promissory notes and documents mentioned in his declaration. They were under his control. I am advised of no good reason why they should not be produced, and there would seem to be, in the circumstances stated, good reasons for their production. An order will therefore be entered requiring the plaintiff to further attend upon the commissioner for examination, and to produce the papers demanded.

In re BLACKBIRD.

(Circuit Court, E. D. Wisconsin. March 15, 1895.)

HABEAS CORPUS—CONFLICTING STATE AND FEDERAL JURISDICTION—INDIANS.

Habeas corpus will not lie to release an Indian convicted and imprisoned under Laws 1885, c. 341, § 9 (23 Stat. 385), for assault with intent to kill, on the ground that he is entitled to be tried under the laws of the state of his residence, by virtue of Laws 1887, c. 119, § 6, declaring Indians, born within the United States, to whom lands have been allotted, to be citizens of the United States; such facts being matter of defense, and reviewable by writ of error.

Application by David Blackbird, an Indian, for a writ of habeas corpus.

Spooner, Sanborn & Kerr, for petitioner.

H. E. Briggs and J. H. M. Wigman, for the United States.

JENKINS, Circuit Judge. The petitioner was indicted in the district court of the United States for the Western district of

Wisconsin for an assault with intent to kill, committed within the limits of the Bad River Indian reservation, and in violation of section 9, c. 341, Laws 1885 (23 Stat. 385). This statute comprehends such an offense committed by an Indian only. The petitioner was, upon trial, convicted, and sentenced to confinement in the state's prison for the period of three years, and is now serving his sentence therein. He applies for a writ of habeas corpus to restore to him his liberty, insisting that his conviction was illegal, and that his liberty is unlawfully restrained. This contention is based upon the ground that while he is of Indian blood, and originally belonged to the Bad River band of Chippewa Indians, yet that at the time of the commission of the offense for which he was indicted, and at the time of the indictment and trial thereof, he was a citizen of the United States and of the state of Wisconsin; that under the treaty of September 30, 1854, between the United States and the Chippewa Indians of the La Point or Bad River band, of which he was born a member, he took an allotment of certain lands within the reservation, for which a patent issued to him on the 28th of December, 1885, which patent provides that he shall not sell, lease, or in any manner alienate the land so allotted without the consent of the president of the United States. Section 6 of chapter 119 of the Laws of 1887 (24 Stat. 390) provides—

"That every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizen, whether said Indian has been or not by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or any other property."

The petitioner claims that by virtue of this statute, and by reason of such allotment, he is a citizen of the United States, and, by reason of his residence within the state of Wisconsin, that he is a resident and elector of that state, and is not subject to the provisions of the act under which he was indicted; that he can only be held for the act charged to the laws of the state of Wisconsin, and thereunder is entitled to be tried therefor by a jury of the county in which the alleged offense was committed; and that the United States district court for the Western district of Wisconsin was without jurisdiction to try him for the alleged offense.

The indictment aptly charged the statutory offense to have been committed by the petitioner within the district and within the limits of an Indian reservation, and that the petitioner was an Indian of a Chippewa tribe, and was at the time of the commission of the offense under the charge of an Indian agent and superintendent of the United States. The interesting question sought to be raised by this application is this: The government of the United States, in furtherance of its attempt to civilize the Indians, has seen fit to confer upon them the title in severalty to the lands held in

trust by the United States for the various tribes, with a view to induce them to take upon themselves the life and habits of civilization. This title has not been conferred, however, with absolute right of disposition. The Indian can neither sell, lease, nor otherwise dispose of the land. By some of the acts or treaties this inability of disposition is restricted to a period of time, ordinarily 25 years; and in other cases, as here, he is not allowed to dispose of the property without the consent of the president. The right of inheritance by his children is recognized. As a further incentive to the adoption of civilized life, the Indian to whom such allotment is made is clothed with citizenship. The government has not construed these provisions of the law as removing its wardship over the Indian, and claims that the tribal relation still remains. The government still continues to them the payment of treaty money, and supervision over them by means of a superintendent or agent resident within the reservation. It is insisted for the petitioner that the conferring of citizenship removes the Indian upon whom such citizenship has been conferred from the application of laws governing the Indian tribes, and that the petitioner, by virtue of his citizenship, stands before the law as any other citizen of the United States and of a state governed by no other or different law than that to which a white citizen is amenable. The question is not only one of interest, but is far-reaching in its results; for, if the contention of the petitioner be correct, the entire supervision and government of Indians to whom allotments have been made is done away with, and all such Indians are incorporated into the body of the people, and are no longer under that separate system of government which was deemed necessary to their peculiar condition. The question, by reason of its importance, should receive solution by the final and authoritative determination of the supreme court. No decision of the matter by me would set the matter at rest, and, for reasons about to be stated, I find no occasion to express any opinion upon the question.

The general principle is well settled that upon the hearing of an application for a writ of habeas corpus the question at issue is whether the prisoner is held without jurisdiction, and that the function of the writ is not to correct errors. In *re Chapman*, 15 Sup. Ct. 331, and cases cited, and *Andrews v. Swartz*, 15 Sup. Ct. 389 (both decided February 4, 1895, not yet officially reported). It is there held, following many cases of the supreme court, that ordinarily the writ will not lie where there is a remedy by writ of error or appeal. Here the indictment showed an offense committed within the purview of the statute, and by one to whom the statute applies. The district court for the Western district of Wisconsin has jurisdiction of the offense, and jurisdiction of the person of the petitioner. If the facts asserted by him are availing to take his case from without the general law respecting Indians occupying tribal relations, such facts would constitute a good defense to the charge brought against him, but those facts do not affect the jurisdiction of the district court to try him for the offense charged. They are matter of defense to the charge, and do not go to the

jurisdiction of the court. Indeed, it was confessed at the argument that the same questions that have been here urged were presented to the trial court in defense of the petitioner, and his claim was overruled. He therefore had a remedy by writ of error from the supreme court to the court by which he was tried. It is true that in rare and exceptional cases the writ may issue, although the remedy by writ of error exists. It has been held by the supreme court, however, that it is the better way to pursue the ordinary remedies afforded by the law. I do not think this to be an exceptional case in which a writ should issue, notwithstanding his remedy by writ of error is complete. This is peculiarly so because, by a writ of error, the grave and interesting question of the status of the Indian to whom allotment has been made can, through such writ of error, receive solution at the hands of the ultimate tribunal. The petition for a writ will be overruled.

CHATTANOOGA MEDICINE CO. v. THEDFORD et al.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1894.)

No. 255.

TRADE NAMES—INFRINGEMENT—SALE OF RIGHTS IN FIRM NAME.

M. A. Thedford, being engaged with others, under the firm name of M. A. Thedford & Co., in the manufacture and sale of "Simmons' Liver Medicine," sold to his partners all his rights therein, and bound himself not to engage in manufacturing the said medicine "under any name or style." Afterwards he formed a partnership under the firm name of M. A. Thedford Medicine Company, which made and sold a compound called "M. A. Thedford's Liver Invigorator," which they placed upon the market in wrappers and packages and with symbols and literature calculated to induce the belief that it was the "Simmons' Liver Medicine." Held, that this was a clear infringement upon the rights of his transferees, and that it was no defense that the latter had discontinued the use of the word "Simmons" and called their medicine "M. A. Thedford & Co.'s Original and Only Genuine Liver Medicine, or Black Draught." 58 Fed. 347, reversed.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

This was a bill in equity by the Chattanooga Medicine Company against M. A. Thedford and W. J. Satterfield to enjoin the use of a trade name. The circuit court denied a preliminary injunction (49 Fed. 949), and afterwards entered a decree for defendants. 58 Fed. 347. Complainant thereupon took this appeal.

John L. Hopkins and William Henry Browne, for appellant.

N. J. Hammond, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

BRUCE, District Judge. The case made by the bill, amendments, answer of respondents, and evidence in the cause is substantially that the complainant, the Chattanooga Medicine Company, a cor-

poration organized under the laws of the state of Tennessee, brings its bill against Miles A. Thedford and W. J. Satterfield, citizens of the state of Georgia, and says: That, prior to the year 1856, one Dr. A. Q. Simmons discovered a medicine which he made, and which become widely known as a liver medicine, and cure for diseases of the liver. That, in the year 1856, Dr. Simmons granted to his son-in-law, John H. Thedford, the right to make his medicine, and to use his (Simmons') name in advertising and selling it. That, in the year 1872, John H. Thedford sold and transferred to Miles A. Thedford all his right and title to make and sell the medicine. In the latter part of the year 1872, Miles A. Thedford engaged in manufacturing and selling the medicine in Chattanooga, Tenn., under the firm name of M. A. Thedford & Co., which name became known as the name of the manufacturers of Simmons' Liver Medicine, and this firm was engaged in manufacturing, advertising, and selling it to the public. On the 14th day of October, 1875, M. A. Thedford sold and transferred to William G. Smith and Charles McKnight a two-thirds interest in his right to manufacture and sell the medicine for \$2,200. This contract is in writing, and states that the right transferred is the "right, title, and interest to compound, mix, make, manufacture, advertise, and sell what is known as 'Simmons' Liver Medicine,' the said right descending to me through my father, J. H. Thedford, who is the son-in-law, and received the right from his father-in-law, A. Q. Simmons, now deceased, and was the original inventor of said medicine." Miles A. Thedford, William G. Smith, and Charles McKnight carried on the business of manufacturing and selling the medicine in Chattanooga, Tenn., under the firm name, of M. A. Thedford & Co. Their chief office was in Chattanooga, and on the 22d day of November, 1876, they were engaged in this business, and had a stock of goods amounting to \$5,329.05; and book accounts, \$8,056.97; and plates, electrotypes, and lithographing stones and printed matter used in advertising the medicine, bearing the signature of M. A. Thedford & Co. On the 22d day of November, 1876, M. A. Thedford sold his one-third interest in the business and right to manufacture and sell the Simmons' Medicine to Z. E. Patton, and was paid for it in a tract of land of 500 acres, more or less, in Carroosa county, Ga. This transfer is in writing, and states that:

"I hereby transfer and convey to said Z. E. Patton all and every of my rights, title, and interest whatsoever, that I have been and am or may hereafter become possessed of, in the right to manufacture, make, advertise, and sell the said Simmons' Liver Medicine; and I hereby bind myself not to engage in the business of manufacturing or selling the said medicine under any name or style, or to become interested in the manufacture through any other person whatsoever, except that I should become the owner of any part or interest sold to Smith, McKnight, or Patton in the manufacture or sale of said medicine, under the firm name and style of M. A. Thedford & Co. * * *"

In 1879 the complainant company succeeded to the right of Smith, McKnight, and Patton, and has ever since been engaged in manufacturing, advertising, and selling the medicine. The defendants in their answer say that they have formed a partnership under the firm name of M. A. Thedford Medicine Company, and that they have

commenced to make, advertise, and sell "T. L. I.," which is "M. A. Thedford's Liver Invigorator," and they say the name M. A. Thedford is worth to them not less than the sum of \$10,000. The evidence shows that "T. L. I.," "M. A. Thedford's Liver Invigorator," is put upon the market in wrappers and packages, with symbols and literature which are calculated to induce the belief on the part of the public that it is the Simmons' Liver Medicine manufactured by the M. A. Thedford Medicine Company, and the literature makes prominent that M. A. Thedford is the grandson of Dr. A. Q. Simmons.

Upon the face of it, it would seem to be a clear attempt upon the part of defendants to use and avail themselves of the same thing that M. A. Thedford sold first, two-thirds of it to Smith and McKnight, and afterwards the other third to Z. E. Patton, November 22, 1876. These sales, in terms, indicate a clear purpose on the part of Thedford to go out of the business, and to give his successors in interest a clear field, not only to the right to manufacture, advertise, and sell Simmons' Liver Medicine, but to the exclusive use of the name "Thedford & Co." in the carrying on of their business. In the very nature of things, such a business as the defendants propose, with the means of advertising they are using, must operate an infringement upon the right of the plaintiff.

There is this suggestion: That the language used in the transfer to Patton is limited to the making and selling of Simmons' Liver Medicine, calling it by that name, and that the use which the complainant company is authorized to make of the name of "M. A. Thedford & Co." is likewise to be limited to the making, advertising, and selling of Simmons' Liver Medicine, and that afterwards the predecessors of the complainant company discontinued the use of the word "Simmons," and called their medicine "M. A. Thedford & Co.'s Original and Only Genuine Liver Medicine, or Black Draught," and that this change in the name and literature of the complainant company gave the defendant the right to do what he now claims. We think this view of the terms of the transfer is too narrow, and the evidence does not show that the complainant company abandoned the right to make Simmons' Liver Medicine in one form or other, but it shows the contrary. The cause of this change may be found in the Zeiler suit, brought by a rival of the predecessor of the plaintiff company in the circuit court of the United States for the Eastern district of Tennessee, with the merits of which we have nothing to do here; but it is in the record, and perhaps furnishes a reason for the change which was made in the name of the medicine which the plaintiff company was engaged in manufacturing and selling; but it is not clear here that change could inure to the benefit of the defendants, in the absence of proof showing an abandonment by the complainant company of the right to make and sell Simmons' Liver Medicine. We do not deem it necessary to enter into any inquiry as to the ingredients of Simmons' Liver Medicine, or what his formula actually was, if he had any, or how the complainant's medicine called "M. A. Thedford & Company's Original and Only Genuine Liver Medicine, or Black Draught," differed, if at all, from Simmons' Liver Medicine, or whether either of the medi-

cines are intrinsically valuable or not. However that may be, the manufacture and sale of the medicine seems to have become the basis of a valuable business, and the question here is as to the right to manufacture it and the manner in which it shall be placed upon the market; and, as between the parties to this suit, we think the evidence shows that the defendants, in clear violation of the contract of M. A. Thedford, are infringing upon plaintiff's rights, and are subjecting the plaintiff to an unjust and unfair competition in business. The decree of the circuit court is reversed, and the cause remanded, with instructions to issue an injunction, and refer the cause to a master to take account of damages; and it is so ordered.

WALTER A. WOOD MOWING & REAPING MACH. CO. v. WILLIAM DEERING & CO. et al.

(Circuit Court, N. D. Illinois. March 5, 1895.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—EXTENT OF CLAIM.

Letters patent No. 456,825, July 28, 1891, to George H. Howe, applied for May 4, 1885, is not infringed by the sheaf carriers shown and described in the Kennedy & Steward patent, No. 405,892, June 25, 1889, and in the Steward patent, No. 482,931, June 24, 1891.

2. SAME—INTERFERENCE.

In the interferences between the Howe application and those of Kennedy & Steward, Ellis and others the patent office arrayed or classified the carrier attachments as of two separate and distinct types or species,—that of Howe being designated as "single-jointed" in design, and that of Kennedy & Steward and one form of Ellis as "double-jointed." *Held*, that the Howe patent is limited to single-jointed carriers, and the carriers of the defendant, being double-jointed, are therefore not infringements.

3. SAME—EXTENT OF CLAIM.

After Howe had made repeated efforts to broaden the claims of his patent so that they might cover double-jointed carriers, and after his patent had been secured in the interference proceedings upon the distinction of the single-jointed feature, the assignee of the patent must abide by the conditions under which the grant was obtained, and is not at liberty in court to ask for a construction relinquished in the patent office.

4. SAME—CONSTRUCTION.

The Howe patent is for an improvement only, and is not for a fundamental invention, and the value of the improvement is not in question, and the fact that it is not a pioneer determines the rule of its construction.

Bill by the Walter A. Wood Mowing & Reaping Machine Company against William Deering & Co. and others to restrain infringement.

George Harding and Pierce & Fisher, for complainant.

Banning & Banning and Edmund Wetmore, for defendants.

SEAMAN, District Judge. This bill charges infringement of letters patent No. 456,825, issued to complainant as assignee of George H. Howe, July 28, 1891, for an improvement in "sheaf carrier and dumper for harvesters," applied for May 4, 1885. The claims of which infringement is alleged are as follows:

"(1) The combination, with a harvester, of a sheaf carrier composed of projecting rods, each having a journal at an angle to the projecting portion of

the rod and being connected with the harvester by a bearing constructed and arranged so as to cause each rod in dumping to move downwardly and laterally towards its support.

"(2) The combination, with a harvester, of a sheaf carrier composed of laterally projecting rods, each having a journal at an angle to the projecting portion of the rod, and being connected to the side of the harvester by a bearing so inclined as to cause each rod in dumping to move downwardly and backwardly toward the side of the machine.

"(3) The combination, with a harvester, of a sheaf carrier composed of a series of laterally projecting rods, each having a journal at an angle to the projecting portion of the rod, and being connected to the side of the harvester by a bearing so inclined as to cause each rod in dumping to move downwardly and backwardly toward the side of the machine, and a bar to which the inner ends of all the rods are connected, to cause them to move concurrently.

"(4) The combination, with a harvester, of a sheaf carrier composed of a series of laterally projecting rods, each having a journal at an angle to the projecting portion of the rod, and being connected to the side of the harvester by a bearing so inclined as to cause each rod in dumping to move downwardly and backwardly toward the side of the machine, a bar to which the inner ends of all the rods are connected, and connections between the bar and the lever within the reach of the driver."

The alleged infringing devices employed by the defendant appear in the record as "Carrier A" and "Carrier B." The former appears in the Kennedy & Steward patent No. 405,892, granted June 25, 1889 (application July 27, 1885), and the latter in patent No. 482,931, granted to J. F. Steward, September 20, 1892, on application filed June 24, 1891.

The answer of the defendants denies infringement, sets up an invention by Ellis of a so-called "Strawberry Point" machine, interference proceedings in the patent office, and adjudication there that the Ellis conception was prior to the Howe (complainant's); that the Strawberry Point machine contains all that was new or patentable in Howe's; that Steward was a prior inventor; and also sets up the prior state of the art as shown by patents of Burnham, Gage, Burson, Dentler, Bell, and others. The testimony is voluminous, and includes that of Mr. See, as expert on the part of complainants, and Mr. Dayton on the part of defendants, and the file wrapper and contents in respect to each of the patents in controversy, and the several interference proceedings in the patent office.

The argument of this case was clear and instructive in presentation of the questions involved, and I regret that other engagements have so long postponed the final consideration, and that, after taking considerable time in careful study of the numerous points which are set forth in the extended briefs and in reviewing the record, I must confine my opinion to a brief statement of conclusions. It is disclosed by the record, as stated by the witness Carver in behalf of the complainant, that "there was a tremendous effort on the part of the manufacturers in 1884 and 1885 to produce a successful bundle carrier" for attachment to the well-known harvester devices. The carriers in use were not satisfactory, and the representative of complainant's machines came in the fall of 1884 from an unsuccessful contest in England, which he attributed to the imperfection of their bundle carrier, and set Mr. Howe upon the work of inventing a remedy. Earlier in that same year the defendants were experimenting to the same end in the wheat

fields of Texas and elsewhere, and Ellis, whose conceptions figure prominently in the contest, was at work in the line prior to Howe. The race on the part of the complainant and the defendants was to find an attachment which would give preference to their harvesters respectively. There were numerous prior devices for the purpose, in one form or another. The contestants were seeking improvements, and in view of the prior state of the art their inventions for which patents were sought and granted cannot be considered fundamental or pioneer inventions. With reference to the inventive conceptions of Ellis, I do not find it necessary to decide the question of priority, or how far he may have been informed by the exhibition of the Howe device, in the spring of 1885, for the working out of his patent, now owned by the defendants. All the controversy in this case seems to me to be resolved by the proceedings in the patent office, whereby the respective claims were clearly limited, and the litigants accepted their patents with the amendments, construction, and limitation there placed upon them, and, in the controlling features, largely upon the distinctions for which the complainant then contended to uphold the Howe invention. The patents were reconciled in the rulings of the patent office by arraying or classifying the carrier attachments as of two separate and distinct types or species; that of Howe being designated as "single-jointed" in design, and the other, of Kennedy & Steward, and one form of Ellis, as "double-jointed." An attempt by Steward to obtain allowance of a claim in his patent which would cross this line with single-axis carrier fingers was successfully contested by the complainant upon this distinction. In substance the patent office gave and the complainant accepted a definition of these several claims of the Howe patent as securing and limiting to the construction of a carrier in which the rods or fingers had a journal with fixed inclined bearing to give the requisite movements, the pivot being single and invariable, called the "single joint," as distinguished from the double-joint journal of Burson's prior invention, and of which Kennedy & Steward were allowed as improvers. The defendants' sheaf carrier is clearly of the latter construction and type. It has not the single and invariable pivot, but the fingers are mounted upon pivots which are in a vertical position while receiving their load, and, as the fingers move to discharge the load, the pivot changes to an inclined position from the vertical. The complainant was met with this distinction and the prior invention of double-jointed devices against repeated efforts to broaden the claims for the Howe patent so that they might bear the construction for which complainant now contends, and, when thrown into interference with the double-jointed inventions, saved its grant for a patent upon the distinction of this single-axis feature of his invention.

The opinions handed down in the interference proceedings are instructive, and are convincing to my mind that the true theory was there adopted, and probably the only one upon which this patent could be founded. The rulings thereupon adopted must control for the construction of these claims. The decisions of the

supreme court are clear and uniform that the complainant must abide by the conditions which were there imposed and accepted, and that it is "not at liberty now to insist upon a construction which will include what it was expressly required to abandon and disavow as a condition of the grant." *Sutter v. Robinson*, 119 U. S. 541, 7 Sup. Ct. 376; *Shepard v. Carrigan*, 116 U. S. 598, 6 Sup. Ct. 493; *Sargent v. Lock Co.*, 114 U. S. 86, 5 Sup. Ct. 1021; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627. The recent and important decision by the circuit court of appeals of the First circuit (*Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958) is not in opposition to the above cases, but expressly recognizes their authority and their application where "there was a fair issue formulated and understood by the applicant for the patent, requiring him clearly to yield directly a portion of what he claimed, and the effect of his yielding could not be mistaken." That the complainant's patent was for an improvement only, and not a fundamental invention, seems entirely clear. Sheaf carriers composed of projecting rods or fingers appear in several prior patents (*Dentler*, *Burnham*, *Bell*, and *Burson*). The features of curved finger, and of hinging to drop the load, and for swinging horizontally, and of devices for the driver to operate, are found in one or other of these. The value of the improvement is not the question. The fact that it is not a pioneer determines the rule of construction. I feel constrained to hold that the defendants' carriers do not infringe, and the bill must be dismissed for want of equity. So ordered.

WESTERN TELEPHONE CONST. CO. v. STROMBERG et al.

(Circuit Court, N. D. Illinois, N. D. February 19, 1895.)

1. PATENTS—VALIDITY—ESTOPPEL BY ASSIGNMENT.

Defendants, in a suit for infringement of patents, are estopped from denying the validity of the patents which said defendants have assigned for a consideration to complainant, but they are not precluded from showing the prior state of the art, to ascertain the nature and extent of the thing granted.

2. SAME—PRELIMINARY INJUNCTION.

In a motion for preliminary injunction it is not necessary to pass upon the question of constructive identity, but it is sufficient that a doubt is fairly raised by the affidavits of the experts in behalf of defendants, who point out grounds of distinction between the complainant's patents and the device of defendants in the light of the prior art, and assert that there is no infringement.

3. SAME—IMPROVEMENTS IN TELEPHONES.

Preliminary injunction against infringement of patents Nos. 504,636 and 516,777, for improvements in telephones, denied, on the ground that infringement did not clearly appear.

This was a bill by the Western Telephone Construction Company against Alfred Stromberg and Androy Carlson for infringement of certain patents. Complainant moved for a preliminary injunction.

Stanley S. Stout (J. H. Raymond, of counsel), for complainant,
Barton & Brown, for defendants.

SEAMAN, District Judge. This is a motion for a preliminary injunction to restrain alleged infringement of letters patent No. 504,636 and No. 516,777. The claims of which infringement is asserted read as follows:

In No. 504,636, one claim:

"(1) In a telephone, the combination of the pole pieces, d, d, with the extensions, f, f, the angular pieces of iron, f', f', attached thereto, the helices, g, g, surrounding the ends of said angular pieces, and the diaphragm, h, adapted to vibrate in proximity to said angular pieces of iron, substantially as described."

In No. 516,777, two claims:

"(1) The combination with a horizontally shifting telephone hook, yieldingly maintained at one end of its travel, of a bracket, one edge thereof occupying a position between the members of said hook, whereby the insertion of the telephone receiver between said edge and the outer member of said hook may impart to the hook a transverse movement, substantially as described.

"(2) The combination with a horizontally shifting telephone hook, yieldingly maintained at one end of its travel, of a bracket, one edge thereof occupying a position between the members of said hook and contact points controlled by said telephone hook, substantially as described."

The complainant relies for an injunction pendente lite upon the following propositions: (1) That the defendants are the patentees to whom both these letters patent were issued, and "the grantors of the full exclusive license to the complainant" thereunder, and are therefore "estopped from denying the validity of the face value of these patents"; and, further, that such estoppel prevents inquiry into the prior state of the art, to narrow the construction or scope of the claims, or, as broadly stated in the argument for complainant, that for the purposes of this motion, "until some further possible showing is made by the defendants, no defense is now open to them." (2) That infringement is clearly shown.

1. It is the undoubted rule that the defendants, as grantors, cannot impeach the validity of the patents, but I am satisfied that the estoppel does not reach to the extent urged by the complainant. The defendants are not precluded from showing the prior state of the art to ascertain "the nature and extent of the thing granted." *Babcock v. Clarkson*, 63 Fed. 607, 11 C. C. A. 351; *Martin & Hill Cash Carrier Co. v. Martin*, 62 Fed. 272. The cases cited in behalf of complainant do not seem to me to support its contention. *Purifier Co. v. Guilder*, 9 Fed. 155; *Burdsall v. Curran*, 31 Fed. 918; *Adee v. Thomas*, 41 Fed. 342, 346; *Blount v. Societe*, etc., 3 C. C. A. 455, 53 Fed. 98. They simply exemplify the rule that the grantor cannot deny or question the validity of his grant or title, or set up his own fraud or mistake to defeat or derogate from his grant. The defendants have introduced showing of the prior state of the art for the purpose of construing the claims of the patents. This is competent, at least so far as it is made to appear that the patentees were not original inventors of telephones or telephone switches; but the invention claimed was only an improvement of

a known device, and the doctrine of equivalents cannot be invoked to suppress other improvements in the same line which are not "mere colorable invasions of the first." The claims must be restricted to the specific form of device for which the patent was granted. *Railroad Co. v. Mellon*, 104 U. S. 112; *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72; *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310.

2. With inquiry open in reference to the prior art, the affidavits of Messrs. Haskins and Jones disclose numerous prior devices in telephones and telephone switches, and that these patents can only have force as improvements in the means. Indeed, the reports are full of adjudications of which notice can be taken to that effect. The affidavits on behalf of defendants alleging breach of contract of employment and misrepresentations cannot be considered upon this motion. The only question is of infringement or identity of devices, and the issue is not upon the alleged subsequent patent granted to the defendants (of which copy is presented in the argument of complainant), but upon the devices which were produced and conceded as an exhibit of the defendants' alleged infringement. The rule is settled that the fact of infringement must be conclusively shown for an injunction *pendente lite*. Therefore, upon this motion, it is not necessary to pass upon the question of constructive identity, but it is sufficient that a doubt is fairly raised by the affidavits of the learned experts in behalf of defendants, who point out the ground of distinction in the light of prior art, and assert that there is no infringement. Cogent reasons are presented by their affidavits against infringement of the combination in the claim of letters patent No. 504,636, in the absence of a pole piece in defendants' apparatus. And, while the showing may not be clearly made out that the switch device is not a mere evasion of No. 516,777, I cannot say that a conclusion is undoubted in view of the affidavits and the reference to the Phelps switch and other prior devices. It follows that an injunction must be denied, leaving all questions of identity to final hearing; and it is so ordered. The demurrers interposed by the defendants are overruled, as the complainant was allowed to amend upon the technical and only ground which was well taken.

WALL et al. v. LECK.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1895.)

No. 184.

1. PATENTS—NOVELTY AND INVENTION—PROCESS OF FUMIGATING TREES.

The discovery that the old process of fumigating plants and trees by hydrocyanic acid gas, after covering them with an oiled tent, is more effective in the absence of the actinic rays of the sun, gives no right to a patent for the use of that process at night or in cloudy or foggy weather, when such rays are excluded by the processes of nature. 61 Fed. 291, followed.

2. SAME.

The Wall, Jones and Bishop patent, No. 445,342, for a process of fumigating trees, *held* void on its face for want of patentable invention. 61 Fed. 291, followed.

Appeal from the Circuit Court of the United States for the Southern District of California.

This was a bill by W. B. Wall and others against Henry Leck for infringement of letters patent No. 445,342, issued January 27, 1891, to W. B. Wall, M. S. Jones, and A. D. Bishop for a process for fumigating trees and plants. The circuit court sustained a demurrer to the bill on the ground that the patent was void on its face for want of patentable novelty and invention. 61 Fed. 291. Complainants appealed.

W. F. Henning and H. T. Hazard, for appellants.
Ray Billingsley, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This suit was brought by appellants against the appellee for an alleged infringement of letters patent No. 445,342, issued January 27, 1891, to appellants for a process of fumigating trees and plants, for an accounting of profits alleged to have been realized by the appellee, and for an injunction, etc. A demurrer was interposed to the bill of complaint upon the ground "that it appeareth by the complainants' own showing by the said bill that they are not entitled in a court of equity to the relief prayed for by the bill against this defendant, or any relief touching the matters contained in the said bill, or any of such matters." This demurrer was sustained, "the court being of opinion that the patent is void for want of novelty and invention, and that, in view of its recitals, it is so plainly so that it cannot be aided by evidence, it should be so declared on demurrer, without subjecting the parties to the costs of producing proof." Did the court err in sustaining the demurrer? Does the bill state facts sufficient to authorize a court of equity to grant the relief prayed for? The bill alleges, among other things, that complainants—

"Are the original and first discoverers and inventors of a new and useful process for the fumigation of trees and other plants, which consists in fumigating with hydrocyanic acid gas, in the absence, substantially, of the actinic rays of light"; that they obtained a patent from the United States patent office for their discovery, "which patented process had not been known, used, or published prior to the said discovery and application of your orators; * * * that the said fumigating process of your orators was designed to destroy, and when performed in the manner set forth in their said application and in their said letters patent does destroy, the scale insects of certain destructive species or varieties commonly infesting or living on citrus fruit trees and other plants, and effectively rids said trees and plants (so fumigated) of such insects, so as to greatly benefit said trees and plants, and thereby produce great benefits and profits to the owner thereof, and when so used does not injure the plant or tree."

These averments in the abstract—independent of the letters patent—might be said to state sufficient facts to show invention; and

if it be true, as alleged, that complainants discovered and invented a new and useful process for the fumigation of trees, etc., then they might, under well-known principles of the patent law, be entitled to maintain the suit. But it will be noticed that the averments in the bill fail to state specifically what the "process" which they discovered is. The letters patent are not annexed to the bill, but an exemplified copy thereof is offered to be and was produced for the inspection of the court. We must therefore look to the patent, its specifications and claim, in order to ascertain the character of the "process" which complainants allege they discovered and invented. What is it? The application for the patent declares that "it consists in fumigating the plant with hydrocyanic acid gas, in the absence of light." The specifications declare that:

"Hydrocyanic acid gas has heretofore been employed in fumigating trees, but it has not been considered practicable, for the reason that, if the gas were of sufficient strength to destroy the insects on the plants, it also injured the foliage and fruit. We have discovered that when the light is excluded the action of the gas is more effective in destroying insect life, and at the same time becomes harmless to plant life, unless used excessively. Our process differs from the ordinary process of fumigating with hydrocyanic acid gas only in that we exclude the light. This may be done by means of the oiled tent or covering ordinarily used for such fumigation, provided the fumigation is done at night. If the work is done in the daytime, the covering must be so colored as to exclude the actinic rays of light, but we do not believe it possible to produce satisfactory results with any colored tent in bright daylight."

After giving this specific statement of their discovery, they declare that what they claim as new and desire to secure by their letters patent is "the process set forth of fumigating plants with hydrocyanic acid gas in the absence, substantially, of the actinic rays of light." The argument of the learned counsel for appellants exhibited a degree of ingenuity that is commendable, and is deserving of respectful consideration. It is earnestly contended that the circuit court, in sustaining the demurrer, failed to distinguish between a process and the means of carrying out the process; between a mode of application or condition and a means of producing that condition; between the importance of the absence of the light and the means of producing that absence,—and numerous authorities are cited which it is claimed uphold the novelty of the invention. While asserting that the claim in the patent is a sufficient guaranty that it was not night nor any force of nature upon which appellants obtained the patent, and contending that it was for a discovery that by employing well-known agents under certain conditions success would result where failure and disaster had previously been the result, it is frankly admitted that the specifications in the patent disclose the fact that appellants made the discovery that hydrocyanic acid gas may be used successfully in the absence of the actinic rays of light. This was the only discovery which is claimed, and the argument is, to quote from appellants' brief:

"The recommendation or direction to apply this gas at night for the purpose of accomplishing the desired result is but the pointing out of a way or mode of avoiding the effect of an element or force which it had now been discovered had theretofore rendered fumigation with this gas impracticable."

But in this connection we are brought back to the fact that appellants in their letters patent only pointed out the way by the use of a natural condition of nature's laws. They did not invent any new process, chemical or otherwise, whereby the force of nature was to be controlled. They invented no machine, apparatus, device, or process to exclude the actinic or other rays of light. It is true that a mode was pointed out, but not approved, to so color the tent or covering as to exclude the actinic rays of light; but they neither invented nor discovered any process, texture, or coloring that would sufficiently accomplish that purpose. The discovery of such a coloring is still an open field for the genius of future inventors. Their discovery, which is conceded to be valuable and of great benefit, was that the old process of fumigating trees by means of an oiled tent and hydrocyanic acid gas, both of which were old and free to the public, could be made successful "provided the fumigation is done at night." Such a discovery, however new and valuable it may be, is not within the pale of patentable inventions. It does not come within any of the principles of the patent law, or any of the provisions of the statute relating to patents. A mere naked principle, a law of nature, or property of matter cannot be patented. So long as the principle is a mere item of knowledge, and sometimes from its nature it must always remain such, no patent can be held valid, however brilliant and useful the discovery may be. Merw. Pat. Inv. 4, 73, 529; 1 Rob. Pat. § 140; Leroy v. Tatham, 14 How. 156, 175. As was said by Shipman, J., in *Morton v. Infirmity*, 2 Fish. Pat. Cas. 320, Fed. Cas. No. 9,865:

"In its naked, ordinary sense, a discovery is not patentable. A discovery of a new principle, force, or law operating, or which can be made to operate, on matter, will not entitle the discoverer to a patent. It is only where the explorer has gone beyond the mere domain of discovery, and has laid hold of the new principle, force, or law, and connected it with some particular medium or mechanical contrivance by which or through which it acts on the material world, that he can secure the exclusive control of it under the patent laws. He then controls his discovery through the means by which he has brought it into practical action, or their equivalent action. Sever the force or principle discovered from the means or mechanism through which he has brought it into the domain of invention, and it immediately falls out of that domain and eludes his grasp. It is then a naked discovery, and not an invention."

An artificial force is a natural force, so transformed in character or energies by human power as to possess new capabilities of action. This transformation of a natural force into a force practically new involves a true inventive act. 1 Rob. Pat. §§ 92, 96, 99, 103.

Within these general principles many cases may be found where patents have been sustained for a process, art, device, or machine where all the elements were old, provided the mode of application is new. But in all of the numerous cases cited by appellants to sustain this position it will be found either that there was a new combination of the old elements, or that something was added thereto or taken therefrom, or a new mode was invented whereby the principle that was discovered could be applied. The case of *Neilson v. Harford*, 8 Mees. & W. 806, 1 Webst. Pat. Cas. 295, furnishes an

apt illustration of the class of cases where a principle with a new means of applying it constitutes the basis for a patent. Neilson in 1828 discovered that a hot blast of air thrown into a furnace was more effective than the cold blast which had been previously used. It had previously been supposed that the colder the blast the hotter the fire, because it had been observed or discovered that the furnace fires burned better in winter than in summer. The supposition that the cold blast was better than the hot blast was not correct, the truth being that the furnace fires burned better in winter because the air was drier, not because it was colder. Neilson discovered the physical law—the real truth—that a hot blast is more effective than a cold blast in a furnace, and he invented and described an apparatus for making use of this discovery by heating the air blast before it is directed into the furnace, and thereby brought his application within the provisions of the statute. Now, if Neilson had merely announced the principle that a hot blast is better than a cold blast for a furnace, it is evident that he would not have been entitled to a patent. But he described a means of applying the principle, by interposing a chamber or receptacle in which the blast was heated by a separate fire before it was thrown into the furnace. If appellants had followed up their discovery by inventing some new process, device, or apparatus that would exclude the light, they would have brought themselves within the principle announced in the Neilson Case. But they did nothing of the kind. They simply discovered a truth,—that the fumigation of the trees and plants could be made more effective and beneficial by using it in the old way, only at night, or in cloudy days or foggy weather; at any time when the actinic rays of light were absent by the natural condition of nature. To have entitled them to a patent, they should have followed up their valuable discovery by inventing some new method by the application of which the deleterious effect of the actinic rays of light could have been avoided.

A similar distinction between the Neilson Case and the present will be found in all the cases. Thus in *Lawther v. Hamilton*, 124 U. S. 1, 8 Sup. Ct. 342, a patent for a new and improved process for treating oleaginous seeds was upheld although all the instrumentalities were old. The only thing that was new was the mode of applying the old instrumentalities. The process of extracting oil from flaxseed was formerly accomplished by means of rollers and muller stones. Lawther discovered, by actual experiments, that in crushing the seed the tearing, pulverizing action of the muller stones was injurious; that more advantageous results were obtained by dispensing with the use of the muller stones. Although the machinery and apparatus had all been used before, yet Lawther discovered an improvement in the process by altogether omitting one of the steps of the former process, and thereby brought himself within the rule which we have heretofore announced. *McClurg v. Kingsland*, 1 How. 202, as explained in *Burr v. Duryee*, 1 Wall. 568, furnishes another illustration of the rule. A workman in a foundry observed, in pumping water into a bucket, that the water, entering at a tangent to the circle of the bucket, acquired a circular

motion, diminishing when it approached the center, where bits of straw and other lighter materials would be concentrated. In casting iron rolls, the metal required to have this rotary motion for the same purpose. This effect had previously been produced by stirring the liquid metal. The thought all at once struck the mind of this observer that the application of this principle or law of nature might be beneficially made to the casting of iron rolls by merely introducing the metal at the bottom of the mold at a tangent. This was held to embrace an invention of a new improvement in the art of casting iron, by giving an angular direction to the tube which conducts the metal to the mold. In these and other kindred cases it will be noticed that the particular processes used to extract, modify, control, or concentrate the natural agencies constituted the invention. The invention was not in discovering them, but in applying them to useful objects. Is it not evident, without further reference to the authorities cited by appellants, that such cases do not support appellants' contention? Appellants, having ascertained that the fumigation of trees by the old process when the actinic rays of light were present, although destructive to the scale, was nevertheless injurious to the trees, in the field of their investigations and experiments made the discovery that if it was used when the rays of light were absent it would destroy the scale or other insects without having any deleterious effect upon the trees. The mode of application of this process, to make it beneficial, useful, and valuable, as described by them, was by utilizing a condition or force of nature by using the process at night, when the rays of light were absent. They did not invent the darkness of night, or the cloudy, foggy weather, when the process could be safely used, nor any method of excluding the light except by the natural changes in the condition of the weather, or of the hours of night as distinguished from the hours of day. In the field of medical science and invention it may be, if it has not already been, discovered that the air we breathe at certain hours of the day is more beneficial and healthful than the air we breathe at certain hours of the night; but would the discovery and absolute proof of this fact entitle the original discoverer to a patent for the exclusive use of the air at the beneficial hours of day, and invest him with the power and authority, under the shield of the patent law, to enjoin each and every other individual from utilizing the air at that particular time of day unless he is paid a royalty, or grants a license for such use? Some things are so self-evident as not to require any proof of their existence. No natural function of the day or of the night, of the sun or of the moon, is patentable. These natural conditions are as free to all mankind as is the air we breathe. The broad canopy of heaven can be used in the daytime, or the night-time, and at all times, in sunshine or in darkness, by everybody, in the presence or the absence of any rays of light, or any condition of the atmosphere. A principle, considered as a natural physical force, is not the product of inventive skill. It is the common property of all mankind. It exists in nature independently of human effort, and can neither be diminished nor increased by human power. Man can discover and

employ it, but his employment of it in the modes or through the instrumentalities by which it is applied in nature is a mere imitation of what every man is able to perceive and reproduce as well as he. All endeavors to confine it to himself are at once futile and unjust. It exists for all men, as well after his discovery as before. The laws necessarily recognize and protect this right, and do not permit any man to exclusively use the conditions which are the gifts of nature, simply because he was the first one to discover its value. Not until some new instrument or method is contrived for its direction towards ends which it cannot naturally accomplish does his creative genius manifest itself. 1 Rob. Pat. § 136 et seq.; *Detmold v. Reeves*, 1 Fish. Pat. Cas. 131, Fed. Cas. No. 3,831; *Morton v. Infirmary*, 2 Fish. Pat. Cas. 320, Fed. Cas. No. 9,865; *Morton's Anaesthetic Patent*, 8 Op. Attys. Gen. 269. The court did not err in sustaining the demurrer. The judgment of the circuit court is affirmed, with costs.

AMERICAN DUNLOP TIRE CO. v. ERIE RUBBER CO.

(Circuit Court, W. D. Pennsylvania. January 28, 1895.)

1. PATENTS—LIMITATION OF CLAIMS—STATEMENT OF BEST METHOD.

A statement in the specifications that in the best methods of applying their invention the patentees use a supplemental device there described, is not to be read, as a limitation, into a claim which contains no reference to it, especially when the significance of its omission is emphasized by its incorporation into a subsequent claim.

2. SAME—INVENTION—INFRINGEMENT—PNEUMATIC TIRES.

The Brown and Stillman patent, No. 488,494, for a pneumatic tire containing an inflatable tube, and made inextensible circumferentially by means of circumferential enforcements along two lines within the edges and above the bottom of the groove, whereby the tire is made to seat itself on inflation and the necessity for mechanical connection with the rim is obviated, construed as to the first claim, which is *held* to show patentable invention, and to be infringed by the Moomey patent, No. 513,617.

Duncan & Page, for complainant.
Hallock & Lord, for defendant.

BUFFINGTON, District Judge. The American Dunlop Tire Company file a bill against the Erie Rubber Company for alleged infringement of the first claim of letters patent No. 488,494 (now owned by complainants), which was applied for June 20, 1891, and issued December 20, 1892, to Alex. T. Brown and George F. Stillman. The subject-matter of that patent and of the present bill is a pneumatic tire, which is so named from the fact that it is inflated with air, to form a cushion which lessens jars in passing over uneven surfaces. In bicycles, iron tires were first used; later came solid rubber ones, and these in time were succeeded by the pneumatics. Prior to the patent in suit, these latter were of two general kinds,—“hose pipe,” tires or endless tubes of canvas or India rubber, usually cemented to the rim; and “double tubes,” which consisted of an inflatable tube within an outer, nonexpansible shoe or covering divided longi-


tudinally, and having its edges detachably connected in some way with the rim of the wheel. By using this outer shoe there was less liability of puncturing the interior air tube, but when this was done it was a matter of difficulty and expense to reach the latter to repair it, the outer one being either mechanically secured or cemented to the rim. This difficulty was in a measure overcome by what are known as "clinchers tires," where the edges of the shoe and the rims of the wheel were adapted to dovetail or interlock with a hook joint when air pressure was applied to the inner tube. This style of tire is shown in the Jeffry patent, No. 454,115, of June 16, 1891 (record, page 430). The alignment of tires was also a matter of difficulty and expense. To obtain and maintain perfect alignment, the tire must be kept from lateral motion in the rim. To fix the cover in place before inflation required accuracy of adjustment in the various parts, and the absence of such accuracy resulted in a distorted tire when the tube was inflated. In the clincher type, rims with grooves were generally used, and the tires were aligned in them by various forms of clamping devices. These difficulties were largely overcome by the patent in suit. By a device, at once simple and effective, easy access is had to the inner tube, and automatic alignment also secured. In it we have an exteriorly grooved rim with divergent flanges; an outer shoe confining an inflatable tube, seated partly within the grooved rim, and made nonextensible circumferentially (preferably by endless wire in its edges) along two lines on opposite sides within the edges, but above the bottom of the groove. When the inner tube is inflated, the shoe moves upwardly and outwardly until a line is reached on the rim of a circumference equal to the nonextensible circumference of the shoe, at which line on the rim the shoe seats itself, and is there kept by internal air pressure. It is thus seen that no permanent connection is needed between the rim and shoe, and when the tube is deflated the shoe may be readily removed from the rim by a process similar to unbuttoning if the circumference of the nonextensible wires be properly proportioned to that of the flange of the rim. In the best method of applying the principle as stated in the patent, the patentees made use of an intermediate "supplemental groove," "offset," or "shoulder," "up into or onto which" the wires are forced by air pressure, and there seated and retained. These grooves are not specified in the claim now before us, nor are they used in either complainant's or respondent's device, as practice has shown they are not essential. The first claim—the only one on which we are asked to pass—is:

"In combination with an exteriorly grooved rim having divergent side edges or flanges, a tire comprising or confining an inflatable tube, seated and contained partly within the grooved rim, and made rigid or inextensible circumferentially along two lines, lying within the groove below the edges, but above the deepest part of the same, by means of circumferential re-enforcements secured to or incorporated with it, and adapted to be held in place in the rim by the action of the internal air pressure."

This general form of tire quickly came into common use. The proofs show they were first used in the latter part of 1892, and that in the first few months of 1893 30,000 of the Dunlop detachable form

were sold by the American Company and 150,000 pairs by the English branches. Tires constructed on this principle do away with all permanent connections between rim and shoe, are capable of being quickly slipped on or off the rim without the use of any mechanical appliances, and, during process of inflation, in a measure, automatically align themselves. We are of opinion that the difficulties overcome by the patentees and the advance they made over former methods are such as stamp their device as of a meritorious character. Conceding, for present purposes, the separate elements which the patentees combined had been known before, yet it must be granted they so united them and placed them in such new relations as to produce a novel and useful result. Indeed, the respondent's expert himself says:

"In considering the question of novelty, I find, by an examination of the state of the art as revealed by the patents which are exhibits in this case, that the older inventors did not seem to have thought of the idea of holding the edges of a pneumatic tire of the U-shaped pattern in the groove of a rim, except by the application of some adjustable clamping device; because the edges of the tire must be stretched in passing it over the flanges of the rim, to place it in position. So far as I know, Brown & Stillman were the first to conceive of a construction of tire and rim provided with supplemental side grooves whose diameter, relatively to the diameter of a deeper central groove and the diameter of the flanges, is such that a tire, the edges of which are permanently re-enforced, and have a diameter corresponding to the supplemental grooves, is capable of being removed from the rim and replaced again without disturbing or adjusting the re-enforcement of the edges."

We next inquire, does the respondent's device infringe this claim? In it we find an exteriorly grooved rim with divergent side flanges, shaped thus: , and not having supplemental grooves. An inner inflatable tube is used, and an outer shoe, the outer edges of which have lips or flaps which fold back upon the main shoe. At the juncture of the shoe side and each flap is a circular hollow, or pocket, adapted to receive several laps of a stout linen cord or binder. This cord is provided with knots, and is tightly wrapped when the tire is deflated, each lap overlapping the preceding one, and the cords being twisted and intertwined at the final, and sometimes at the preceding, laps. When the shoe and lip are in close contact from inflation, a closed circular binder recess is formed, the shoulder or upper segment of which is part of the flap. Patent No. 513,617, issued January 30, 1894, to Joseph G. Moomey, in accordance with which this device is made, thus alludes to the binder and its workings:

"The flaps are made of gradually increasing thickness from the seat of the binder outward, so that, when the flap is in place, the circumference of its upper edge increases from the seat toward the outer edge. This makes the flap triangularly shaped, where the rim is shown as in Fig. 1, the sides being on the rim and the flange, and the largest triangular side of the flap uppermost. With this construction, the binder, as the tire is inflated, slides or rolls upon this increasing thickness or circumference of the flap, so that whatever slack or give there is to the binder is taken up, and the flap as a whole is held tightly in place. This feature is clearly shown in Fig. 1, the right side showing the position of the binder when first put in place before the tire is inflated, and the left side of the figure showing the position assumed when the tire is inflated. * * * The annular shoulder, b¹, on the upper side of the flap, forms the upper wall of the binder recess, b², and stops this slipping

or rolling movement at the greatest diagonal thickness of the flap. * * * In this construction (Fig. 3) the gradually increasing circumference toward the outer edge of the flap is given to the flap by the shape of the rim. From this it will be seen that the essential property of this feature is that the upper side of the flap should gradually increase in circumference from the seat on which the binder is placed, while the tire is deflated, toward the outer edge of the flap, so that the binder can roll or slip up on the flaring surface of the flap, so as to take up the give or slack."

The respondents allege there is no infringement in this device; that the supplemental groove described in the Brown & Stillman patent are not found in their device; that they do not use the endless bands of that patent; that their shoe cannot be taken from the rim without taking off the binder, and that this is one of the essential features disclosed by complainant's invention; that their binder clamps the shoe to the rim, does not perform the function of complainant's endless bands, and is not a mechanical equivalent thereof. It is clear to us from the proofs and our own observation that when the inner tube of a double-tube tire is inflated, the rim forms a permanent base, and the pressure on the outer shoe is exerted upwardly and outwardly. The resultant of these two pressures finds vent in the tire blowing off at the flange of the rim, or is overcome by some countervailing pressure from the rim or base of counter force. It follows from this that, where the edge of the shoe is made inextensible circumferentially, the air pressure will keep moving it upwardly and outwardly until its inextensible circumference finds its corresponding counter circumference on a permanent base, and there it will seat and adjust itself; that is, where a corresponding line or circumference is reached on the divergent flange of the exteriorly grooved rim. This being the case, it follows that the presence or absence of a supplemental or intermediate groove becomes a matter of indifference, so far as seating is concerned, in applying the principle disclosed by the patent. If the shoulder of the supplemental groove is of greater diameter than the supplemental groove depression, it is clear the shoe will not seat itself in such depression when it has already been carried over the larger circumference of the shoulder, but will continue its movement until it reaches its corresponding counter inextensible circumference further out and up on the diverging flange. It seemed to the patentees the best results were had by the use of a supplemental groove or seat, but the mechanical application of the principle disclosed by their patent showed that such groove was not essential, and, unless such a limitation was carried into their claims, it is clear they should not be clogged with it from the suggestion of its use made in the specification. In point of fact there is no such limitation in the first claim, and the presence of such limitation in the third further emphasizes the significance of its absence from the first. It is to be noted, too, that while it is mentioned in the specification as being used in the suggested form of applying the principle, yet it is not even referred to when "the chief characteristics" of the invention are summed up as follows:

"The improvement subject of our application, and by which this object is realized, involves as its chief characteristics—First, an exteriorly grooved rim, with divergent side edges or flanges; and, second, a tire comprising, or

confining an inflatable tube, seated and contained partly within the grooved rim, and made rigid or nonextensible circumferentially along two lines on opposite sides which lie within the groove, below the edges, but above the bottom or deepest part of the same."

It is clear to us that the element of a supplemental groove is neither expressly nor impliedly incorporated in the claim now being considered. The same reasoning applies to the contention that the patent of complainant only covers a device where the shoe can be taken from the rim without unfastening the binder. It is true that in speaking of the suggested form of application, the specification says:

"It further obviates the use of tightening appliances or accessories other than those required for inflation, or any manipulation of the same in the operation of applying the tire to or removing it from the rim. * * * These bands 2 are of greater diameter than the wheel rim at the bottom of the groove therein, and less diameter than the side edges of the rim. * * * The distance between the bottom of the groove in which the one part of the tire is already contained and the other edge of the diametrically opposite part of the rim is less than the internal diameter of the wire re-enforced edges of the tire. * * * We prefer that the bands be welded to be continuous or that the ends thereof be connected by suitable means, so that the tire may be adjusted to the proper fit upon the rim, but not to be used in removing the tire from or attaching it to the rim, and in the claim in which these bands are referred to as endless bands, we do not limit ourselves to a welded band, but regard as within our invention a band, the ends of which are connected in any manner."

Conceding that these in themselves would be limitations in the respects contended for, and granting (what is by no means clearly established by the proof) that the cords in respondent's device, as ordinarily used, were so tightly wrapped as to prevent the shoe being removed when the tire was deflated, yet the fact still remains that, while such limitation is found in the fourth claim, it is not in the first, and we are of opinion that such limitation cannot be carried into it by implication.

As we have seen, the mechanical clamping of the shoe to the rim was one of the difficulties existing before complainant's patent. It is contended the cord of respondent's device clamps the shoe to the rim, and that such device belongs to the general type of tires of that kind in use before complainant's patent. It must be remembered that the practical object of any kind of attachment between shoe and rim is to have it perform that function when the tire is inflated and in use. The severe lateral strains to which it is subjected in making sharp turns, its liability to "creeping," or having the rim turn within the shoe, make its condition at the time of inflation the test of successful function capacity; in other words, it is a question of ultimate, rather than initial, function. The test is not, what function does the cord or binder perform with a deflated, but with an inflated, tire. Conceding, for present purposes (what is, at best, left uncertain by the proofs), that the cords of respondent's device can be wound tight enough to secure it fixedly to the tire, it is evident that, as inflation proceeds, the cord does not retain its initial position. The statements quoted from the Moomey patent, and others that are not cited, concede, what is indeed apparent, namely, the stretching and slack

of the cord, its tendency to roll (which is the upward and outward movement under increased pressure), this rolling and distention of the cord being finally limited by the frictional contact of its parts, and the pinch of the flap and shoe, and its finally finding "its true position on the flap" (and therefore on the rim) "as the tire is inflated." Such being the facts,—and we see no way of avoiding them,—it is manifest that at the proper time of functional test the cords of respondent's device produce the same results as complainant's endless bands, in substantially the same way. The slack or give in the cord has been taken up; they have reached the limit of expansion; they have become, for the time being, for their functional purpose, endless bands, and are inextensible circumferentially; and a permanent position of the parts is maintained by internal air pressure. To use the language of the claim in question, they have made the shoe inextensible circumferentially along two lines lying within the groove below the edges, but above the deepest part of the same by means of their circumferential re-enforcement, incorporated with the shoe, and all adapted to be held in place in the rim by the action of internal air pressure. That their device may be an improvement upon respondent's, that the cord may have additional functions to the one just noted, that their device may disclose a further advance than complainant's, might, for present purposes, be conceded, yet even these facts would not free the respondent from the claim of the dominant patent. To our mind, infringement has been clearly established of the first claim, and a proper decree must issue in favor of the complainant and against the respondent.

YOUNG REVERSIBLE LOCK-NUT CO. v. YOUNG LOCK-NUT CO.

(Circuit Court, D. New Jersey. March 1, 1895.)

PATENTS—PRELIMINARY INJUNCTION.

A preliminary injunction will not be granted where defendant shows that the patentee, before making the assignment upon which complainant bases its right, executed an irrevocable power of attorney to a third person, giving full powers as to the sale and disposition of the patent; and that defendant contracted with such attorney to purchase the patent upon time payments, with the right to operate under it in the meantime by paying royalty; and that the payments had since been fully made, and the patent delivered, although no formal assignment had been executed.

This was a bill by the Young Reversible Lock-Nut Company against the Young Lock-Nut Company for infringement of a patent. Complainant moves for a preliminary injunction.

Edwin H. Brown, for complainant.
Alexander Thain, for defendant.

GREEN, District Judge. This matter comes before the court upon a motion for an injunction pendente lite, to restrain the defendant from infringing letters patent No. 447,224, granted to Levi H. Young, February 24, 1891, for "improvement in lock nuts." The

validity of the patent is not attacked in any way by the defendant; and it is admitted that "the defendant has been at all times since the date of its incorporation, down to the present time, and still is, the manufacturer of the peculiar articles covered by the patent." The defendant corporation justifies its alleged infringing acts, which are not denied—First, under a license duly executed by one Ira Abbott, authorizing such manufacture of the patent lock nuts; and, secondly, by virtue of an absolute assignment of the letters patent to it by the said Abbott. In both instances the allegation is that Abbott was acting for and on behalf of the said Young. The facts seem to be these: Soon after Mr. Young, the patentee, obtained letters patent for his invention, by his certain writing under seal, he made, constituted, and appointed the said Ira Abbott his full and lawful attorney, irrevocably for him, and in his name, stead, and place, "to conduct all and any negotiations for the sale or other disposition of the aforesaid patent, or for the formation of a company to manufacture and sell the patented articles under and by virtue of said patent, with full power to transfer and deliver the aforesaid letters patent whensoever and to whomsoever, and for such consideration, as the said Ira Abbott shall deem advisable and think fit and proper." This power of attorney bears date March 30, 1892, and, as it appears, is irrevocable on its face. The evidence in this case does not disclose any attempt to revoke it. Afterwards, on or about the 5th day of April, 1893, and more than a year previous to the alleged assignment of the letters patent to the complainant by Young, the patentee, the said Abbott, as such attorney for Young, entered into an agreement in writing and under seal with the defendant, the Young Lock-Nut Company, wherein and whereby, among other things, he did agree to sell and deliver the letters patent in question to the said company for a certain specified consideration, to be paid in the manner therein set forth, and at the times mentioned; it being expressly stipulated between the parties to said contract that in the meantime, and until the payment by the said Young Lock Company of the said purchase money, and the delivery by the said Abbott of said letters patent to the said company, the said Lock-Nut company (the defendant here) was duly authorized to manufacture and sell the said patented articles, upon condition that certain royalties were paid. And it appears that afterwards the said letters patent were actually delivered to the defendant, who now has them in its possession. It is further alleged, and, indeed, is testified to in the affidavits used on this motion, that the letters patent were duly assigned to the defendant. But no deed of assignment is produced, and the complainant inferentially denies that any legal assignment was ever made. But it appears by the affidavit of the secretary of the defendant company that it has paid in full the consideration for the license and for the subsequent assignment of the letters patent; and Abbott, the attorney, testifies that, acting for the said Young, he received the full consideration for the license and assignment; and he further testifies that everything he did in the matter was made known to and was approved by Young.

These facts strongly militate against the granting of this motion. The defendant comes into court with clean hands, shows a prima facie justification, at least, of its alleged infringing acts, and certainly has the right to be undisturbed in the enjoyment of those rights which it has acquired by an expenditure of large sums of money, until the whole transaction can be sifted thoroughly and presented succinctly on final hearing. Even if it be true that no formal assignment in writing of the letters patent, as required by statute, has been made, yet, under the circumstances it might readily be held that the assignment by parol would vest an equity in the defendant corporation sufficient to defeat a motion for a preliminary injunction. Besides, it is not absolutely certain that the complainant, as the assignee of Young, has such standing in the court as to entitle it to the relief and remedy asked for. The irrevocable power of attorney executed and delivered to Abbott by Young could, without resort to violent stretching of rules of interpretation, be construed to be an assignment; and, if so, Young, so long as that power of attorney was outstanding, would have no rights or property in the letters patent capable of passing by assignment from him to any other. Of course, the complainant, if eventually such should turn out to be the true construction of this power of attorney, would have acquired no rights entitled to the protection sought, so far as they arise out of the alleged assignment by Young to it. Upon this, however, no opinion is intended to be expressed. It is only necessary to say that the case presented for consideration is not sufficiently free from doubt as to entitle the complainant to the preliminary injunction which it asks for; and the motion is therefore denied.

THE WILLAMETTE VALLEY.

CLARK v. CHANDLER.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1895.)

No. 206.

COMITY — VESSEL IN POSSESSION OF RECEIVER — ENFORCEMENT OF LIEN FOR SUPPLIES.

Where a receiver sends a vessel, belonging to his trust, out of the jurisdiction of the court appointing him, and into a port of another state in charge of a master, he places her in the position of all other vessels engaged in the same business; and, when supplies are there furnished upon her credit, there is no rule of comity to prevent an admiralty court of that jurisdiction from enforcing the lien against her by proceedings in rem. On the contrary, the enforcement of such lien is a matter of right, not dependent upon the consent of the court by which the receiver was appointed. 62 Fed. 293, affirmed. *Barton v. Barbour*, 104 U. S. 126, distinguished.

Appeal from the District Court of the United States for the Northern District of California.

This was a libel by R. D. Chandler against the steamship Willamette Valley (Charles Clark, receiver, claimant) to enforce a lien for supplies. Exceptions to the libel were overruled, and a decree

entered for libellant. 62 Fed. 293. Afterwards an order of sale pendente lite was entered. 63 Fed. 130. The claimant appeals.

Page, Eells & Wheeler, for appellant.
Andros & Frank, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The steamship Willamette Valley, a vessel of the United States, and enrolled at the office of the collector of customs at the port of Yaquina, in Oregon, was the property of the Oregon Pacific Railroad Company, a corporation established under the laws of the state of Oregon. The western terminus of the railroad was at Yaquina, and the steamship was employed in connection with the road in transporting passengers and merchandise between that port and the port of San Francisco. In October, 1890, in a suit commenced in the circuit court of the state of Oregon for Benton county to foreclose a certain mortgage upon the property of said railroad company, a receiver of the property of said corporation, including the steamship in question, was appointed by the court. The receiver, acting under the orders of said court, continued to operate the road, and the steamship in connection therewith, in the manner in which the same were operated before the receivership. In the regular course of the business of the steamship she was supplied by the libellant with coals, at the port of San Francisco, of the value of \$7,781.75, and for the coal so furnished at that port she was there libeled. It was stipulated by the parties to the libel that the coals mentioned in the libel as furnished to the steamship were in fact so furnished; that the value thereof was as stated in the libel, and that they were furnished at the request of the master of said steamship, for the use thereof and on the credit of said steamship; and that they were necessary for the navigation of said vessel in the business in which she was then engaged. Upon this stipulation of facts the district court held that a maritime lien inured to the benefit of the libellant, which was enforceable in said proceeding.

Upon the appeal from that decree it is contended upon behalf of the appellant—First, that the steamship, being in the charge and control of a receiver, was not liable to be sued or seized in any court; and, second, that even if such right of seizure or action existed, it could not be exercised without the permission of the court which had jurisdiction over the receiver and controlled his action.

In considering these questions, which are believed to be new, reference must be had to some of the underlying principles of law governing receivers and the law maritime. The powers of a receiver are bounded by the territorial limits of the court under whose authority he is appointed and acts. Within that territory the possession by the receiver of the property placed under his control will be respected by all other courts, and his possession may not be disturbed by process issued out of any court. *Taylor v. Carryl*, 20 How. 583; *Freeman v. Howe*, 24 How. 450; *Ellis v. Davis*, 109

U. S. 485, 3 Sup. Ct. 327; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355; *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906. The reason of the rule, as expressed in *Covell v. Heyman*, is that to disturb property in the possession of the receiver upon process from another court "would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer."

But the rights which a receiver may enjoy without that jurisdiction are purely those which may be conceded by the courts of the foreign jurisdiction. His right to sue in such foreign jurisdiction concerning the property of his trust, although it has been denied in some states, is usually respected. But this right is always subjected to the limitation that the receiver will not be permitted to use the foreign court to the detriment of the citizens of the state to which it belongs. If the person, firm, or corporation whose assets are placed in the hands of such receiver owed debts in the foreign state, the courts of that state will protect the right of resident creditors to attach and levy upon any property of such nonresident debtor which may be found within that jurisdiction, so long as the same has not been reduced to the actual possession of the receiver, and will protect their right to first satisfy their demands out of such property, rather than relegate them to a foreign tribunal for the enforcement thereof. *Hunt v. Insurance Co.*, 55 Me. 298; *Hurd v. City of Elizabeth*, 41 N. J. Law, 1; *Runk v. St. John*, 29 Barb. 585; *Catlin v. Silver-Plate Co.*, 123 Ind. 477, 24 N. E. 250; *Bank v. McLeod*, 38 Ohio St. 174. But if, upon the other hand, the receiver should first obtain the possession of said property before an attempt is made to subject the same to the payment of domestic debts, or if, as in this case, in the prosecution of the business which he is appointed to conduct, or otherwise, he should take any of the property of his trust into the foreign jurisdiction, his possession and right of possession will be respected in the foreign tribunal, even as against the rights of creditors there residing, who may attempt to subject the same to the satisfaction of debts created before the receivership. *Chicago, M. & St. P. Ry. Co. v. Keokuk Northern Line Packet Co.*, 108 Ill. 317; *Pond v. Cooke*, 45 Conn. 126; *Cagill v. Wooldridge*, 8 Baxt. 580; *Killmer v. Hobart*, 58 How. Pr. 452. This rule of comity is denied, however, in California, where it is held that a resident creditor may attach property which has been in the actual possession of a foreign receiver, and is afterwards brought within the state. *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892.

But the decisions establishing the immunity of the receiver's possession of the property brought by him into a foreign jurisdiction refer solely to the attempted enforcement of demands that existed before the property was taken under the control of the court. In the case at bar the property of the receiver is not seized upon such a demand. The libellant is not here seeking to enforce a lien that attached to the vessel while in the possession of her owners, but one that arose in the regular course of the business

assumed and undertaken by the receiver. The steamship was obliged to and did incur an indebtedness in the port of San Francisco. The credit was given upon the faith of the vessel. The maritime lien of one who furnishes such supplies to a vessel in a foreign port is universally recognized. Heretofore no exception has existed to the rule that requires its enforcement, save in the case of supplies furnished to a vessel belonging to the government. In such a case a principle of public policy which underlies all government intervenes to deny the right of any person to seize the property of the government. But shall another exception be recognized, and shall the fact that the vessel is in charge of a receiver when in her home port exempt her from the rule that otherwise would obtain, and will a court of admiralty, within whose jurisdiction the lien was incurred, and whose jurisdiction is foreign to that of the receiver's court, deny the right of the lienor to proceed in rem against the vessel for the enforcement of his lien? We find no satisfactory ground for so holding. When a receiver, under the order of his court, takes a vessel, the property of his trust, out of the jurisdiction of the court, and sends her into a foreign port under the charge of a master, he places her in the position of all other vessels engaged in like business. It is our judgment that in so doing he subjects her to the same conditions that other vessels are subject to. The master should be accredited with all the powers usually incident to his employment, one of which is the power to pledge the vessel for the supplies or repairs necessary to accomplish her voyage. If he is unsupplied with the funds wherewith to purchase in a foreign port the coals required for the navigation of his vessel, it must be presumed to have been the intention of the receiver, and of the court whose officer he is, to procure such supplies upon the vessel's credit, and to subject her to the usual maritime lien therefor. If such is not the policy of the receiver and of his court, the remedy is to furnish the master with the requisite funds, or to procure the supplies otherwise than upon the credit of the vessel.

To libel the vessel in a foreign port, in the prosecution of a lien so incurred, is not to disturb the possession of the court wherein the receiver was appointed. The actual possession of that court is, as we have seen, coextensive only with the territorial limits of its jurisdiction. Its right to property, through its receiver, beyond that territory, is purely *ex gratia* of the courts of the foreign jurisdiction in which the property may be located. The observance of the comity which confers that right will yield, as has been shown, to the consideration of the welfare of resident creditors. It is but extending the doctrine to its legitimate conclusion to deny the concession of that comity to the case of a vessel sent forth by a receiver in the business of carrying freight and passengers to and from a foreign port, with no means to procure necessary supplies in the foreign port, and whose master procures the same upon her credit. It would be but indifferent protection to one who should furnish such supplies to refer him to the court of a distant state, a court uninvested with the jurisdic-

tion to enforce a maritime lien, and where his remedy would be uncertain as well as inconvenient. The comity which is the basis of the receiver's protection in a foreign jurisdiction does not extend so far. Nor does the enforcement of the maritime lien so incurred interfere with the orderly administration of the assets which the court has taken under its charge, nor confer upon the libellant a preference to which he is not justly entitled. When a court takes possession of a railroad and steamboat line, and operates the same, the expense of such operation is a first lien upon the income of the property, and, if that be insufficient, it is chargeable upon the corpus of the property. *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Myer v. Car Co.*, 102 U. S. 1; *Kneeland v. Machine Works*, 140 U. S. 592, 11 Sup. Ct. 857.

It is true that the employes of such receiver, and all who deal directly with him in contracts concerning such expenses, must look to the court whose receiver he is for the allowance and payment of their demands, or for permission to enforce the same; but in the case before the court there was no contract between the libellant and the receiver. It does not appear from the record that the libellant knew, either when he furnished the supplies or filed his libel, that the steamship was in charge of a receiver. He describes her in his libel as a vessel registered and enrolled in the port of New York. The receiver in answering the libel, so far from asserting that the libellant had notice of the receivership, or that provision had been made for paying for the supplies, disclaims under oath all knowledge as to whether such supplies had been furnished at all. It is not disputed that the libellant's claim was due and unpaid for more than 11 months before the libel was filed. If a receiver is to be permitted to take charge of a railroad and steamboat line, and to operate the same under the orders of a court, he should be held to the observance of that honest and fair dealing that should characterize the officer of a court of equity. He ought not to be permitted, as in this case, to incur a large debt in another state, with no provision for the payment thereof. And when the creditor, whose claim is long overdue and unpaid, seeks to enforce payment out of property within his reach, and subject to his claim, the receiver ought not to be allowed to defend upon the ground that the creditor's only recourse is to the court of another state,—the court under whose authority the receiver has incurred the debt, and has failed to pay the same when due.

When reference is had to the reasons out of which the maritime lien for supplies has grown and received universal recognition, it will be seen that those reasons apply with full force to the case of a vessel under the charge of a receiver. Such a vessel, in the course of the business in which she is engaged, may be sent to the ports of distant states, or even to ports in foreign countries. It would be a departure from the principles that have governed admiralty courts to hold that a material man who furnishes supplies to a foreign vessel upon her credit, and at the instance of her master, does so at the risk of being deprived of the security of the usual lien, in case it should appear that the vessel, which so

far as he is able to discern is in the control of a master, sailing the seas and incurring liabilities as other vessels do, is nevertheless, when at her home port, in the possession of a receiver. There should be no such uncertainty concerning the powers of a master. If he is given the authority to make the contract for supplies, it should be held that he has also the power to invest his contract with the incidents that usually attend it. The maritime lien is designed not only for the benefit of material men, but for the advantage of the vessel, which, in contingencies that are liable to arise in navigation, might otherwise be unable to proceed upon her voyage. Said the court in *The St. Jago de Cuba*, 9 Wheat. 416:

"The vessel must get on. This is the consideration that controls every other; and not only the vessel, but the cargo, sub modo is subjected to this necessity. For these purposes the law maritime attaches the power of pledging or subjecting the vessel to material men to the office of shipmaster, and considers the owner as vesting him with those powers by the mere act of constituting him shipmaster. The necessities of commerce require that when remote from his owner he should be able to subject his owner's property to that liability without which, it is reasonable to suppose, he will not be able to pursue his owner's interests."

The appellant cites the case of *Barton v. Barbour*, 104 U. S. 126. In that case the court of Virginia had appointed a receiver of a railroad situate within that state. The plaintiff sued the receiver in the District of Columbia on a cause of action based upon the receiver's negligence in operating the railroad in Virginia. There was no appointment of a receiver in the District of Columbia, and none of the property was there. The conclusion of the court is thus expressed:

"The court of another state has no jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the state in which he was appointed, and in which the property in his possession is situated, based upon his negligence," etc.

In arriving at this conclusion the court was influenced by the consideration that the evident purpose of the suitor, who brought his suit without leave, was to obtain an advantage over other claimants upon the assets in the receiver's hands, and to enforce the same by execution, and thereby take the property from the receiver's possession, without regard to the rights of other creditors, and that the court of the District of Columbia had no jurisdiction to distribute the assets of the corporation, or to protect the rights of all persons entitled to share in the same. This reasoning is not applicable to the facts in the case at bar. The libellant is not here seeking to enforce a cause of action that arose in Oregon, or to obtain a preference to which he is not entitled, or to obtain a personal judgment against the receiver, to be satisfied out of the property in his charge. Nor is his suit capable of preventing the court, which has placed the property in receivership, from administering upon the same with just regard to the rights of all persons. The libellant's claim is by the law maritime a lien upon the vessel. As such, it is entitled to priority of payment, except as to similar liens. In the court of admiralty the holders of all such

liens have an opportunity to appear and present the same. In the meanwhile, if the receiver has occasion to continue to use the vessel in the business of his trust, he may have her released upon stipulation.

The recent cases of *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, and *Paxson v. Cunningham* (decided by Mr. Justice Gray in the circuit court of appeals of the United States for the First circuit) 11 C. C. A. 111, 63 Fed. 132, cited by both parties to this appeal, have been carefully considered. While those decisions are not directly in point upon the questions in controversy in this case, it is believed that they are not in conflict with the conclusion we have reached. It necessarily follows, from the views we have expressed concerning the lien which the material man acquires in a case like that at bar, that the right to enforce that lien by a proceeding in rem against the vessel, in a court of admiralty of a jurisdiction foreign to that of the court wherein the vessel is held in charge of a receiver, is a matter of right, and is not dependent upon the consent of the latter court. It was not necessary, therefore, that the permission of the Oregon court should have been obtained to the commencement of this suit. The decree is affirmed, with costs to the appellee.

MUNKS v. JACKSON.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1895.)

No. 160.

1. ADMIRALTY—WHEN LIBEL OF REVIEW LIES.

It is within the discretion of the district court to entertain a libel of review in admiralty, filed after the expiration of the term, by a surety on the release bond of a vessel, who was absent from the state at the time of the decree, and knew nothing thereof until after the expiration of the time for appeal; it appearing that the libellant had delayed the hearing eight years, and until the claimant had died insolvent; that he had asserted that certain depositions originally taken were lost; that the decree was rendered on his deposition alone; and that the said depositions, being afterwards produced, showed a state of facts which, if presented to the court, would have constrained it to find against the libellant's claim. 58 Fed. 596, affirmed.

2. TOWAGE—LIABILITIES OF TOWING VESSEL—COMMON CARRIERS.

A contract of towage does not impose the liability of a common carrier, and, in cases of loss or injury to the tow, the burden is upon the claimant thereof to prove negligence on the part of the towing vessel. *The Webb*, 14 Wall. 414, followed.

3. ADMIRALTY—PROCEEDINGS IN REM—RELEASE BOND—LIABILITIES OF SURETY.

A bond in the general form of a common-law bond, admittedly given to secure the release of a vessel, and approved by the judge and filed with the clerk, is within the provisions and requirements of Rev. St. § 941, even if given before the vessel is actually arrested, process having been issued to the marshal for that purpose; and a decree and execution thereon may be awarded against the surety without a separate suit.

4. SAME—JURISDICTION—DECREE FOR EXCESSIVE AMOUNT.

The fact that a decree upon the release bond of a vessel is in excess of the penalty named in the bond does not deprive the court of jurisdiction, but the decree is a nullity for the excess only.

Appeal from the Circuit Court of the United States for the District of Washington.

This was a libel for review, filed in the district court by Charles E. Jackson, surety on the release bond of the steamer *Susie*, against William Munks, to review a decree in favor of said Munks as libellant of the steamer. The district judge being disqualified, the bill of review was certified to the circuit court, by which the decree in the original cause was modified and affirmed. 58 Fed. 596. The respondent appeals.

Hastings & Stedman and James M. Epler, for appellant.
Greene & Turner, for appellee.

Before McKENNA, Circuit Judge, and HAWLEY and MORROW, District Judges.

HAWLEY, District Judge. The facts of this case, and the reasoning and conclusion of the circuit court thereon, as reported in *Jackson v. Munks*, 58 Fed. 596, are hereby adopted as the basis of this opinion. The question whether the libellant was entitled to file a bill of review after the term of the district court had expired is not, perhaps, entirely free from doubt. Although the case does not show actual fraud upon the part of Munks, which is one of the grounds mentioned to sustain the bringing of such a bill (*Car Co. v. Hopkins*, 4 Biss. 51, Fed. Cas. No. 10,334), nor "the highest diligence and an entire absence of just imputations of negligence" upon the part of Jackson, as stated by Mr. Justice Story in *The New England*, 3 Sumn. 496, 506, Fed. Cas. No. 10,151, yet the delay of Munks in not bringing the case up for trial for a period of eight years after filing his libel, and then, after the claimant Olney had died, pressing it for trial at a time when Jackson, the surety upon the bond, was known to be absent from the state, and asserting and claiming that certain testimony, which had many years previously been taken, was lost, when in truth it was not, and which, if it had been presented to the court, would have prevented the recovery of a decree in favor of Munks in the amount obtained by him, makes out such a case as to bring the question of allowing the libel for review within "the judicial discretion of the court, guided by such rules of decision as sound principles of justice and policy dictate." *Janvrin v. Smith*, 1 Spr. 14, Fed. Cas. No. 7,220. The court did not, in our opinion, err in exercising this discretion in favor of the libellant.

Upon the merits, we are clearly of opinion that the decision of the circuit court was correct. In answer to the contention upon the part of appellant that the towboat was a common carrier, and in affirmance of the rule stated by the circuit court that "the burden was upon William Munks to prove the negligence of the steamer," we quote the language of the supreme court in *The Webb*, 14 Wall. 414:

"It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negli-

gence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

It is true, as subsequently stated by the court, that there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it. But this case does not come within the exception to the rule announced by the court. Contention is made by the appellee that the territorial district court never had any jurisdiction to render any decree against him upon the ground that the bond signed by him was in form a common-law bond, and is not conditioned for judgment nor for execution against the surety; that the act of March 3, 1847, "for the reduction of the costs and expenses of proceedings in admiralty against ships and vessels" (9 Stat. 181) only authorized judgment against a surety in case of a bond received from the claimant by the marshal, and returned by him into court as the ground of his stay of process or release of the vessel; that, it being a cause in rem, jurisdiction could only be obtained by an actual seizure of the vessel, or by delivery to the marshal of such a bond as is provided for in the statute, while process for her arrest was still in his hands. The record upon which this contention is based shows that the monition against the steamer *Susie* was issued May 5, 1882, and returned by the marshal "without service, by request of plaintiff's attorneys." This return is dated May 10, 1882, but was not returned and filed with the clerk until May 16, 1882. The bond for the release of the steamer was executed May 12, 1882; was approved by the judge May 18, 1882; and filed with the clerk "as of 5th June, 1882." The bond is in general form a common-law bond. It is signed by H. J. Olney and C. F. Jackson. It recites the filing of the libel by Munks against the steamer *Susie*, and the condition of its obligation is such "that, if the above bounden shall abide by and answer the decree of the court in such cause, then the above obligation to be void; otherwise to remain in full force and virtue." Jackson admits that he signed this bond for the release of the steamer. This bond comes clearly within the provisions and requirements of the statute approved March 3, 1847 (Rev. St. U. S. § 941). The claimant had the right, after the libel was filed, to give a bond or stipulation, which might be approved by the court, before the steamer was actually seized; and, if the statute requires that the bond should first be delivered to the marshal as claimed by appellee,—a question that need not be discussed,—we would be bound to presume, in the absence of any affirmative showing to the contrary, that the law in this respect had been complied with. The surety or stipulator upon the bond, with actual knowledge that it was given for the release of the steamer, is bound by the terms of the stipulation which he voluntarily signed, and thereby brought himself within the jurisdiction of the court, and was thereafter bound to "abide by and answer the decree of the court in such cause."

Benedict, J., in *The Roslyn*, 9 Ben. 119, 129, Fed. Cas. No. 12,068, said:

"It is a common practice, adopted for convenience and the saving of expense, to give a stipulation to secure the debt upon simple notice of the filing of a libel. A stipulation given under such circumstances is valid, although in fact the vessel sought to be proceeded against is not, and never was, in custody. The jurisdiction of the court, upon the giving of such a stipulation, to proceed with the cause to a decree, and to enforce the stipulation according to its terms, has never, to my knowledge, been doubted. In such case the entering a general appearance, and giving a stipulation to abide by a decree, is deemed a waiver of all objection based on an omission to serve the process, and it is not thereafter open to the stipulators to deny the power of the court to compel them to perform their agreement."

See, also, *The Alligator*, 1 Gall. 145, 149, Fed. Cas. No. 248; *The Struggle*, 1 Gall. 477, Fed. Cas. No. 13,550; *The City of Washington*, 13 Blatchf. 411, Fed. Cas. No. 2,772.

Admiralty courts proceed according to the principles, rules, and usages which belong to the admiralty, as contradistinguished from courts of common law. "Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the court which it could properly exercise if the thing itself were still in its custody. This is the known course of the admiralty." *The Palmyra*, 12 Wheat. 1. Nothing can be better settled, said Judge Story, than that the admiralty may take a *fide jussory* caution or stipulation in cases in rem, and may in a summary manner award judgment and execution thereon. Jurisdiction to that effect is possessed by the district court; and, being fully authorized to adopt the process and modes of proceeding of the admiralty, they have an undoubted right to deliver the property on bail and to enforce conformity to the terms of the bailment. Authority to take such security is undoubted, and, whether it be by a sealed instrument or by a stipulation in the nature of a recognizance, cannot affect the jurisdiction of the court. Having jurisdiction of the principal cause, the court must possess jurisdiction over all the incidents, and may, by motion, attachment, or execution, enforce its decrees against all who become parties to the proceedings. *The Alligator*, 1 Gall. 145, Fed. Cas. No. 248; *Nelson v. U. S.*, Pet. C. C. 235, Fed. Cas. No. 10,116. Bonds, says Dunlap, are, to all intents and purposes, stipulations in the admiralty. *Dunl. Adm. Prac.* 164. See *The Wanata*, 95 U. S. 600, 616; *U. S. v. Ames*, 99 U. S. 35, 41; *The Madgie*, 31 Fed. 926. The fact that the decree of the territorial court was in excess of the penalty named in the bond did not deprive the court of jurisdiction. The judgment was a nullity for the excess only, and, if the circuit court had found in favor of Munks, it would have been its duty to modify the decree so as to bring the amount awarded to him within the penalty. *The Webb*, 14 Wall. 406, 418. The claim of appellee that no judgment could now be rendered against him because the claimant of the vessel, who was a costipulator on the bond, is dead, is untenable. *Penhallow v. Doane*, 3 Dall. 54;

The James A. Wright, 10 Blatchf. 160, Fed. Cas. No. 7,191; The C. F. Ackerman, 14 Blatchf. 360, Fed. Cas. No. 2,564. The judgment of the circuit court is affirmed, appellee to recover his costs upon appeal.

In re THE ANNIE FAXON.

(District Court, D. Washington, S. D. February 18, 1895.)

1. SHIPPING—LIMITATION OF LIABILITY—PLEADING AND PRACTICE.

Under a petition for limitation of liability the petitioners are entitled, under admiralty rule 56, to litigate the question of the existence of any liability whatever, and therefore do not plead themselves out of court by denying any negligence, either of themselves or of any of their agents or employes. The Benefactor, 103 U. S. 239, and Providence & N. Y. S. S. Co. v. Hill Manuf'g Co., 3 Sup. Ct. 379, 617, 109 U. S. 578, followed.

2. SAME—STEAM-BOILER INSPECTION.

It is the intention of the inspection law (Rev. St. § 4418) that every sheet of which a boiler is composed must be inspected, and subjected to the prescribed test; and it is therefore a violation of the law to use, without official inspection, an old boiler, in which a new mud ring has been placed.

3. SAME—PERSONAL INJURIES FROM EXPLODING BOILER.

The limited liability law (Rev. St. § 4283), taken in connection with the act of June 26, 1884, and especially section 18 thereof (1 Supp. Rev. St. [2d Ed.] 440), which is the latest expression of the legislative will on the subject, operates to relieve owners of steam vessels from liability for injuries to passengers occasioned by explosion of the boilers, although the inspection laws have been violated, when such violation is without their personal knowledge or privity; and this notwithstanding the provisions of Rev. St. § 4493, declaring owners to be responsible for damage to passengers or baggage through violation of the inspection laws, or through known defects in the steaming apparatus.

This was a petition by the Oregon Railway & Navigation Company, as owner, and the Oregon Short Line & Utah Northern Railway Company, as lessee, for limitation of liability in respect to damages caused by explosion of the boiler of the steamboat Annie Faxon.

W. W. Cotton, for libelants.

Charles H. Tayloy, for claimants.

HANFORD, District Judge. The steamboat Annie Faxon, owned by the Oregon Railway & Navigation Company, and operated under a lease of the transportation lines owned by said company to the Oregon Short Line & Utah Northern Railway Company, was, prior to the explosion and wreck hereinafter described, employed as a carrier of passengers and freight on Snake river, between Riparia, in the state of Washington, and Lewiston, in the state of Idaho. Said steamboat was inspected by the United States local inspectors of steam vessels December 12, 1892, and then granted a certificate of inspection, and licensed to navigate said river; the maximum steam pressure allowed being 125 pounds to the square inch. In June, 1893, the mud ring of the boiler in said steamer was removed, and replaced by a new one, and other repairs were made. Said boiler was not, after the completion of said repairs and alterations, inspected by the United States inspectors, nor sub-

jected to any sufficient test for determining whether it was safe and fit for use. On August 14, 1893, while the steamer was going down stream, having on board freight and several passengers, with a pressure of steam upon said boiler of 110 pounds, with her safety valve set to blow off at 125 pounds, said boiler exploded, thereby wrecking the boat. As a result of said explosion 8 persons were killed and 15 were injured. Among those killed were two passengers named John Mackintosh and Thomas Mackintosh, and among the persons injured were two other passengers named Lewis T. Lawton and Daniel H. Bechtol. The Oregon Railway & Navigation Company, as owner, and the Oregon Short Line & Utah Northern Railway Company, as lessee, petitioned this court, as a court of admiralty, to adjudicate as to their liability for the damages resulting from said explosion. Thereupon the court made an order for the appraisalment of the vessel and freight pending, and requiring all persons claiming damages for any loss or injury occasioned by said explosion to come before the court, and submit proof of their respective claims, and forbidding the prosecution by such persons of any suit or action for the recovery of damages for injuries so occasioned until the final determination of the rights of said petitioners in this cause. An appraisalment has been made, and the value of the wreck and pending freight found to be \$3,520. Several persons have appeared and made proof of their claims as required by the citation and monition issued pursuant to said order of the court, and the claimants have made separate answers to said petition. Among the claimants who have so appeared and answered are the said injured passengers, Lewis T. Lawton and Daniel H. Bechtol, and Mary A. Mackintosh, widow of said John Mackintosh, deceased, and administratrix of his estate, and Susan E. Mackintosh, widow of said Thomas Mackintosh, deceased, and administratrix of his estate. Each of said claimants alleges personal injury caused by said explosion, for which they seek to obtain damages. They each charge that the injuries complained of were caused by negligence on the part of the petitioners, their servants and agents, and they contest the right of the petitioners to have the benefit of the limited liability act aforesaid.

The case has been conducted by able counsel on both sides, and sharply contested. The testimony is full and minute, and all the facts have been disclosed which can be ascertained from the surviving witnesses. I have given it all careful consideration, but the conclusion I have reached renders it unnecessary for me to make any extended recital of the facts. Rev. St. § 4283, limits the liability of owners of vessels for any embezzlement, loss, or destruction, by any person, of any property or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners, so that the same shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. Taking advantage of the permission accorded by the fifty-sixth admiralty rule promulgated

by the supreme court, the libelants have, while **claiming the benefit of the law limiting the liability of shipowners**, also denied all negligence on the part of their agents and employés, as well as themselves, whereby any responsibility should attach to them, or the vessel, the cargo, or the pending freight should be at all chargeable; and they pray the court to pronounce in their favor, that the vessel and owners are entirely exempt from liability. Preliminary to the hearing on the merits, the claimants moved to dismiss the proceedings, on the ground that, by alleging that their agents and servants were entirely free from fault, the libelants have pleaded themselves out of court. The argument on the motion is that, the agents and servants being free from all blame, the limited liability law is not applicable to the case, for, if the owners were guilty of negligence, the law does not entitle them to any relief; and, if not guilty, they are not liable, even to a limited extent. The motion was denied by a pro forma ruling at the time, which I now confirm after due deliberation. The rule itself and the decisions of the supreme court emphatically declare the right of parties in the situation of the libelants to have in one proceeding in admiralty a full and final determination of all questions affecting their liability, and, if exempt from all liability, to have a decree forever foreclosing the right to litigate concerning the same matter. The purpose of the rule, and the power of the supreme court to make it, have been several times explained in the decisions of that court. In the case of *The Benefactor*, 103 U. S. 239-250, Mr. Justice Bradley, in the opinion of the court, declares the purpose of the rule thus:

"Hence this court, in preparing the rules of procedure for a limitation of liability, deemed it proper to allow a party seeking such limitation to contest any liability whatever."

And again, in the case of *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, 109 U. S. 578-607, 3 Sup. Ct. 379, 617, the same learned justice makes the following comments:

"The rules further provide that the shipowners, making suitable allegations for the purpose, shall be at liberty to contest their liability, or the liability of the vessel, to pay any damages, as well as to show that, if liable, they are entitled to a limitation of liability under the act; and that any parties claiming damages may contest the right of the shipowners to exemption from liability, or to the benefit of a limited liability. * * * We are clearly of opinion that the authority thus vested in this court was adequate, and sufficient to enable it to make the rules before referred to. The subject is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial; and, if this were not so, the subject-matter itself is one that belongs to the department of maritime law. The adoption of forms and modes of proceeding requisite and proper for giving due effect to the maritime rule thus adopted by congress, and for securing to shipowners its benefits, was therefore strictly within the powers conferred upon this court; and, where the general regulations adopted by this court do not cover the entire ground, it is undoubtedly within the power of the district and circuit courts, as courts of admiralty, to supplement them by additional rules of their own. * * * In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the definite decree

of a competent court, which should be binding on all parties interested, and protect the shipowners from being harassed by litigation in other tribunals. Unless some proceeding of this kind were adopted, which should bring all the parties interested into one litigation, and all the claimants into concourse for a pro rata distribution of the common fund, it is manifest that in most cases the benefits of the act could never be realized. Cases might occur, it is true, in which the shipowners could avail themselves of those benefits by way of defense alone,—as where both ship and freight are totally lost, so that the owners are relieved from all liability whatever. But even in that case, in the absence of a remedy by which they could obtain a decree of exemption as to all claimants, they would be liable to a diversity of suits, brought perhaps in different states, after long periods of time, when the witnesses have been dispersed, and issuing in contrary results before different tribunals; whilst in the ordinary cases, where a limited liability to some extent exists, but to an amount less than the aggregate claims for damages, so as to require a concourse of claimants and a pro rata distribution, the prosecution of separate suits, if allowed to proceed, would result in a subversion of the whole object and scheme of the statute. The question to be settled by the statutory proceedings, being—First, whether the ship or its owners are liable at all (if that point is contested, and has not been decided); and, secondly, if liable, whether the owners are entitled to a limitation of liability,—must necessarily be decided by the district court having jurisdiction of the case; and, to render its decision conclusive, it must have entire control of the subject, to the exclusion of other courts and jurisdictions. If another court may investigate the same questions at the same time, it may come to a conclusion contrary to that of the district court; and, if it does (as happened in this case), the proceedings in the district court will be thwarted, and rendered ineffective to secure to the shipowners the benefit of the statute."

I am required, therefore, to decide, in the first place, whether the said explosion and wrecking of the Annie Faxon happened in consequence of any negligence on the part of the libelants, their officers, agents, or employés; and, if yea, whether the disaster was so caused without the knowledge or privity of the libelants. The inquiry is thus divisible into two parts, because responsibility attaches where negligence on the part of any officer, agent, or servant causes injury; but in every such case the limited liability law may be invoked by the owner, if he personally, or, if a corporation, the managing officers thereof, be free from culpability. *Craig v. Insurance Co.*, 141 U. S. 646, 12 Sup. Ct. 97. After giving the testimony full consideration, I find that the boiler was made of iron, and it had been in use many years. It had been cracked and blistered in several places, and had been patched a number of times. In June preceding the explosion one of the important sheets of the boiler, known as the "mud ring," was replaced by a new one, and some patching was done. In making these last repairs the old iron was broken by hammering, showing that it had become brittle from crystallization. I conclude, therefore, that the explosion occurred because the boiler was defective, and that there was negligence on the part of some one in the service of libelants in continuing the use of a boiler so old as the one in question, and without having it properly tested and inspected after the last repairs were made. Rev. St. § 4418, requires that the boiler of every steam vessel shall be inspected by the local inspector before being used. Manifestly, to comply with this law according to the intent thereof, every sheet of which a boiler is composed must be inspected and subjected to the prescribed test; and the law was violated by using

the boiler after the new mud ring had been put in without an official inspection. *Posey v. Scoville*, 10 Fed. 140. The engineer in charge of the boiler was capable, experienced, and duly licensed. The libelants also employed competent men as master mechanics and superintendents to furnish everything necessary in the way of materials, equipments, and machinery for their vessels, and to attend to the inspection thereof, and keep the same in repair. And there is no evidence tending to prove that any managing officer had personal knowledge of the age or condition of the boiler, or of any negligence or violation of law in using the same without having it properly tested and inspected. Under these facts the owners are not exempt, but they are entitled to the limitation of liability fixed by the statute.

It is not pretended that any managing officer of the petitioning corporations did have actual personal knowledge of the defective condition of the boiler, or of the failure to inspect the same after the alterations were made. But it is insisted that knowledge must be imputed to them, or that they are guilty of negligence for failure to acquaint themselves with facts which could have been discovered if they had been vigilant. This position, if sustained by the courts, must result in fastening personal liability on shipowners for the negligence of their agents or servants, contrary to the terms of the law, or compel them to personally inspect their vessels and the machinery therein, and see to keeping the same in repair, and attend to the official inspection, and to personally comply with every exaction of the steamboat inspection laws, as a condition precedent to a right to a limitation of liability for damages caused by any mishap, which is equally contrary to the intent of congress. Many owners of vessels, and good managers of corporations engaged in transportation business, are obliged to employ persons skilled in the art of constructing machinery and equipments for vessels, so as to secure the highest degree of safety in navigation, because of their own lack of technical knowledge. And the limited liability law was intended to encourage capitalists and persons of that class to invest money in ships. In the case of *Transportation Co. v. Wright*, 13 Wall. 104-123, Mr. Justice Bradley, the great expounder of this law, declares:

"The great object of the law was to encourage shipbuilding, and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount."

In behalf of the injured passengers and the representatives of those who were killed it is contended that, as to them, by force of section 4493, Rev. St., the owners must be held liable to the full extent of the damages sustained, because of their failure to comply with the provisions of section 4418, Id., as to inspection of the boiler after putting in the new mud ring. It is said that section 4493 is

a later enactment than section 4283, and makes an exception in favor of injured passengers. There is, however, another statute, later still, to be considered. I refer to the act of June 26, 1884, entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes." 1 Supp. Rev. St. (2d Ed.) 440. The eighteenth section of said act reads as follows:

"That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending. Provided that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action: nor shall the same apply to wages due to persons employed by said ship-owners."

By the fourth section of the act of June 19, 1886 (1 Supp. Rev. St. [2d Ed.] 494), the provisions of the section above quoted, as well as sections 4282-4289, are extended so as to apply to all vessels used on lakes and rivers or in inland navigation, including canal boats, barges, and lighters. By the general maritime law as understood and administered in continental Europe, shipowners are not held personally liable for damages caused by torts or negligence in connection with the operation of vessels, if personally free from blame; and in England, by acts of parliament, the right to similar immunity is given. While the rule of respondeat superior was enforced in such cases in this country, American shipping was at a very great disadvantage in competition for foreign commerce. The object which congress had in view in enacting the limited liability law was to build up the American merchant marine by relieving American shipowners from burdensome liabilities, from which European competitors were already free. Section 4493 was first enacted by congress as section 30 of the act of 1852, revising the laws regulating the use, and providing for the inspection, of steam vessels. The title as well as the body of the act shows the intent of congress to provide for the better security of life on board of steam vessels, and, as a means to that end, to subject owners and officers to severe penalties for neglecting to comply with any of its requirements. In the case of *Sherlock v. Alling*, 93 U. S. 99-108, the supreme court held that under this law the master, owner, and vessel are liable for damages sustained by a passenger from any neglect to comply with the provisions of the law, no matter where the fault may lie. The intent to hold owners liable for full damages to passengers suffering injury through any neglect or failure to comply with the steamboat inspection laws, or through known defects in the steaming apparatus or hull, was adhered to in the general revision of the permanent laws of the United States; and at the same time congress persisted in the policy of relieving all proprietors of vessels not employed in inland navigation from liability beyond the value of vessel and pending freight, by re-enacting the limited liability law, and so we have sections 4283 and 4493 both in the Revised Statutes. With both sections standing together as re-enactments of the same date, and

the supreme court having, in the case of *Sherlock v. Alling*, given to the latter a broad construction, there was room for doubt as to the legal rights of parties in cases likely to arise, for, if the facts of a case should bring it within both sections, it would be extremely difficult, if not impossible, to determine which to regard as paramount. The latest, and therefore controlling, expressions of legislative will on the subject are the section above quoted from the act of 1884, and the act of 1886, extending its provisions to every description of vessel employed on lakes, rivers, and in inland navigation. In *Butler v. Steamship Co.*, 130 U. S. 527-558, 9 Sup. Ct. 612, Mr. Justice Bradley criticizes the law of 1884, saying, on page 554, 130 U. S., and page 612, 9 Sup. Ct., after stating only a part of the provisions of the eighteenth section:

"The language is somewhat vague, it is true; but it is possible that it was intended to remove all doubts of the application of the limited liability law to all cases of loss and injury caused without the knowledge or privity of the owner."

The language of the act, if vague, is nevertheless comprehensive. Its title indicates a purpose to relieve shipowners from burdens, and the proviso to section 18 makes an exception of "wages due to persons employed by said shipowners." What other exceptions do the rules for construing statutes admit of? I think that the maxim, "*Expressio unius est exclusio alterius*," may with great propriety be applied here. Congress certainly intended to relieve shipowners of some burden of liability by enacting the eighteenth section. Then, what kind of liability theretofore imposed was removed by this law? The inquiry forces me to conclude that congress intended to encourage investments of capital in all kinds of vessels, and to authorize persons to become owners of steam vessels with freedom to intrust to others the entire burden of care in the management thereof, and with a right to the same immunity from claims for damages, in case of any disaster, that the law extends to owners of sailing vessels. In accordance with this opinion, a decree will be entered that, upon payment into court of the amount of the appraised value of the vessel and pending freight for the benefit of the several claimants, the libelants be forever released from all liability for damages on account of said explosion and wreck.

THE JOSEPH OTERI, JR.

OTERI et al. v. SCHMIDT et al.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1894.)

No. 320.

SHIPPING—INTERRUPTION OF VOYAGE — SALE OF GOODS BY MASTER—LOSS AND DAMAGES.

A steamship bound from New Orleans to Ceiba and Truxillo, Spanish Honduras, was denied inspection at the usual place, and the master changed his course to the island of Ruatan, where he learned that the authorities had issued orders not to permit his vessel to do any business on that coast. He then proceeded to Livingston, Guatemala, where, on the

advice of the United States consular agent, he turned over the goods to the latter, to be sold for the benefit of all concerned. The sum realized, as reported by the master, was but a small part of the invoice price. There was much delay in the meantime,—sufficient to have enabled the master to return to New Orleans, and consult with his owners and the shippers. *Held*, that the master had not acted with the good faith required under the circumstances, and the vessel was liable in damages to the shippers; and, further, that no injustice would be done in making the invoice price the measure of such damages.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel by William B. Schmidt and Francis M. Zeigler, partners under the name of Schmidt & Zeigler, against the steamship Joseph Oteri, Jr., (Mrs. Luela A. Oteri, claimant). The district court rendered a decree for the libelants, and the claimant and Joseph Oteri, her husband, and surety on the release bond, took this appeal.

The steamship Joseph Oteri, Jr., left the port of New Orleans on the 30th day of July, 1892, bound for the ports of Ceiba and Truxillo, Spanish Honduras, and having on board the goods shipped by libelants for those ports. The vessel proceeded on her voyage, and on arriving off the island of Utila, Spanish Honduras, August 3d, signals were given for fruit inspectors to come on board, as had been done on previous voyages of the vessel, but, the master finding no response to signals, and seeing that the lighthouse was occupied by soldiers, and as the vessel had been seized and detained by armed forces on a previous voyage of the vessel at the port of Ceiba, Spanish Honduras, and fearing this would be done again, the master changed the course of the vessel, and proceeded to the island of Ruatan, Spanish Honduras, and was there advised by the United States consul at that port, and by an officer of Spanish Honduras, that orders had been issued by the government of Spanish Honduras not to permit the steamship Joseph Oteri, Jr., to receive inspection, laborers, or to transact any business on the coast of Spanish Honduras. The master then changed the course of the vessel, and proceeded to the port of Livingston, Guatemala, and there he was advised by John T. Anderson, Esq., United States consular agent at that port, to turn the goods over to him, and he would sell them for the benefit of the parties in interest. The evidence shows that the goods were turned over to, and were sold and disposed of by or under the direction of, Anderson, the consular agent at Livingston; and the claim is that the proceeds of the sale of the goods shipped by libelants and reported by Anderson is \$741.88, which amount of money was tendered to libelants in the answer of respondents, and placed in the registry of the court. Testimony was taken, and the case submitted to the court, and on the 18th day of May, 1894, decree was rendered for libelants for \$2,393.11, with interest from June 30, 1894, until paid, and costs of suit, being the proved value as per invoices at port of shipment, less the sum of \$741.88, the amount tendered by respondents as due to the libelants on account of the proceeds of goods sold.

Guy M. Horner, for appellants.

W. S. Benedict, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

BRUCE, District Judge, after stating the facts as above, delivered the opinion of the court.

The testimony shows that Spanish Honduras was in a state of turbulence, and even war, at the time of the arrival of the vessel off that coast, and, on account of what had happened to this master and his vessel on a previous voyage to that country, when his ves-

sel was seized by an armed force, and, against his protest, used for a time as a transport for troops, and it coming to his knowledge that his vessel would not be allowed to transact any business on that coast, we think he had good grounds for apprehension for the safety of his vessel and cargo if he landed at the ports to which he was destined. After this, however, and after he had decided that he could not with safety land at Ceiba, or get to Truxillo, there seems to have been much delay, and it was not until the 14th, and even the 16th, of August, the last of the goods were disposed of at Livingston. It would seem that during this time the master could have returned to his home port with his cargo, and could have conferred with his owner and the shippers of the goods he had on board. In the case of *The Julia Blake*, 107 U. S. 427, 2 Sup. Ct. 692, speaking of the necessity under which the master is authorized to sell ship and cargo, and quoting from the former case of *New England Ins. Co. v. The Sarah Ann*, 13 Pet. 387, the court say:

"All will agree that the master must act in good faith, exercise his best discretion for the benefit of all concerned, and that it can only be done upon the compulsion of a necessity, to be determined in each case by the actual and impending peril to which the vessel is exposed."

The testimony, we think, shows a want of good faith on the part of the master in the matter of the disposition of his cargo. He seems to have sought to avoid the responsibility of his position, turning the goods over to Anderson, consular agent, to be disposed of under his order. The purser, the witness Commegere, says he opposed this; but, under the advice of the consular agent, Anderson, a cargo of bananas was taken, and paid for in part from the proceeds of the sale of the goods as stated by the witness Commegere, and the vessel cleared for New York. The conclusion is, we think, inevitable, from the testimony on this subject, that the master was at fault in the matter of the disposal of the goods shipped by the libelants, and that the case is one in which damages should be awarded. This brings us to the question of the measure of damages, which, it is insisted, is the value of the goods at the port of destination. If we are correct in the conclusion that the master was justified in not proceeding to and landing the goods at the ports of destination, according to the tenor and effect of the bills of lading, then we are of opinion that it devolved upon the master to either dispose of the goods in good faith, and to the best advantage, in the nearest ports which he was able to reach, or to return the goods to the shippers, with reasons for nondelivery. It is not shown that he did either. The bill of lading provides that, in the event of loss or nondelivery, the liability of the carrier is not to exceed the invoice value,—this to protect the carrier in ordinary cases where the goods are lost by some casualty. In view of the fact that the carrier might have relieved himself from responsibility by returning the goods to the shipper, and as the proof shows that in the port of shipment the goods were of the value specified in the invoice, we are of opinion that, under the peculiar facts of this case, no substantial injustice results to the carrier from following the rule of damages adopted by the district court, to wit, the

value of the goods as shown by the invoices at the port of shipment. We think the judgment of the court below should be affirmed, and it is so ordered.

THE OXFORD.

SWEETING et al. v. THE OXFORD et al.

(District Court, S. D. Florida. March, 1894.)

1. SALVAGE COMPENSATION—HOW MEASURED.

The whole of a salvage service is to be considered together, and any bonus or gratuity may be measured by valuable, energetic action, and exposure of person or property; but, when the amount is necessarily limited to a mere compensation for work and labor, it should not be reduced by anything short of gross negligence or dishonesty and fraud.

2. SAME—AMOUNT.

\$37,114 allowed upon a valuation of \$155,000 for services of some 65 sailing vessels and four steamers, with 500 men, in discharging and carrying to Key West a cargo of sugar from a steamer grounded in a dangerous position on the Florida Reefs, and for floating her and bringing her disabled to the same place; the service lasting during 13 days, and much of it prosecuted at night and in rough weather.

This was a salvage case, in which separate libels were filed by Thomas B. Sweeting and others, and O. J. Kendal and others, against the steamship Oxford and cargo; and an intervening petition was presented by the Davis Coast Wrecking Company.

Geo. W. Allen and J. Vening Harris, for libelants.
J. B. Browne, for respondent.

LOCKE, District Judge. This vessel, a large steamship, laden with about 4,000 tons of sugar, bound from Cardenas to Philadelphia, went ashore early in the morning of 11th of February, 1894, upon a projecting point of Florida Reef known as "Conch Reef," about 100 miles northeast of the port of Key West. The place was a dangerous one, and one upon which several vessels have been wrecked, and was exposed to the full force of the sea from the northeast and around to south. A portion of the libelants herein, seeing the vessel aground, went to her assistance, and tendered their services, at about half-past 8 o'clock a. m. At first the master thought he might be able to float his vessel without aid, but finally, later in the day, agreed to accept the services of the several vessels and their crews which had arrived, and at about 12 o'clock permitted them to carry out a heavy anchor and hawser in the direction which he himself designated as the one which he considered the most proper, which was off the starboard quarter, trending well astern. The vessel, at the time of going ashore, had gone with such force and speed as to drive herself several feet out of the water, so that, at the time of the libelants' sounding around her, she was found to be in some four feet less water than when floating, with an uneven bottom. The anchor, weighing some three tons, with a

large hawser and fifteen fathoms of heavy chain, was carried out in the direction selected by the master, and let go. The libelants then suggested to the master that some of the cargo be transshipped to their vessels, in order that, when the tide arose, they might be able to float the steamship, but he declined to have any of the cargo taken out at that time. Later in the afternoon, when nearly dark, the master suggested that another hawser be run out, and furnished libelants a steel cable. By this time the wind had increased, together with the force and violence of the sea, so that it was with great difficulty that the cable was taken out. The instructions of the master and the efforts of the libelants were to make the steel cable fast to the heavy chain attached to the anchor which had already been dropped in seven fathoms of water, and a large iron shackle was furnished them for that purpose; but by that time the wind and sea had so increased that it was impossible, as alleged by the libelants, to bring the chain to the top of the water, so as to attach the shackle and the steel cable to it, and the cable was therefore made fast to the bight of the hawser, and the libelants returned on board the steamship. In the meantime another hawser had been carried off from the starboard bow of the steamship trending towards the stern, and the master had permitted libelants to commence discharging cargo into their vessels. As the tide arose, heavy strains were heve upon the steel cable and both hawsers by the steam power of the capstan and the winches of the vessel and the men on board the steamship, when both hawsers and cable parted, and the vessel remained upon the bottom.

It is alleged by the respondents that, before the parting of said hawser and cable, the vessel had started several feet from the bottom; but upon this point there is much conflicting evidence. After the parting of the hawsers, the wind and sea were so rough that it was impossible to do anything further that night about an anchor, but they continued discharging cargo. Early in the morning a steamer that had arrived (the O. C. Williams) went out and picked up the chain attached to the anchor, and made the steel hawser fast to it. The vessel being at that time so hard aground, it was conceded by all parties that it would be impossible to move her without lightening her of more of her cargo. The libelants continued loading sugar into their vessels, and bringing same to Key West. The weather increased in severity to such extent that at one time all of the sailing vessels were compelled to leave the vicinity of the steamship, and go into harbor for safety, there being but one steamer (the O. C. Williams) that was able to remain in the vicinity of the steamship during the entire service. The salvors were increased in numbers by vessels coming to their aid, until in all there were between 60 and 70 sailing vessels of different sizes and 4 steamers and about 500 men engaged in the service. In the meantime the steamship had sprung a leak, and finally filled with water, so that at one time the sea was washing over her upper deck. In addition to the steam vessels which had come to her aid, there were several steam pumps brought and used to free her from water. It is unnecessary to review in detail each day's work. Most of the time the pumps

were running day and night, and several nights the salvors were discharging cargo. The labor of discharging the cargo, pumping the vessel clear of water, and towing her to port occupied 13 days. Finally, the vessel being pumped nearly free from water, and much of the cargo having been taken out, and a large portion of that which was not taken out having been dissolved by the water and pumped out, she was finally relieved from the bottom, and brought to Key West.

It is claimed by the respondents that the salvors were lacking in energy in their work; that it was through their fault that the steel cable was not made fast to the chain, but to the hawser, which caused it to part on the first night, and had it not been for this the steamship would have been floated.

Salvors are expected to do everything within their power to relieve property the custodian of which has accepted their aid; but it cannot be expected that they will accomplish impossibilities or work miracles in attempting to render salvage services, and all that can be demanded is honest exertion and diligence. The question which arises in this case is, was it within the power of the salvors, on the first night of the disaster, to have attached the steel cable to the chain, instead of attaching it to the hawser, as they did? The facts and circumstances attending the case have been fully testified to, and all that can be determined is that there appears to be a large preponderance of evidence to show that the salvors did everything which could reasonably be expected of them in endeavoring to perform that part of their duty. The anchor had been dropped in seven fathoms of water. The chain to which it was desired to make fast the steel cable weighed upward of 240 pounds to the fathom, making a total of upward of 1,600 pounds which it would be necessary to raise to the bow of the vessel before the shackle and cable could be made fast. The evidence shows that at this time it was dark, and that the sea was very high, and the wind and waves so severe, with a strong current running, that the vessel that was detailed for this duty was plunging and pitching into the sea so that it was impossible to stand upon her deck, and that the men were compelled to dive overboard under the water, in order to make the cable fast to the hawser as it was. Captain Baker, whose services upon this reef have been well known for years, and in whom I have every confidence as an able, energetic, and active salvor, was detailed to do this duty; and he testifies, positively and clearly, that it was impossible, under the circumstances, to attach the steel cable to the chain, as was desired.

Whether the vessel moved at all that night I consider very uncertain, as there appears no reason for her stopping with so much force as to break the several hawsers, if once she had started. The taking in of the slack of the hawser, cable, and chain which had been laid irregularly upon the bottom, the rush of the water forward from the reversed propeller, and the apparent change in direction of a light, caused probably by a slight swinging of the vessel, would account, I consider, for all the facts or appearances upon which it is

claimed she moved. Whether the vessel moved that night or not, the breaking of the hawsers was unquestionably the great misfortune of the service, and rendered it impossible for the salvors to float the vessel before she had sprung a leak, and thereby save much more property for its owners, as well as earn for themselves a larger compensation, with comparatively little labor and loss of time, instead of performing the amount of labor they have been compelled to do, under such circumstances that no reasonable salvage can adequately compensate them. Their inability to make this connection between the steamer and chain was their misfortune as much as it was that of the owners of the property; and, if it was beyond their power to accomplish it, they should be no more held responsible for it than for the ship's being so hard aground that she could not be floated. There can be no question about their honest, earnest, and energetic efforts; and it appears they were not furnished the steel cable until after it became too dark and the sea too rough for them to complete what they had attempted.

It is also claimed that, in discharging the cargo, the libelants were lacking in energy and force; and, while it must be admitted that this appears to have been the case to some extent, there are circumstances that would tend to partially excuse or explain the reason for no greater rapidity in the work of discharging. Many of the vessels were comparatively small; yet they were the best that could be obtained at that time for the service. The weather much of the time was very bad. The admission of the master of the steamship shows this to have been so. One vessel, a schooner of the ordinary cruising size, was capsized in the immediate vicinity of the steamship, and became a total loss. Frequently the vessels were driven from their anchorage, and were unable to lie in the vicinity of the steamship. Several of them suffered damage in broken rails and chafed and splintered timber. They were 100 miles from the port of Key West, to which place it was necessary to transfer the cargo, and much time was taken in going and returning. While pumping, the water became so thick that several of their pumps would not work, and constant diving was required to keep the strainers clear. For not having saved more cargo that they might possibly have saved, they will suffer largely in a diminution of salvage. The compensation of salvors depends upon the success of their efforts, and is measured to a certain extent by the amount and value of property saved by them; and while, from such lack of energy as would imply culpable negligence, or a lack of ordinary skill or good faith, the amount of salvage on that actually saved may be reduced, such negligence must be gross and willful to so affect any compensation for other services actually rendered. The whole service is to be considered together, and any bonus or gratuity may be measured by valuable, energetic action, and exposure of person or property; but when the amount given sinks to a mere quantum meruit, or compensation for work and labor, as it must in this case, it can be affected or reduced by nothing less than gross negligence, or dishonesty and fraud.

The question now for determination is, what would be a reasonable, fair, and just compensation for the salvors under the circum-

stances? Salvage is not a quantum meruit, or a compensation for work and labor only, but a gratuity or a bonus for the benefit of commerce, to be given for the encouragement of parties who may be called upon to render such service. The parties engaged in this service were mostly licensed wrecking vessels. The large number employed, on account of the length of time occupied by the service, will so divide any amount which can reasonably be given that the individual shares, instead of being a bonus or a gratuity as a salvage, will scarcely compensate them for the actual labor performed. That this has been the case is exceedingly to be regretted, but the amount cannot be increased on account of the large number of individuals employed to do a certain service. Unquestionably, the service could have been rendered by a much smaller number; but the parties upon whom it devolved to determine those who should be taken into the service have unquestionably acted honestly and in good faith. It was impossible for them to determine just what force might be required, or just when any of the vessels which had left for Key West with cargo would return. It may be true that the entire force of sailing vessels and men were not constantly engaged in the actual labor of the service, but they were waiting, ready to assist, or coming and returning to and from Key West with cargo. All those named, with the exception of one schooner which went to the assistance of another vessel in distress during the time, and two which left the work three days before the steamship floated, their services being no longer required, were occupied the entire time either in working or waiting, and could not engage in anything else. The steamers and pumps were constantly occupied in the service day and night. The long time occupied by the service was caused by the efforts of the salvors to pump out and float the vessel; and, although it is claimed that they did not use as much diligence and force in saving cargo as they should have done, there is no complaint but that everything that possibly could have been done with the appliances at command in freeing the vessel from water, and relieving her from the bottom, was done, and in as short a space of time as was possible.

The service was to a vessel in distress, was rendered in good faith, and with a reasonable degree of energy and skill; and a reasonable compensation should be allowed, although nothing that can be considered as a bonus or gratuity can be reached.

The vessel had been appraised in her present condition, by a board of appraisers appointed by the court, at \$95,000, and the cargo at \$60,000. To the appraisal of the vessel an objection has been made by the claimants, and evidence introduced tending to show that the value is not as great as is shown by this report, and a motion made for a new board of appraisal. Accepting such evidence, and construing it with all weight to which it is considered to be entitled, I do not deem it necessary to set aside the report of the appraisers, and appoint a new board. In appointing such board, great care was taken to select those who were considered the most competent and best qualified for the service of any of the entire community, and it would be impossible to appoint another

whose opinion as to the matter of value would be entitled to greater confidence or credit. While the representatives of the owners have objected to the valuation, they have failed to give us any information as to the actual value which can be relied upon. They have not informed us as to the actual cost of the vessel, or for what she has been valued for insurance.

The property was in immediate and great peril. The master was powerless to save it, or to obtain assistance in any way or by any means different from the parties who offered their aid and have performed the service. It was upon one of the most exposed and dangerous points of the reef. The weather was very bad; the cargo of the class and character that would amount to a total loss if not saved in a short length of time. The vessel, so exposed to a fierce sea, would unquestionably, if left to herself, have been so badly damaged and injured as to be a complete loss. The labor was disagreeable, hard, and attended with exposure and damage, both to person and property, far exceeding that of ordinary navigation. There has been no objection to the value of the cargo, and I do not deem it necessary to determine positively the actual value of the vessel in determining the amount of compensation. The amount which I deem reasonable as compensation would not be an unreasonable or an unusual rate per cent. even if she might prove to be of somewhat less value than the appraisers have reported. But, if she is of as great value, the percentage of proportion of her value given as a salvage compensation will be low, when her condition and the services rendered are considered. In *The Kimberley*, 40 Fed. 290, 20 per cent. of \$490,000 was given, and upon an appeal a compromise effected for \$100,000 salvage; in *The Egypt*, 17 Fed. 359, one-fifth of \$250,000 was given, in addition to an amount of expenses which had been incurred by the salvors; in *The Sandringham*, 10 Fed. 562, one-fourth of \$193,000; in *The Tregurno*, 50 Fed. 946, 22½ per cent. was given on \$205,000, in addition to the services of a vessel employed and paid by the underwriters. In none of these cases was the property in greater danger than in this, nor the risk and exposure greater, the labor more severe or long-continued, nor the services of higher value to the property.

In order that the different interests represented by the vessel and cargo may be more readily and easily adjusted and settled, an amount to each will be decreed separately. After a careful consideration of the case, it is ordered that a decree for \$21,125 salvage on the vessel, and \$15,989.61 salvage upon a portion of the cargo saved and brought into this port, be entered, and that upon the payment of that amount, together with the costs, expenses, and charges herein, the property be restored to the claimant, for the benefit of the true and lawful owners thereof.

THE OXFORD.

JANES v. SWEETING et al.

(Circuit Court of Appeals, Fifth Circuit. January 29, 1895.)

No. 237.

1. SALVAGE—REDUCTION OF AWARD ON APPEAL—NEW EVIDENCE.

A steamer with a cargo of sugar, having gone ashore on the Florida Reefs, was rescued and taken to Key West, where she was appraised in salvage proceedings at \$95,000, after deducting the estimated damage. A reappraisal was refused, and salvage awarded, the steamer's proportion being \$21,125, in addition to costs, amounting to over \$10,000. On appeal, it was shown by new evidence that, on placing the vessel in dry dock, at Newport News, her injuries were found to be much more serious than supposed, and such as could not have been ascertained while she was in the water, at the place of the former appraisal; that, after deducting the actual cost of repairs and reasonable expenses, her value when saved did not exceed \$35,000. *Held*, that the award of salvage should be reduced by the appellate court, and that 25 per cent., being the proportion awarded below on the cargo, would be a reasonable allowance, amounting, as it would, with the costs, to over half the valuation of the vessel.

2. ADMIRALTY APPEALS—COSTS ON APPEAL—NEW EVIDENCE.

When an admiralty decree is reversed by an appellate court on new evidence, not accessible at the time of the trial below, neither party being in fault in respect thereto, substantial justice will be done by requiring each party to pay his own costs incurred on the appeal.

Appeal from the District Court of the United States for the Southern District of Florida.

This was a case of salvage, in which separate libels were filed by Thomas B. Sweeting and others, and by O. J. Kendal and others, against the steamship Oxford (Walter Janes, claimant) and her cargo, while an intervening petition was presented by the Davis Coast Wrecking Company, as owners of the wrecking steamer Right Arm. There was a decree for libelants in the court below (66 Fed. 584), from which the claimant appealed.

Butler, Stillman & Hubbard and Farrar, Jonas & Kruttschnitt, for appellants.

Henry J. Leovy, Joseph Paxton Blair, J. Vining Harris, and George W. Allen, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. In the early part of February, 1894, the steamship Oxford, a large steel steamer, built in England in 1887, with a cargo of about 27,500 bags of sugar, sailed from Matanzas, Cuba, for Philadelphia. In the early morning of February 11, 1894, she went ashore on a portion of the Florida Reefs, variously known as "Pickles' Reef," "Molasses Reef," and "Conch Reef." This reef is about 100 miles northeast from Key West, and is well known as dangerous, being exposed to the full force of the sea from the northeast and around to the south. The vessel went on the reef with such force as to drive her several feet out of water, and leave her hard and fast aground. Early in the morning of the 11th, the sailing schooner Magnolia, a vessel of 43 tons and a crew of 11 men,

proceeded to the relief of the Oxford. The next morning, the schooner Annie Lord, a vessel of 273 tons and a crew of 7 men and a pilot, lying at anchor off Key Largo, saw the Oxford, and went to her assistance. On that and the following days, a fleet of small vessels of all classes, over 60 in number, also went to the assistance of the Oxford, among which were the steam tug Clyde and the steam tug Triton, and the rest sailing vessels ranging from medium to small, and averaging about 25 tons, some so small as to have no registered tonnage. The services of these vessels being accepted, two consortships were formed, and assistance was given by them to the stranded vessel. The wrecking steamer Right Arm, built expressly for wrecking purposes, furnished with wrecking pumps and other machinery, and sent out by the underwriters from the North, arrived later on the scene, but was not permitted to render assistance until after the Oxford was floated. The services rendered by these vessels are sufficiently described in the opinion of the learned judge of the district court, on file in the record; and, as they were admitted salvage services, they need not be recapitulated. It is also admitted that they were successful salvage services, in so far as to bring to safety, in Key West Harbor, between two-fifths and one-half of the cargo of sugar and the steamship Oxford, all in a more or less damaged condition; the sugar reaching that port from time to time between the 16th and the 27th of February, and the ship on the 27th of February.

Proceedings were commenced on the 19th of February by the libelants Sweeting and others of his consortship against such portion of the cargo as had already reached Key West. On the 27th of February, the master of the Annie Lord, with others of his consortship, filed a libel against the Oxford and her cargo. On the 2d day of March, the libelants Sweeting and others filed an amended libel against the cargo of the Oxford, and against the Oxford herself. On the 13th of March, the master of the Right Arm filed a petition of intervention for services rendered to the steamship Oxford from the time she was floated and until her arrival at Key West. The master of the Oxford answered the several libels and interventions, and the case came on for trial, and was tried on the 14th, 15th, and 16th days of March. The court appointed appraisers for the Oxford, and also for the cargo. These appraisers reported as follows:

"Upon an examination of the Br. S. S. Oxford, for the purpose of appraisal, we find the ship in a condition of considerable damage. In No. 2 hatch there are 25 or 30 frames broken on the starboard side, and the ballast tanks and bulkheads are somewhat started. In No. 3 hold there are five frames broken on the port side, and the ballast tanks also started. The rudder post is broken, and the rudder, the latter having been removed. The engineers on board examined carefully the engines, boilers, and dependencies of the ship, and found them in bad condition. The boilers have shifted in board on the port and starboard sides. The main and auxiliary steam pipes are somewhat broken. The main shaft requires lifting and lining, and the whole machinery should be taken apart and overhauled. The probable cost of this portion of the work of repairs would amount to \$15,000. Under all the circumstances, and considering the cost of repairing and restrengthening the ship generally, together with a fair and moderate estimate of her value when so repaired, we judge the Oxford to be worth in her present condition \$95,000.

"We, the undersigned, having been appointed a board of appraisement to appraise and determine the value of the sugar of the cargo of the Br. S. S. Oxford, recently ashore upon the Florida Reef, would report that we proceeded on the 28th day of February, 1894, to examine the same, and found:
* * * Total, \$60,896.12."

On the 19th of March, the plaintiff made a motion to set aside the appraisal of the steamer, on the ground that the same was too high, as shown by documents attached, as follows:

"New York, March 8th, 1894.

"The undersigned, Thomas Congdon, surveyor to Lloyds' Register, and Frank S. Martin, engineer surveyor, having been requested by Messrs. Johnson & Higgins, average adjusters, to estimate the cost of repairing the damages to the steamship Oxford, of Bristol, as per report made by submarine diver, estimate the cost of repairs and making the same at about \$35,000 (thirty-five thousand dollars).

Thomas Congdon.
"Frank S. Martin."

"New York, 8th March, 1894.

"The undersigned, Thomas Congdon, surveyor to Lloyds' Register, and Frank S. Martin, engineer surveyor, having been requested by Messrs. Johnson & Higgins, average adjusters, to estimate the sound value of the steamship Oxford, of Bristol, 1892, tons net, built in April, 1887, find it amounts to the sum of eighty thousand dollars (\$80,000).

Thomas Congdon.
"Frank S. Martin."

On March 24th the court entered a final decree, refusing the motion for a reappraisal of the Oxford, and awarding salvage to the several libelants and the intervenor Right Arm in the sum of \$37,114.60, of which sum \$15,989.60 was decreed to be paid by the cargo, and \$21,125 was decreed to be paid by the Oxford. In addition to these awards, there was a decree for costs against the Oxford for \$10,735.42, and against the cargo for \$7,446.86. 66 Fed. 584. In regard to the amounts awarded, in connection with the value of the salvaged property, the judge says:

"There has been no objection to the value of the cargo, and I do not deem it necessary to determine positively the actual value of the vessel in determining the amount of compensation. The amount which I deem reasonable as compensation would not be an unreasonable or an unusual rate per cent. even if she might prove to be of less value than the appraisers have reported. But if she is of as great value, the percentage of proportion of her value given as a salvage compensation will be low, when her condition and the services rendered are considered."

The amounts allowed appear to be about 26 per cent. of the value of the cargo saved, and 25 per cent. of the value of the steamer, taking such value at \$84,500. The salvage and costs decreed against the Oxford amount to about 37½ per cent. of \$84,500. The owners of the cargo paid the award and costs decreed against them. The master of the steamer took this appeal from the award against the ship; and as a condition thereof, and to obtain the release of the vessel, he paid the costs adjudged against the steamer, to wit, the sum of \$10,734.42, and deposited in the registry of the court the sum of \$28,000.

In taking the appeal, error was assigned as follows: (1) That the court erred in accepting the valuation of the Oxford at the amount fixed by the appraisers. (2) The court erred in refusing to set aside the appraisement of the Oxford, and refusing to appoint

a new board of appraisers. (3) The court erred in awarding \$21,125 salvage on said *S. S. Oxford*.

After filing the transcript of record in this court, and on a showing made by appellants as follows:

"That the steamship *Oxford* was under arrest at Key West from the time when the alleged salvage services, for which compensation is herein claimed, were rendered, up to the date when the appeal was taken from the decree of the district court to this honorable court; that there is no dry dock or other facilities for the examination of the hulls of large steamships at Key West, nor nearer thereto than Newport News, in the state of Virginia; that there is also no machine shop at Key West of sufficient capacity to undertake the repairs of machinery of the size and character of the machinery in said steamship, nor were there any facilities for the taking out of said machinery for such examination as was necessary in order to arrive at the true amount of damages which the said machinery had sustained; that, as soon as said steamship was released from arrest, she proceeded to New York, and thence to Newport News, where she was docked; that it thereupon became apparent that the damages done to said steamship and her machinery whilst on the reef or near Key West had been very much heavier than could be ascertained from any inspection that could be made of her at Key West by the appraisers or by any one else, or than could be made of her except after docking, and that said damages were then ascertained to be far heavier than had been estimated by the appraisers at Key West; that no evidence as to the true condition of the said steamship, after she had run upon the reef, could, for the reasons aforesaid, be produced at the trial of this cause in the lower court, but that appellant is now in a position to furnish such evidence, and desires to be allowed to do so, pursuant to the practice of this honorable court in causes of admiralty appeals; that in order to show the damages done to said steamship whilst on said reef, and the cost of repairs to her and to her machinery, and in order to show her condition prior to the time when she ran upon said reef and her condition whilst upon said reef, and in order to show the fact that no damages occurred to her on the passage from Key West to New York and Newport News, appellant desires to take the deposition of the following witnesses, to wit: John J. Milbank, Thomas Congdon, Frank S. Martin, John Mancor, Frank J. Lord, C. B. Orcutt, Walter Janes (the captain and master of said steamship), — Evers (the chief engineer of said steamship), Charles E. Davis, and James Evers Davis,—all of whom reside or are temporarily in the city of New York, and are there to be examined as witnesses for appellant."

—This court ordered as follows:

"It is ordered that the appellant do have leave to take the depositions of the following named witnesses, to wit: John J. Milbank, Thomas Congdon, Frank S. Martin, John Mancor, Frank J. Lord, C. B. Orcutt, Walter Janes, Charles E. Davis, the chief engineer of the steamship *Oxford*, and James Evers Davis, —to be used on the hearing of the case in this court, the same to be taken under commission, in manner and form as prescribed by rule 12 of the supreme court of the United States [3 Sup. Ct. ix.], and to be returned into this court on or before the first day of October next; provided, however, that the depositions so taken shall be limited to such testimony as could not have been reasonably produced on the trial of this cause in the court below, on account of the nature thereof or of the attendant circumstances."

The evidence taken under this order shows that the *Oxford* leaked heavily after reaching Key West, requiring constant pumping; that there was no possibility of making permanent repairs there; that the vessel could not be docked for examination even, there being no dock on the island of sufficient capacity; and that the *Oxford's* condition was such that she could not leave Key West without first making important repairs to refit her for the voyage. These repairs were chiefly to the rudder and to the engines, to render

them temporarily serviceable, and in stopping leaks, and all cost about \$5,000. For the pumping the master employed the Right Arm, at a cost of about \$400. It was not prudent for the vessel, in her damaged condition, to proceed unaccompanied to New York, and, besides, she required pumping beyond the facilities of her own pumps to keep her afloat. Accordingly, the master employed the Right Arm as a convoy, and paid for the service the sum of \$2,500. Upon her arrival in New York, the vessel was docked, carefully surveyed, and a report of her condition was made. This examination showed very serious and extensive injuries to the Oxford, much in excess of what were apparent or could have been discovered in Key West. In order to repair her and put her in as substantial and good condition as at the time she was stranded required an expenditure of over \$53,000. When repaired, she was worth about the same sum as before she went aground, and that was shown to be from \$90,000 to \$95,000. Her value after she was repaired at Key West and towed to New York was not in excess of \$30,000. This value is shown by the estimate and appraisal of most competent experts, who examined her in the dock, where alone all her injuries could be seen; and also by taking her value after repair, and deducting actual expenses disbursed by the owners in removing her from Key West to New York, and in making repairs. All this is undisputed; so that, according to the evidence now before the court on the hearing of this appeal, the steamship Oxford, in her disabled and damaged condition at Key West, at the time she was brought into the harbor at Key West, and at the time of the decree of the district court, awarding salvage against her, was not, and could not have been, worth half, even, of the value apparently forming the basis of the decree for salvage under review.

The proctor for the appellees contends that:

"The value of the Oxford in her damaged condition is still further reduced, according to the theory of appellant's witnesses, by the enormous expenses incurred before she reached the port of repair. These expenses amount to \$12,850, and are enumerated on page 48 of the supplemental record. They appear to be excessive, especially the payment of \$7,000 to the favored Right Arm. Of this sum, \$4,500 was paid for 'temporary repairs' at Key West, and \$2,500 for conveying the Oxford to New York. The nature and extent of the temporary repairs are not stated with sufficient detail in the contract therefor to enable the court to judge of their reasonableness. When it is remembered that the Right Arm's home port was New Bedford, and that she did not have to go out of her way to accompany the Oxford to New York, \$2,500 is certainly excessive. Had the owners treated the salvors with anything like the same liberality, this cause would not now be in this court."

There is considerable force in this view of the evidence as to the preliminary repairs and expenses, and, in arriving at the value of the Oxford in Key West at the time of the trial in the district court, we are disposed to reject some of these items and cut down others. If we do this to the extent of 50 per cent., we still have the sum of \$6,425 to be considered on the score of preliminary expenses. The amount paid to the Newport News Shipbuilding & Dry-Dock Company for actual repairs was \$53,925, which, under the evidence given in detail, is shown to be in all respects reasonable and just. These two sums for repairs amount to \$60,325,

which deducted from \$95,000, the outside value given the vessel after all her repairs were made, leaves about \$35,000 as the value of the Oxford in Key West at the time the decree was rendered. Considering this result, and the other evidence tending to show about the same value of the Oxford in Key West, and all the circumstances of the case, we are of opinion that \$35,000 should be taken and considered as the true value of the Oxford in determining the amount of salvage proper to award. Finding the value of the Oxford at not exceeding \$35,000, it is clear that we must reduce the amount of salvage awarded against her, unless we admit that salvage awards may go beyond compensation and suitable reward to appropriation of the salvaged property; for the decree of the district court, under the erroneous valuation that the Oxford appeared to have, awards salvage and costs against her in the sum of \$31,860.42,—very nearly, if not quite, her entire value, as shown in this court.

We do not deem it profitable or necessary to review in detail the salvage service rendered to the Oxford and cargo, nor to discuss the general principles controlling salvage awards; for if the percentage which was applied to the cargo, which seems to have been satisfactory to all parties in the district court, be applied to the Oxford at the valuation herein shown, the total compensation awarded the salvors will still be so far beyond compensation *pro opere et labore* as to amount to a suitable reward for saving property in impending peril on the high seas, and the total amount required from the Oxford as salvage and costs will exceed one-half her actual value.

There remains the question of costs in this court. Ordinarily, where a decree is reversed on appeal on evidence not presented to the lower court, the costs do not follow the judgment, for it is generally found that the appellant was in fault in not producing his evidence in the first instance. Here the record shows that the case was speedily heard in the district court, before the exact facts necessary to a proper disposition of the same could be obtained; yet neither party asked for delay. In this court the depositions permitted to be taken were especially "limited to such testimony as could not have been reasonably produced on the trial of this cause in the court below, on account of the nature thereof." If the testimony produced here could have been and had been produced in the district court, the costs of the same, following the general rule in such cases, would have been awarded against the ship. Under these circumstances, the costs of this court can hardly be imputed to the fault of either party, and substantial justice will be reached by awarding costs to neither.

The decree of the district court is reversed so far as salvage is awarded against the steamship Oxford, and the cause is remanded, with instructions to enter a decree against said steamship for salvage in the sum of \$9,100, to be distributed as justice may require. Each party in this court is to pay his own costs.

THE JOHN CRAIG.

THE ALPHA.

THE GRACE DANFORTH.

(District Court, N. D. New York. March 13, 1895.)

1. COLLISION—EVIDENCE—NICE CALCULATIONS—POSITIVE TESTIMONY.

Nice calculations, based upon the assumed positions of vessels just before collision, when an error of a few feet in regard thereto would destroy the most plausible reasoning, must give way to the positive testimony of witnesses as to what they saw.

2. SAME—ENTRANCE TO CANAL—TUGS AND TOWS.

A large propeller, which grounded upon a mud bank at the mouth of the Blackwell Canal, in attempting to enter it from the Buffalo river just as a tug with a large barge in tow was coming out, *held* in fault for immediately backing off, and thereby narrowing the channel, before the barge had got past, thus contributing to a collision between them.

3. SAME.

The tug towing the barge also *held* in fault for turning suddenly westward after getting into the river without reducing speed, and thus throwing the stern of the barge in the opposite direction, and thereby contributing to the collision.

This was a libel for collision brought by the owners of the barge Wenona against the propeller John Craig and the tug Alpha. Subsequently, and on petition of the owner of the Alpha, the tug Grace Danforth was also made a party.

The libel alleges that the libelants' barge Wenona was, on the 13th of September, 1893, injured by reason of a collision with the steam propeller John Craig, caused by the negligence of the Craig and the tug Alpha which had the Craig in tow. The Craig and Alpha appeared and answered charging that the collision was due to the negligence of the Wenona and the tug Grace Danforth, which had her in tow. Subsequently, upon the petition of the owner of the Alpha, the tug Grace Danforth was made a party and filed an answer alleging that the injury was occasioned without fault on the part of the Wenona or the Danforth and was due solely to the unskillful seamanship of the Craig and the Alpha.

George Clinton, for libelants.

George S. Potter, for the Craig and the Alpha.

Harvey D. Goulder, for the Danforth.

COXE, District Judge. On the morning of September 13, 1893, the barge Wenona was being towed by the tug Grace Danforth down the Blackwell Canal, at Buffalo, bound on a voyage up the lakes. The Wenona is 193 feet long and 30 feet beam. On the day in question she was partly loaded and drew about 12 feet of water. She is a sailing vessel and was wholly under the control of the tug. The Danforth is a large and powerful harbor tug, about 75 feet long and 17 feet beam. The line between the tug and barge was about 25 feet in the clear. While the Danforth and Wenona were proceeding down the canal, bound out, the Craig, in tow of the Alpha, was coming up the Buffalo river, bound in, it being her intention to turn into and proceed up the Blackwell Canal. The Craig is a large and powerful propeller 288 feet in length and 42 feet

beam. She was loaded and drew about 16 feet of water. The Alpha is about the same size and capacity as the Danforth. The Alpha's line to the Craig was about the same in length as the Danforth's line to the Wenona. The Watson elevator is located at the junction of the Buffalo river and the Blackwell Canal. There is at this point a shoal of soft mud extending out several feet from the elevator dock. As the tugs approached the junction they gave the proper signals, the final agreement being that they should pass starboard to starboard. In attempting to turn into the canal the Craig ran upon the shoal and came to a standstill with her bow about 10 feet from the elevator dock. The Danforth after the signals were exchanged kept well over to the southerly side of the canal, passed the stern of the Craig in safety and kept on diagonally across the river. When near the propeller Armour, which was lying at the D., L. & W. coal docks on the opposite side of the river, the Danforth starboarded and headed almost directly west or out into Lake Erie. The effect of this maneuver was to head the Wenona in the same direction and as she passed the stern of the Craig a collision occurred, the starboard quarter of the Craig striking the Wenona about 45 feet from her stern breaking 30 of her stanchions and inflicting a long wound upon her starboard side. The Buffalo river is about 300 feet wide and the Blackwell Canal 200 feet wide. At the point of junction the channel is a little over 500 feet in width; that is to say, a line drawn from the northerly shore of the river to the southerly shore of the canal through the Watson dock would be a little over 500 feet. The day was bright and clear, there was little wind, and nothing in the elements which interfered with the free navigation of the harbor. The libelants and the Danforth maintain that the Craig and the Alpha are solely responsible for the accident. They insist that the Craig was negligent because she backed off the shoal and into the Wenona, whereas she should have stopped her engines and remained where she was until the Wenona had passed, and that the Alpha contributed by assisting in pulling the Craig off the shoal. The Craig and the Alpha deny that they were backing at the time of the collision and insist that while the Craig was lying motionless with her bow imbedded in the mud the Danforth approached at a dangerous rate of speed, for such a locality, and, by making a sudden turn before the Wenona had passed the point of danger swung her stern violently against the Craig, and that the Wenona helped to produce this result by keeping too near the center of the canal and because she did not secure the services of a second tug. In short, each of the four vessels is charged with some fault which produced or contributed to produce the collision.

The accusations against the Alpha and Wenona may be dismissed in a few words. Neither was guilty of a fault which contributed in any appreciable degree to the accident. The Wenona was entirely under the control of the Danforth and her steering seems to have been without just ground of complaint. It is not necessary to determine whether it would have been prudent for her to have taken another tug for the reason that the theory that a

second tug would have prevented the collision is based merely upon conjecture and unsubstantial presumption. The same is true of the Alpha. If the court should find that all the charges made against her are true it by no means follows that she contributed to the collision. The principal force which pulled the Craig off the shoal was her own wheel. Assuming that the Alpha supplemented this force, the line of her pull was not directly aft, but on an angle; so that if she exerted any force at all the tendency was to pull the propeller's bow to starboard and her stern directly away from the Wenona. If there were anything in the situation to prevent the application of this elementary rule of mechanics it should have been proved. There is nothing in the testimony which proves that the Craig was moved backward an inch by the Alpha. This leaves the controversy one between the Craig and the Danforth.

Counsel for these vessels have submitted ingenious arguments to prove that they were not at fault, but should the court accept both as correct it must be found that no collision occurred, for if the counsel for the Craig be correct in his conclusions she was stationary at the time of the accident, and if the counsel for the Danforth be correct the Wenona's stern had passed some distance beyond the Craig when the turn down the river was made. But the inquiry must begin with the unquestioned fact of the collision. This was not the result of inevitable accident. It took place in broad daylight when there was nothing in wind or water to make navigation dangerous. It was the result of bad seamanship. Either the Craig or the Danforth, or both, were to blame.

As to the Craig. Before the Danforth passed the stern of the Craig the latter's bow was imbedded in the mud at Watson's point and her stern was 300 feet down the river pointing about W. by N. The Craig is longer than the Blackwell Canal is wide, and it is probable that after running aground her stern was considerably less than 100 feet from the signal station dock on the southerly shore of the river. If the Craig backed while lying in this situation it was negligence. It was clearly her duty to suspend her efforts to get off the shoal during the few minutes necessary to enable the Danforth and Wenona to pass. To obstruct the channel still more was careless seamanship. I do not understand that this proposition, generally speaking, is disputed, but it is argued on behalf of the Craig that she did not back or attempt to back until after the Wenona had passed and even if she did back her position was such that she must have widened the channel instead of obstructing it. This argument is supported by nice calculations based upon the assumed positions of the vessels at the time of and just previous to the accident. When, however, it is remembered that an error of a few feet in the major premise may destroy the most plausible reasoning and that it is simply impossible to locate the vessels with perfect accuracy, the theory that the Craig could not have backed into the Wenona must give way before the testimony of witnesses who swear that they saw her back into the Wenona. The preponderance of testimony is to the effect that from the moment the bow of the Craig entered the mud it was her purpose to back out as quickly as

possible and that she never relaxed this purpose for a moment. The mud was soft, there was no great difficulty in pulling her out and the presumption is that she commenced to back almost immediately after she stopped and began to feel the force of the reverse action of her powerful engines. This view is supported by a large number of interested witnesses and, I think, by all the disinterested witnesses sworn in the cause.

With the fact of the Craig's backing so clearly established, it follows almost as a necessary inference that she must be held liable. The burden is strongly upon her to show that this dangerous maneuver did not contribute to produce the accident. She has not done so; she has advanced ingenious theories, but, as before stated, they must yield to the oaths of witnesses who were standing on solid ground and who swear that they saw the Craig back into the Wenona. The testimony of those stationed on moving vessels is, as to such matters, illusory, deceptive and unreliable. McNally v. Meyer, 5 Ben. 239, Fed. Cas. No. 8,909.

But was the Craig solely to blame? I cannot resist the conclusion that the Danforth might have prevented the accident, or at least lessened the force of the blow. Perhaps as succinct an account of the accident as any is that given by the boy who stood on the dock of the life-saving station. He says that there was about 75 feet of water between the stern of the Craig, after she had grounded, and the dock. That this was a narrow passage through which to tow a barge 193 feet long and 30 feet wide on a rounding course cannot be denied. The situation required the greatest care and caution on both sides. The witness continues as follows: "I saw the Danforth come down towing the Wenona and the Danforth took a sheer right across the creek into the Armour, and when she got there she pulled over. The Craig backed right up. I saw her move sternways and strike the Wenona." I am convinced after reading the testimony that the Danforth, in view of the position of the Craig, and of the fact that the Craig was "backing strong," should have reduced her speed and should have proceeded with the utmost care. Instead of doing this she "kept going right along" until she had almost reached the Armour on the north side of the river, and then without looking back to ascertain the position of the tow her master wheeled her around sharply to port, opened his engine wide and proceeded straight down the river. The tendency of pulling the bow of the barge thus suddenly to port was to swing her stern to starboard and directly against the backing Craig. This is, in my opinion, precisely what took place. Not only is this view corroborated by a large number of witnesses, including some of those called on behalf of the Danforth, but also by the character of the Wenona's wound. It is perfectly clear that the Craig could not have acquired much sternway. She was large, heavily loaded and had only a few moments before come to a dead halt with her bow in the mud. She could not have backed far and must have been proceeding at a snail's pace when the vessels came together. She could not have inflicted a wound 40 feet in length on the Wenona's quarter unless her backing were supplemented by the swinging of

the Wenona. In other words, it required the joint carelessness of the Craig and the Danforth to produce such a wound.

It is possible that the difficulty in formulating a theory of the collision, which can be followed to a perfectly satisfactory conclusion, is found in the fact that counsel have not attempted to point out any faults except those occurring at and just previous to the moment of collision when the vessels may almost be said to be in extremis. My own impression is that the negligence which brought about the disaster occurred some time before the Craig grounded.

It is thought that a cogent argument can be constructed to show that it was a grave fault for a heavily loaded propeller to attempt to enter a narrow canal when she knew that she would probably run aground at the entrance and that another steamer was coming down the canal so that a meeting at the turn was almost inevitable. When the Craig heard the Danforth's signals she could have slowed down, and, if necessary, passed the entrance of the canal and up the Buffalo river. But for the grounding of the Craig, no accident would have happened—this is beyond dispute. And yet the Craig knew that grounding was almost certain to follow her attempt to enter. The evidence is undisputed that large boats "generally fetch up there." To thrust such an immense vessel into a shoal at the mouth of a narrow channel already occupied by a tug and tow which are rapidly approaching the mouth, seems hardly compatible with prudent seamanship. *The Michael Davitt*, 28 Fed. 886; *The Troy*, Id. 861; *The Iron Chief*, 53 Fed. 507; *The Osceola*, 50 Fed. 326.

To a less extent these observations apply to the Danforth. Knowing what was likely to happen if the Craig attempted to enter the Blackwell Canal, knowing that a vessel a third longer than the canal is wide would probably run aground at the point and might block the entire entrance, would it not have been wiser to have stopped or to have slowed down still further so as to approach the point of danger with as little momentum as possible? This view of the subject,—so in accord with prudence, safety and common sense, at least from a layman's standpoint,—finds support in the record. The master of the Craig testifies:

"When we got in by the lighthouse, I am not certain whether it was the Alpha or the Danforth that blew a long whistle first, it was blown and answered. Q. What did that indicate? A. It was turning the corner and was supposed to stop. Two boats meeting along in there in that shape one will blow a long blast and the other will answer her and is supposed to check down and stop."

If either had checked down and stopped no collision would have occurred.

I make these suggestions with considerable hesitancy, for the reason that they have not been alluded to, although the cause has been presented by counsel of unquestioned ability and expertness in the law maritime. Possibly, however, the failure to do so may be explained on the supposition that neither counsel cared to advance an argument which might prove to be a two-edged sword.

As the result will be substantially the same whichever view is taken I prefer not to base the decision upon the considerations just alluded to, as it is entirely possible that these views may be ill founded, and, in any event, before they are accepted by the court counsel should have an opportunity to discuss them. The libellant is entitled to a decree against the Craig and the Danforth. A moiety of the entire damages, interest and costs should be charged against each. The Alabama, 92 U. S. 695; The Nicholson, 28 Fed. 889. As to the Alpha the libel is dismissed without costs.

THE WILLIAM W. WOOD.

WALSH v. THE WILLIAM W. WOOD.

(District Court, D. Connecticut. March 11, 1895.)

No. 1,042.

COLLISION—TUG AND TOW—CASTING OFF—MUTUAL FAULT.

A schooner, towed out through Hell Gate by a tug, got her sails up, and, at a signal of one blast on the tug's whistle, cast off the hawser. The tug shut off steam, but did not starboard her wheel, as is usual in such cases; neither did the schooner port, but, continuing in the same direction, struck the tug, and sunk her. *Held*, that the tug was clearly in fault; and, it appearing from the preponderance of evidence that the schooner could have avoided her by porting, that she, too, was in fault, and the damages must be divided.

This was a libel by William E. Walsh against the schooner William W. Wood for a collision, whereby libellant's tug was sunk.

Edward H. Rogers, for claimant.

Goodrich, Deady & Goodrich, for libellant.

TOWNSEND, District Judge. Libel in rem for collision. On May 1, 1893, the libellant, owner and master of the steam tug Kapella, started, with the claimant's schooner Wood in tow on a hawser, to go from Red Hook, Brooklyn, through Hell Gate. A second schooner, the Three Sisters, tailed astern of the Wood. When the tow arrived off Sunken Meadows, the Wood began to set her sails, and had them all hoisted when rounding North Brothers Island. The collision occurred at a point in the middle of the channel about halfway between North Brothers Island and Riker's Island. No questions of law are presented in the case.

The decision of the question of liability chiefly depends upon the direction and force of the wind at the time of the collision, and the conduct of those in charge of the tug just prior thereto. At about 5 o'clock in the afternoon of said day, the tug and tow were off North Brothers Island, and proceeding in a southeasterly direction, the hawser from the tug Kapella being on the port bow of the schooner Wood. Shortly thereafter the tug blew a whistle, which the schooner understood as a signal to let go the hawser. She did so, and, overtaking the tug, struck her astern, causing her to sink. The libellant denies that he gave a signal to let go, and

claims that at this time the schooner had all her sails hoisted, trimmed, and full, with booms on the port side, and was going so fast, with a strong south-southwest breeze, that the tug, although she put on full speed and starboarded her wheel, could not get out of the way of the schooner; and, further, that the schooner, after having let go, failed to port her wheel so as to go to starboard of the tug. The claimant claims that a single whistle or toot was blown on the tug; that this was the usual signal to let go the hawser; that, as soon as it was given, the tug stopped to slack the line and let the schooner cast it off; that the wind was south-southeast, and was a light breeze; and that, as the schooner was heading southeast, and her sails were flat and shaking, she had no headway, except what she got from the tug; and that the tug failed either to go ahead, or to steer to port; and that, therefore, he could not avoid running on to her. There is not only the usual conflict of testimony, but a number of outside and apparently disinterested witnesses give diametrically opposite testimony as to the customary signals for dropping a tow, as to the direction and force of the wind, and as to the circumstances attending the collision.

It is not necessary to consider at length so much of the testimony as relates to the conduct of those in charge of the tug. The evidence shows clearly that she was to blame. The testimony of Davis, the captain of the Three Sisters, an intelligent and apparently sincere and disinterested witness, is conclusive on this point. He was alongside the tug, heading in the same direction, and not over 150 feet away; and I have accepted, practically, his statement of the circumstances attending the collision, so far as the conduct of those on board the tug is concerned, as confirmed by other witnesses. The tug blew one short blast, and shut off the steam from her engine. The line, which had previously been taut, became slack, and was slipped over the Samson post on board of the Wood, and cast off. The tug did not throw the wheel hard to starboard and sheer to port when she let go, as is customary in such cases; but, according to the statement of Davis, "she lay right there, and was run over,—stopped directly as she had been towing the vessel." In these circumstances, even if the short whistle blown may sometimes be used as a signal to call a deck hand, it would be immaterial. The captain of the schooner had a right to understand the toot as a signal to drop the hawser; he had a right to suppose that the tug would sheer to port, and get out of the way; and she was negligent in stopping as she did, especially with a short hawser, and in thereby incapacitating herself from getting out of the way. Furthermore, whatever may have been the direction of the wind, the evidence clearly shows that its force was not sufficient to have enabled the schooner to run into the tug if the tug had properly increased her speed. The engineer of the tug admits that, with the tug in tow, she was not going more than 5 miles, if she was going that, but that she was capable of going $7\frac{1}{2}$ or 8 miles an hour. His statements strongly confirm the other evidence as to the negligence of the tug. He

testifies that he was in the engine room, where he could not look back, and all he could do was to look straight out on either side; that he did not see the schooner cast off the hawser, and did not know when it was let go; that the first thing that attracted his attention to the possibility of a collision was his seeing the Wood gaining on them, when the end of her jib boom was right by them on the starboard side; and that he then hallooed to go ahead, and opened the engine.

The vital question in this case is as to the negligence of the schooner. If there was a light southeast breeze, and she had no headway, she could not have avoided the collision by porting her wheel. If there was a stiff south-southwest wind,—a whole-sail breeze,—she could have got out of the way. Some of the witnesses swear to a heavy southwest gale; others say that what little wind there was, was about south-southeast. The observations of Sergeant Dunn, of the United States weather bureau, show a southwest wind during the entire day on the top of the Equitable building at New York, with a velocity of 13 miles an hour between 5 and 6 o'clock in the afternoon. The log of the lighthouse keeper at North Brothers Island shows a moderate southerly breeze, which grew lighter and drew a little to the eastward at about 5 o'clock. The log of the steamboat Richard Peck shows a light breeze southwest at 3 o'clock, becoming south at 5 o'clock. Some half dozen other witnesses swear to a south-southwest or southwest breeze; a less number swear to a south-southeast or southeast breeze. Three witnesses, in addition to those already referred to, swear that the wind was southward. The captain of the tug swore to the allegation in the libel (afterwards amended) that the wind was south-southeast. In these circumstances, I incline to think that there was a light breeze, and that it was not east of south, but was practically from the south. The schooner, when she let go her hawser, had at least such headway as she got from the tug. This headway was at the rate of about four or five miles an hour. The captain of the schooner admits that she had steerageway. It is not satisfactorily shown how close to the wind this schooner could sail. The preponderance of testimony is to the effect that the direction and force of the wind and the position of her sails were such that she got some slight assistance from the wind. Although Capt. Davis, of the Three Sisters, testifies that the Wood had no speedway other than what she got from the tug, and that her sails were not trimmed, he also testifies that her foresail was in the wind, her mainsail full, and her jib pulled up. He testifies that his vessel, which was going in the same direction, had her sails set and trimmed, and her booms on the port side. Bartlett, captain of the tug Jones, testifies that the sails of the Wood were set, eased off on the port side, and full. O'Brien, of the tug Escort, testifies that the schooner had wind enough to control her with. Bartlett and O'Brien and the witnesses on the Kapella swore that, if the captain of the schooner had put his wheel to port, he could have avoided the collision. In this connection, it is significant that Capt. Davis, of the Three Sisters, was not interrogated on this point. Walter Wheeler, cook of the

Three Sisters, shows by his testimony, and finally admitted, that he could not tell whether the Wood could or could not have kept out of the way of the tug. It is practically admitted that the captain of the Wood did not port his wheel. I have disregarded the testimony of the landsman Rand on this point. But with a short hawser, with her sails practically set, and the other conditions of wind, tide, and eddies, such as to call for extreme caution, it seems to me that the captain of the schooner Wood was negligent, either in voluntarily letting go the hawser at an unusual place until her sails were in such condition that she could be controlled, or that, whatever the condition of her sails, having let go, he was negligent, when she had steerageway, in not putting her helm to port, in order to avert the collision, after he saw that the tug had stopped and that he was running on to her.

It was not claimed on the trial that his conduct was an error in extremis, and I do not think the circumstances would justify such claim. Inasmuch as the captain of the Wood stands practically alone in his statement that "the result would have been nothing" if he had ported his wheel, I feel bound by the counter statements of eyewitnesses, two, at least, apparently disinterested, to the effect that the collision would have been avoided if he had ported his wheel. The evidence seems to show, as already suggested, negligence on the part of the Wood in letting go the hawser in these circumstances.

Finally, in this conflict of testimony, a suggestion is derived from the point at which the schooner struck the tug. The captain of the schooner said she sagged off onto the tug's starboard quarter. The captain of the tug says the schooner hit the tug just aft of the center of the stern. The conclusion seems irresistible that the captain of the Wood must have been able either to port or starboard his wheel so as to change her direction sufficiently to avoid such an end on collision. Instead of doing so, it appears that neither he nor his mate paid any attention to the tug after they let go, until they struck her.

Let a decree be entered dividing the damages, and referring the case to a commissioner to compute the same.

THE ENERGIA.

CROSHAW v. PHILLIPS et al.

SAME v. INSURANCE CO. OF NORTH AMERICA et al.

(Circuit Court of Appeals, Second Circuit March 5, 1895.)

1. COLLISION—STEAM AND SAIL IN CHANNEL—RULE 21.

A steamer outward bound from New York *held* in fault for collision with a schooner, in that she violated Rule 21 of the rules of navigation (Rev. St. § 4233), by going down the Cut Channel close to the easterly side, under conditions of wind and tide causing a strong current to set easterly across the channel, whereby she became unable to reverse soon enough because of her liability to drift ashore. 56 Fed. 124, affirmed.

2. SAME—CROSSING COURSES—SIGNALS.

The failure of a schooner to hear the whistles of an approaching steamer, seen several miles off, *held* not to have contributed to the collision, because the vessels were on crossing courses, and the duty of the schooner was to keep her course, whether the steamer was, by whistle, signifying an intention of going ahead or astern of her.

3. SAME—CHANGE OF COURSE BY SAIL.

Change of course by a schooner on crossing courses with a steamer *held* not to have placed her in fault, as it was shown to have been made long before any risk of collision was involved, and could in no way have operated to confuse, mislead, or obstruct the navigation of the steamer. 56 Fed. 124, affirmed.

4. SHIPPING—BILL OF LADING—EXEMPTIONS FOR NEGLIGENCE—VALIDITY—PUBLIC POLICY.

In respect to bills of lading executed at a time when the law, as announced by the supreme court, declared stipulations against liability for negligent navigation to be void as against public policy, there is no force in a contention that the act of February 13, 1893 (27 Stat. 445, § 3) was practically a declaration that the public policy of this country was otherwise; for this change in the law could have no retroactive effect.

5. SAME—FOREIGN LAWS—CHARTER AND BILL OF LADING.

A stipulation in the printed form of a bill of lading that the carrier's liability is to be determined by the laws of England, even if valid, is ineffective, where the instrument was given under a charter which contained no such clause, and the evidence shows that there was no intention of making a different contract by the bills of lading from that in the charter party.

6. SAME—DAMAGE TO CARGO—AVERAGE CHARGES IN FOREIGN PORT.

A cargo owner may recover from the ship, as damages for a negligent collision in American waters, average charges by reason of the collision, legally assessed against his cargo in the foreign port of destination, according to the law there prevailing. 61 Fed. 222, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

These were two libels against the steamship *Energia* (George Croshaw, claimant) to recover losses arising from a collision with the schooner *Wild Pigeon*, in the Cut Channel, in the lower bay of New York. The first was filed by William H. Phillips and John Phillips, owners of the schooner, to recover for damages done to her and her cargo; and the second by the president and directors of the Insurance Company of North America and others against both vessels to recover damages to cargo on board the steamship. The district court entered decrees in favor of the libelants in each case. 56 Fed. 124. It also entered a decree in favor of the libelants in the second case, upon a supplemental libel to recover money exacted from the consignees to cover general average and special charges. 61 Fed. 222. In the first case, appeals were taken by both parties. In the second, the claimant alone appealed.

Harrington Putnam, for the *Energia*.

Frank D. Sturges, for appellee Phillips.

Wilhelmus Mynderse, for appellee Insurance Co. of North America.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The *Energia* was outward bound for Shanghai, China, and moving down the Cut Channel, in the

lower bay of New York. The Wild Pigeon was bound eastward from South Amboy. Her intention was originally to go up through the Narrows, and out by way of the Sound; but, upon a more favorable turn of the weather, her master concluded to go out by way of Sandy Hook, in consequence changing direction several points to starboard of his previous course. The vessels came together close to red buoy C No. 4, on the easterly edge of the channel. The faults charged against the schooner are: (1) No lookout; (2) failure to heed the whistles of the steamer; and (3) not keeping course. The steamer, however, was seen when several miles off, and, although some of her whistles were not heard, failure to hear them did not contribute to the collision; since the vessels were on crossing courses, and the duty of the sailing vessel was to keep her course, whether the steamer was by whistle advertising an intention to go ahead of her or astern of her. A change of course by the schooner is conceded, but we concur with the district judge in the conclusion that it was made long before any risk of collision was involved, and could in no way operate to mislead or confuse or obstruct the navigation of the steamer. It is unnecessary to add anything to the discussion which is found in the opinion of the district judge. The manifest cause of the collision was the violation of article 21 by the pilot of the steamer. The Cut Channel is about 1,000 feet in width, with a depth of 30 feet at low water. The *Energia* was of about 2,000 tons register, 337 feet long, and drawing $23\frac{1}{2}$ feet of water. The tide was about one-third ebb, and the wind W. N. W., under which conditions there is a strong current setting easterly across the Cut Channel. Rule 21¹ required the steamer, if "it were safe and practicable, [to] keep to that side of the fairway or mid-channel which lies on the starboard side of the ship." There is no evidence even tending to show the impracticability of counteracting the set of the current and the pressure of the wind by the use of a port wheel, and thus coming down the comparatively narrow channel just to starboard of its mid-line, thereby securing a safe position for whatever maneuvers the presence of another vessel might require. Instead of thus navigating, the pilot of the *Energia* brought her down, hugging the easterly side of the channel so closely that he was, as the district judge finds, unable to reverse sooner than he did on account of his liability to drift ashore on the port side of the cut, or to foul the chain of one of the channel buoys with his propeller. The decree of the district court is therefore affirmed.

Among the cargo of the *Energia* were 68,838 cases of oil shipped by Carleton & Moffatt, merchants in New York, and insured by the libelants in the second above-entitled action. As a result of the collision, the hold, where a portion of the oil was stowed, was flooded, and a large number of cases were thereby damaged. The steamer returned to New York for repairs. The oil was discharged, and 16,508 cases were found to be in such condition that they could not be carried forward to destination. They were surren-

¹ Rev. St. § 4233.

dered to the underwriters, who have settled with the assured for a total loss thereon. There is no question raised on this appeal as to the amount of such loss. The steamer, upon completion of her repairs, proceeded upon her voyage to Shanghai. There, as a condition of delivery of the balance of the shipment of oil, a cash deposit was exacted by the steamer from the consignees to cover general average and special charges, which were subsequently adjusted at \$953.11 and \$636.06, respectively. The underwriters paid these to the assured, and a claim for them was included in a supplemental libel, and sustained by the district court. 61 Fed. 222. The steamer's agents here, Carter, Hawley & Co., chartered her in New York on November 22, 1892, to Barber & Co., of the same place, and it was under such charter that the oil was shipped by Carleton & Moffatt.

There is a manifest error in printing one clause of the charter party in the transcript of record. As the form of such clause which is set forth in appellant's brief is not objected to by appellees, it may be assumed to be the correct quotation from the original. It contains a statement of agreement that the carrier "shall not be liable for loss or damage occasioned * * * by collisions, stranding, or other accidents of navigation of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners, not resulting, however, in any case from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager." Appellant relies upon this as a defense to the action. The cases of *Railroad Co. v. Lockwood*, 17 Wall. 357, and of *Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana)*, 129 U. S. 397, 9 Sup. Ct. 469, sufficiently dispose of this point. There is no force in the contention that the act of congress of February 13, 1893, is practically a declaration that the public policy of this country touching such clauses in carriers' contracts is otherwise than as stated in the cases last cited. When this contract was made, in November, 1892, it was made under the law as it then stood, whether that law was found in a statute or in the authoritative decisions of the supreme court, and subsequent changes in such law by act of congress have no retroactive effect.

The case of *The Montana*, however, expressly reserves for future decision cases where the contract itself expressly provides that any question arising under it should be governed by the law of some specified foreign country; and appellant seeks to bring himself within this exception by reason of the presence in the bills of lading of the following clause:

"(8) The liability of the carrier under this bill of lading shall be governed by the law of England, with reference to which this contract is made."

We are satisfied, however, from the evidence, that the contract was fully expressed in the charter party, which contained no such clause, and that there was no intention to modify that contract in so important a particular merely by making use of a printed form of bill of lading which contained the so-called "flag clause." In fact, the steamer's agent expressly testifies that there was no in-

tention or even any talk about making a different contract in the bills of lading from that in the charter party. This case, therefore, is controlled by the principles enunciated in *The Montana*.

It only remains to consider the claim to be reimbursed for the general average and special charges exacted from the cargo upon adjustment at Shanghai. Upon this branch of the case, we concur in the reasoning and conclusion of the district judge, as expressed in the following excerpt from his opinion:

"I do not perceive any sound reason, in justice or in common sense, why both the general and the particular average charges, to which the residue of the cargo is legally subject in Shanghai, should not enter into the damages to be recovered for this collision. The rule of damages here is 'restitutio in integrum' (*The Potomac*, 105 U. S. 630); and this rule as plainly demands compensation for a charge or expense lawfully imposed upon this sound part of the cargo as for a deterioration or physical injury to another part, when both are equally the direct results of the collision. The loss to the cargo owner is alike in both, and both, upon the stipulated facts, are alike the direct and natural consequence of the collision. It is immaterial that the charge or expense in dispute has to be paid at Shanghai, instead of here, or that it is payable to the shipowner who is in fault, so long as the charge is a lawful one where it arises. If the exaction were an illegal one, no claim for it would arise here, for then it would not be the proper and natural result of the collision, but of a new agency, and an independent wrong, for which an independent remedy must be sought. But by our law, as well as by the English law, all average charges for the voyage are to be determined and adjusted by the law of the place of destination, which in this case was Shanghai, governed by English law. From the moment of collision, therefore, the sound part of the cargo became liable to these average charges, should it ever reach its destination; and, as that destination has been reached, that item of damage has become fixed, and is therefore recoverable here, as one of the direct and necessary legal results of the collision." 61 Fed. 223.

The appellant contends that this conclusion is fallacious, because general average contribution neither arises by the collision nor while in the port of New York, but is the striking of a balance of the entire transactions of the voyage, and is therefore only recoverable at the place of destination, where vessel and cargo are finally separated. This criticism, however, is without force in the case at bar. All the average charges, both general and special, were for expenses incurred as a direct consequence of this collision, unaffected by any of the subsequent transactions of the voyage. The circumstance that they were collected from the cargo only when the voyage was terminated is immaterial. The "contribution" between the various interests—ship, freight, and cargo—may, indeed, be said to arise only when a process of adjustment has determined the amount to be paid by the respective shares. But the necessity of paying out money in order to enable surviving cargo to secure transportation to its original destination in the vessel by which it was shipped arose here. Whether it was paid here in the first instance by the cargo owner himself, or was paid by the shipowner who thereafter repaid himself out of the cargo owner's goods, it was equally an expense which was the necessary result of the collision; it "arose" at the moment of collision; and it is immaterial when it was paid.

The decrees of the district court in both cases are affirmed, with interest and costs.

DISTILLING & CATTLE FEEDING CO. v. GOTTSCHALK CO.

(Circuit Court of Appeals, Seventh Circuit. March 20, 1895.)

No. 199.

PRACTICE—SUBMISSION TO COURT WITHOUT JURY—REVIEW ON APPEAL.

Where a case is submitted to the court without a jury, by consent of parties, and the court makes a general finding, neither the correctness of that finding nor the refusal of the court to make special findings can be reviewed on a writ of error.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

J. S. Stevens, for plaintiff in error.

A. W. Green and W. Pinkney Wyte, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. The appellee, the Gottschalk Company, a corporation of Maryland, sued the appellant, the Distilling & Cattle Feeding Company, a corporation of Illinois, in assumpsit upon special and common counts, to recover money alleged to be due as rebates under a contract between the parties. A more particular statement is unnecessary here. The opinion delivered in the circuit court is reported in 62 Fed. 901. The court, by written consent of the parties, tried the case without the aid of a jury, and, having refused a number of propositions, some of law and some of fact, which the appellant had submitted, made a general finding of the issues for the appellee, and gave judgment accordingly.

The assignment of errors contains two specifications to the effect that the court erred—First, in refusing each of the propositions submitted; and, second, in finding that there had been no violation of the condition upon which sales were made by the plaintiff in error to the defendant in error. No question is presented by either specification of which this court can take cognizance. Before the act of March 3, 1865, no decision by the court in the trial of a case at law, in which the jury had been waived, could be reviewed upon writ of error. *Campbell v. Boyrean*, 21 How. 223. By that act, the provisions of which have been embodied in sections 649 and 700 of the Revised Statutes, the right of review is given in respect to "the rulings of the court in the progress of the trial of the cause"; and, "when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment." It is also provided that "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." The meaning and effect of these provisions have been under frequent consideration, and it is well settled that no question involved in a general finding by the court in a case at law, when a jury has been waived, can be the subject of review. "If a jury

is waived, and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence." *Dirst v. Morris*, 14 Wall. 484; *Insurance Co. v. Folsom*, 18 Wall. 237; *Tyng v. Grinnell*, 92 U. S. 467; *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481; *St. Louis v. W. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485; *Reed v. Stapp*, 3 C. C. A. 244, 9 U. S. App. 34, 52 Fed. 641; *Skinner v. Franklin Co.*, 6 C. C. A. 118, 9 U. S. App. 676, 56 Fed. 783, and cases cited; *Bowden v. Burnham*, 8 C. C. A. 248, 59 Fed. 752; *Searcy Co. v. Thompson*, 66 Fed. 92. In *Insurance Co. v. Folsom*, it was distinctly held that the refusal of requests that the court should adopt certain conclusions of law could not properly be denominated a ruling in the progress of the trial, and therefore could not be reviewed; and in *Cooper v. Omohundro*, 19 Wall. 65, *Crews v. Brewer*, 19 Wall. 70, and other later cases cited, the doctrine has been reiterated. It is urged that there is and can be no dispute about the facts of this case, but whether or not that is so is itself a question of fact upon which the court cannot enter. "The burden of the statute," says the supreme court in *Lehnen v. Dickson*, *supra*, "is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages, or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult, when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts." The judgment of the circuit court is affirmed.

BANE v. KEEFER et al.

(Circuit Court, D. Indiana. March 20, 1895.)

No. 9,173.

REMOVAL OF CAUSES—DISCONTINUANCE AFTER REMOVAL — FAILURE OF JURISDICTION.

B., a citizen of Indiana, commenced an action for personal injuries, in a court of that state, against three defendants, two citizens of Indiana and one of Ohio. The Ohio defendant removed the cause to the federal court on the ground of local prejudice. B. then discontinued the action as to the Ohio defendant, and moved to remand. *Held* that, as the cause no longer involved a controversy properly within the jurisdiction of the federal court, it should be remanded.

Spencer & Branyan and Holstein & Barrett, for plaintiff.
Olds & Griffin and Blackledge & Thornton, for defendants.

BAKER, District Judge. On December 24, 1894, Henry Bane filed his complaint in the circuit court of Huntington county, Ind., against Henry Keefer, Henry S. Hallwood, and the city of Huntington, Ind., to recover damages for personal injuries sustained by him while in the employ of Keefer & Hallwood, who had entered into a contract with said city to construct a certain sewer therein. On January 19, 1895, Henry S. Hallwood filed his petition in this court, in which it was made to appear that he was a citizen of the state of Ohio, and that the plaintiff, Bane, and the defendants Henry Keefer and the city of Huntington were citizens of the state of Indiana, and that from prejudice and local influence the petitioner would not be able to obtain justice in the circuit court of Huntington county, Ind., nor in any other court in said state into which said cause could be removed. Thereupon an order was entered removing said cause into this court. After the removal of the cause, the plaintiff discontinued the same as to the defendant Henry S. Hallwood, and said cause is now pending against Keefer and the city of Huntington alone. The plaintiff now moves the court to remand the cause to the circuit court of Huntington county, Ind., on the ground that it is one in which all the parties plaintiff and defendant are citizens of the state of Indiana. The cause of action is not one arising under the constitution or laws of the United States or any treaty entered into by the United States with any other country or government. The jurisdiction of the court must, therefore, depend upon the diversity of the citizenship of the parties. Such diversity of citizenship existed at the time of removal, but has ceased to exist since the discontinuance of the case as to Hallwood. Counsel for the defendants claim that the jurisdiction of the court is still maintainable, notwithstanding all parties are now citizens of this state, by virtue of section 2 of an act of congress passed March 3, 1887, the enrollment of which was corrected August 13, 1888 (25 Stat. 435). That part of the section relied upon reads as follows:

"And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

The contention of counsel is that the cause of action, when it was removed here, was one which could not have been separated and remanded as to Keefer and the city of Huntington, leaving the action pending here as to Hallwood alone, because such separation would have worked to the prejudice of the defendants; and it is claimed that the discontinuance amounts simply to a separation, at least so

far as Keefer is concerned. This contention cannot be maintained. This is an action sounding in tort for personal injury, and one or all the tort feorsors, at the election of the plaintiff, may be joined as defendants. Having joined all in the first instance, the plaintiff has an undoubted right at any time to discontinue his suit as to any one of them. He has availed himself of this right of discontinuance, a right which defendants' counsel concede he possesses. After such discontinuance, the case is in the same position as it would have been if it had been originally brought here, and the plaintiff had rightfully discontinued the cause as to the parties whose presence was necessary to give the court jurisdiction. Can this court, because it has once acquired jurisdiction, retain it when the cause of action has been rightfully so changed as to disclose on the face of the record a complete failure of jurisdiction? Section 5 of the act of March 3, 1875 (18 Stat. 470, 473), is applicable to and decisive of the question. So much of that section as is continued in force by the acts of 1887 and 1888, *supra*, reads as follows:

"That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after said suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a cause cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The suit does not now really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and therefore it becomes its duty to proceed no further, but to remand the cause to the court from which it was removed.

In the case of *Transportation Co. v. Seeligson*, 122 U. S. 519, 7 Sup. Ct. 1261, it was held if a cause pending in a state court against several defendants is removed thence to the circuit court of the United States on petition of one of the defendants, under the act of 1875, on the grounds of a separate cause of action against the petitioning defendant, in which the controversy was wholly between citizens of different states, it should be remanded to the state court if the action is discontinued in the circuit court as to the petitioning defendant. The court, after quoting section 5 of the act of 1875, *supra*, says:

"The court was not required to keep the suit after the discontinuance simply because it might have been removed when *Huntington* was a party. As soon as he was out of the case, it did appear that 'the suit did not really and substantially involve a dispute or controversy properly within' its jurisdiction."

The same doctrine is asserted and enforced in *Robinson v. Anderson*, 121 U. S. 522, 7 Sup. Ct. 1011; *Graves v. Corbin*, 132 U. S. 571, 590, 10 Sup. Ct. 196; *Torrence v. Shedd*, 144 U. S. 527, 533, 12 Sup. Ct. 726. These cases settle the question of jurisdiction adversely to the defendants' contention, and the case must therefore be remanded; but, inasmuch as the cause was rightfully brought here, and the cause for remanding arises from the plaintiff discontinuing his suit

as to the defendant Hallwood, it is ordered that the costs of the removal be taxed against the plaintiff. Cause remanded to the Huntington circuit court at the costs of the plaintiff.

DONNELLY v. UNITED STATES CORDAGE CO.

(Circuit Court, D. Massachusetts. March 16, 1895.)

No. 512.

CIRCUIT COURTS—JURISDICTION OVER PARTIES — NONRESIDENTS OF DISTRICT—
PATENT SUITS.

In section 1 of the judiciary act of 1887-88 (1 Supp. Rev. St. 611), the clause defining the districts in which suits may be brought is not limited in operation to the classes of cases enumerated in the preceding part of the section as being within the jurisdiction of the circuit courts, but applies to all suits, including patent cases; hence a New Jersey corporation cannot be sued in the district of Massachusetts for infringement, although it has a place of business there.

This was a suit in equity by Michael Donnelly against the United States Cordage Company for infringement of a patent. Defendant demurred to the bill for want of jurisdiction.

George R. Swasey, for complainant.

Fish, Richardson & Storrow, for defendant.

COLT, Circuit Judge. This is a bill in equity brought for the infringement of a patent by a citizen of Massachusetts against the defendant, a corporation organized under the laws of New Jersey, but having a usual place of business in Boston, in the Commonwealth of Massachusetts. The case was heard upon demurrer to the bill for want of jurisdiction.

The question in issue arises under section 1 of the act of March 3, 1887 (24 Stat. c. 373), as corrected by the act of August 13, 1888 (25 Stat. c. 866; 1 Supp. Rev. St. 611), the material parts of which are as follows:

"The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority * * * or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid * * * or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The contention of the plaintiff is that the last part of this statute, which defines the district where suits of a civil nature are to be

brought, is limited to the class of actions mentioned in the first part, and therefore does not apply to a suit concerning a patent right where the subject-matter is within the exclusive jurisdiction of the federal courts. In support of this proposition the plaintiff refers to the case *In re Hohorst*, 150 U. S. 653, 661, 14 Sup. Ct. 221.

The first part of the act mentions certain classes of suits in which the circuit courts shall have original cognizance concurrent with the courts of the several states. The second provision does not seem to be restricted to any particular class of actions in the circuit court, but apparently covers all classes of civil actions in both the circuit and district courts. The language is:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

Then follows the exception where jurisdiction is founded solely on diversity of citizenship, which is inapplicable to the present case.

Like the act of March 3, 1875, this act does not supersede the prior statutes (Rev. St. § 629) granting the circuit courts jurisdiction in civil actions therein mentioned, including those arising under the patent laws of the United States. *U. S. v. Mooney*, 116 U. S. 104, 6 Sup. Ct. 304; *Miller-Magee Co. v. Carpenter*, 34 Fed. 433.

The distinction between the first and second paragraphs of the act is clearly set forth in *Smith v. Lyon*, 133 U. S. 315, 316, 10 Sup. Ct. 303, where the supreme court, by Mr. Justice Miller, says:

"This first clause of the act describes the jurisdiction common to all the circuit courts of the United States, as regards the subject-matter of the suit, and as regards the character of the parties who by reason of such character may, either as plaintiffs or defendants, sustain suits in circuit courts. But the next sentence in the same section undertakes to define the jurisdiction of each one of the several circuit courts of the United States with reference to its territorial limits, and this clause declares that 'no person shall be arrested,' etc.

The restriction in this statute with respect to the district where suits must be brought has been uniformly applied by the circuit courts to actions for infringement of patents. *Miller-Magee Co. v. Carpenter*, 34 Fed. 433; *Halstead v. Manning*, *Id.* 565; *Gormully & Jeffrey Manuf'g Co. v. Pope Manuf'g Co.*, *Id.* 818; *Reinstadler v. Reeves*, 33 Fed. 308; *National Typewriter Co. v. Pope Manuf'g Co.*, 56 Fed. 849; *Stepladder Co. v. Gordon*, 57 Fed. 529; *Preston v. Manufacturing Co.*, 36 Fed. 721; *Cramer v. Manufacturing Co.*, 59 Fed. 74; *Adriance v. Harvesting Mach. Co.*, 55 Fed. 287. This act, like the act of March 3, 1875, is merely a modification of the eleventh section of the judiciary act of Sept. 24, 1789 (1 Stat. c. 20). *U. S. v. Mooney*, 116 U. S. 104, 106, 6 Sup. Ct. 304; *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303. In the former case, the court says:

"How, then, can the substantial re-enactment of section 11 by the act of March 3, 1875, with modifications immaterial so far as the question in hand is concerned, have an effect which the original section did not? * * * It is not to be supposed that congress, in using in the act of 1875 the same

language, so far as the present question is concerned, as that employed in the act of 1789, intended to give it a meaning different from that put upon it by this court, and which had remained unchallenged for three-quarters of a century."

If the provision defining the districts in which suits must be brought contained in the eleventh section of the judiciary act has been adjudged not to be limited to those cases in which the federal and state courts have concurrent jurisdiction, then it follows that the same construction should be applied to this statute, which is simply an amendment of the original act.

Chaffee v. Hayward, 20 How. 208, 215, 216, was a suit brought for the infringement of a patent in the circuit court for the district of Rhode Island. Service was made by the attachment of the property of the defendant, who was not an inhabitant of the district, or found therein. In construing the language of section 11 of the judiciary act, the supreme court says:

"It is insisted, however, for the plaintiff, that these rulings were had in cases arising where the jurisdiction depended on citizenship; whereas, here the suit is founded on an act of congress conferring jurisdiction on the circuit courts of the United States in suits by inventors against those who infringe their letters patent, including all cases, both at law and in equity, arising under the patent laws, without regard to citizenship of the parties or the amount in controversy, and therefore the eleventh section of the judiciary act does not apply. * * * It applies in its terms to all civil suits. It makes no exception, nor can the courts of justice make any. The judicial power extends to all cases in law and equity arising under the constitution and laws of the United States, and it is pursuant to this clause of the constitution that the United States courts are vested with power to execute the laws respecting inventors and patented inventions; but where suits are to be brought is left to general law, to wit, to the eleventh section of the judiciary act."

In *Butterworth v. Hill*, 114 U. S. 128, 131, 5 Sup. Ct. 796, the plaintiff, a citizen of Vermont, brought his bill in the circuit court of Vermont against the commissioner of patents, residing in Washington, to adjudge that he (the inventor) was entitled to his patent. In that case, the court, referring to the act of March 3, 1875, says: "We entertain no doubt that this statute applies to suits brought under section 4915."

In *re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221 (see, also, *Railroad v. Gonzales*, 151 U. S. 496, 503, 14 Sup. Ct. 401), decided the single point that the act of 1887 did not apply to a suit brought by a citizen against an alien, on the ground mainly that the words "against any person" in the act must be held to mean "against an inhabitant of the United States." Any expression of opinion, not necessary to the determination of that case, cannot be considered as an authority in a case which presents a different question. *Carroll v. Lessee of Carroll*, 16 How. 275, 287; *Barney v. Railroad Co.*, 117 U. S. 228, 231, 6 Sup. Ct. 654.

The defendant, being a corporation, incorporated under the laws of New Jersey, cannot under this statute be considered an inhabitant, citizen, or resident of a state other than that in which it was incorporated. *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935; *Southern Pacific Co. v. Denton*, 146 U. S. 202, 205, 13 Sup. Ct. 44.

It follows, for the reasons given, that the defendant cannot be compelled to answer to a suit brought in this district, and that the bill must be dismissed for want of jurisdiction. Demurrer sustained; bill to be dismissed, with costs.

NELSON v. HUIDEKOPER et al.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1895.)

No. 244.

REVIEW IN ACTIONS AT LAW — APPEAL AND WRIT OF ERROR—CIRCUIT COURTS OF APPEALS.

A judgment in an action at law (as for damages for personal injuries) is not reviewable in the circuit courts of appeals upon an appeal. The proper method is by writ of error, with citation to adverse parties.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

This was an action at law commenced in the city court of Birmingham, Ala., by William F. Nelson against F. W. Huidekoper and Reuben Foster, as receivers of the Richmond & Danville Railroad Company, to recover damages for personal injuries. The case was removed to the federal circuit court by the defendants, as nonresidents, on the ground of prejudice and local influence. Prior to the removal the defendants pleaded to the jurisdiction of the court, on the ground that the defendants were nonresidents of Alabama, and, as receivers, were operating the railroad of the Richmond & Danville Railroad Company, which was a foreign corporation, at the time of the injury complained of, and that the cause of action arose wholly without the territorial jurisdiction of the courts of Alabama. After the removal of the cause, the plaintiff demurred to the plea to the jurisdiction on various grounds, and, the plea and the demurrer thereto having been duly argued and submitted to the court below, the court overruled the demurrer, and, the plaintiff declining to take issue on the plea, or to proceed further, the court sustained the plea, and entered an order dismissing the case for want of jurisdiction. To obtain a review of this judgment, plaintiff, instead of suing out a writ of error, took an appeal, as stated below in the opinion of the court.

Griffith R. Harsh, for plaintiff in error.

James Weatherly and A. G. Smith, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. This was an action in the circuit court for the Southern division of the Northern district of Alabama to recover damages for personal injuries alleged to have been sustained by the plaintiff while a passenger on a train operated by defendants as receivers of the Richmond & Danville Railroad Company, and was originally commenced in the city court of Birmingham, state of Alabama, and afterwards removed to the circuit court by the defendants, as nonresidents, on the ground of prejudice and local influence. After final judgment rendered in the action, the plaintiff, by his attorneys, in open court, and in the presence of the attorney for the defendants, prayed an appeal from the judgment of the court, which was granted upon the plaintiff giving a bond for costs in the sum of \$300, with good and sufficient

sureties, to be approved by the clerk of the court. On the same day the order of appeal was granted plaintiff lodged with the clerk an assignment of errors, and soon thereafter an appeal bond, which was approved by the clerk of the court. The bond in question shows other illegalities and informalities not necessary to notice. The record does not show that any writ of error has ever been applied for or allowed or issued, or that any citation to adverse parties had been issued. The motion to dismiss the case for want of jurisdiction must be granted. *Ward v. Gregory*, 7 Pet. 633; *Parish v. Ellis*, 16 Pet. 451. So ordered.

ADAMS v. MERCANTILE TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1895.)

No. 329.

1. COURTS—COMITY—POSSESSION OF RECEIVERS.

In 1893 one B. filed a bill in a state court, in behalf of himself and all other creditors, against the J. Ry. Co., to which the M. Trust Co., trustee of a mortgage upon the railway, was also made a party, in which bill he claimed a first lien upon the property of the railway company; alleged its insolvency, and the existence of numerous other liens on its property; and sought the appointment of a receiver and a sale of the road for the payment of liens. In September, 1893, the state court appointed a receiver of the railway, who, later in the same month, was discharged, by consent of parties. On November 17, 1893, a decree pro confesso was taken against the M. Trust Co. On March 6, 1894, after hearing on the answer of the railway company, the state court made a decree granting the prayer of the bill, and sending the case to a master to take an account of the indebtedness. On March 19, 1894, the M. Trust Co. filed its bill in the federal court for foreclosure of its mortgage on the J. Ry. Co.; and on the same day, on consent of the railway company, a receiver of its property was appointed by the federal court, who took possession of the road. On April 5, 1894, the state court again appointed one A. receiver of the railroad property in the suit brought by B. On May 7th, a decree pro confesso was entered against the railway company in the M. Trust Co.'s suit in the federal court. May 21st, A. filed his intervening petition in the federal court, seeking delivery to him, as receiver in B.'s suit, of the property then in the hands of the receiver of the federal court. *Held* that, as a matter of comity between the state and federal courts, the application should be granted, and the possession of the property, which was clearly necessary to the exercise of its jurisdiction, should be turned over to the state court.

2. SAME—EXCLUSIVE JURISDICTION OF PROPERTY—NECESSITY OF SEIZURE.

It seems that actual seizure is not always necessary in order to give exclusive jurisdiction over property to a court in which a suit affecting such property is pending, if possession of such property is necessary in order to give the full relief sought in such suit. *Wilmer v. Railroad Co.*, Fed. Cas. No. 17,775, 2 Woods, 409-427, criticised.

This is an appeal from an order of the circuit court of the United States for the Northern district of Florida. The facts in this case are substantially as follows:

On the 19th of March, 1894, the Mercantile Trust Company, the appellee in this case, filed its bill in equity in the court below against the Jacksonville, Mayport & Pablo Railway & Navigation Company. This bill set forth that the said railroad company had issued 250 bonds, and executed a mortgage to the appellee, to secure the payment of these bonds, upon its entire line of

railroad and all of its property, of every nature and kind, including the income, tolls, rents, and profits; that 175 of said bonds had been sold, and were in the hands of bona fide purchasers for value; that the said railroad company had made default in the payment of interest, and that, under the terms and conditions of the mortgage or deed of trust, the trustee, the appellee here, had the right to take possession of the properties aforesaid, or to have a receiver appointed; that the said railroad company was hopelessly insolvent; that it had never paid any interest on its bonds, and was wholly unable to do so; that suits at law have been brought in the state court, in some of which judgments have been recovered, and that other of said suits are still pending; that the railroad property of the defendant was in a damaged and dilapidated condition; and that the interest of the bondholders required the appointment of a receiver,—and prayed for a decree for the foreclosure of the mortgage, and sale of the properties of the railroad company. That on the 19th day of March, on notice given to the defendant company, and on appearance by the attorney of that company, and his statement that there was no objection to application for a receiver, and that the best interests of the bondholders, creditors, and stockholders required the appointment of a receiver, and on the affidavit of Archer Harmon, who was then the president of the railroad company, to the same effect, the court appointed John L. Marvin receiver, with the usual powers and instructions. The receiver immediately gave bond, and filed his oath of office, took possession of the properties, and entered upon the discharge of his duties. On May 7th of the year aforesaid a decree pro confesso was entered against the defendant company.

On May 21, 1894, the intervenor and appellant, Charles S. Adams, after due notice to counsel for complainant in this suit, and by leave of court duly obtained, filed his petition of intervention in said cause. The said intervenor, Charles S. Adams, represented in his said petition that he had been appointed receiver of the railway and other property of the said defendant company by the circuit court for Duval county, state of Florida, in a suit therein pending, in which George F. Broughton had filed a bill in behalf of himself and all of the creditors of the said defendant company against the said company, and against the said Mercantile Trust Company, the complainant in this suit; that the said Broughton claimed to have a first lien upon the property of the said defendant company; that the said company was insolvent, and the president was misappropriating the revenues thereof; that on the 17th of November, 1893, a decree pro confesso had been entered against the said Mercantile Trust Company, and that on the 6th of March, 1894, the said state court had rendered a decree entitling said complainant Broughton to the relief prayed in and by his said bill, and referred the cause to a master to ascertain what amounts were due the creditors and bondholders of the company who might come in and prove their claims, and that a large number of said creditors had proved their claims in said suit; that the solicitors representing the said defendant company in the state court were the same as those representing the defendant in the federal court, and the counsel representing the Mercantile Trust Company in the federal court also signed the answer of the defendant company in the state court; that no notice was given of the application for appointment of receiver, except to H. H. Buckman, Esq., counsel for the defendant company in the said state court, who filed the consent hereinbefore referred to; that the bill in this cause did not inform the court that a creditor's bill was pending in the state circuit court, to which the Mercantile Trust Company, the complainant in the federal court, was a party defendant, and in which a decree pro confesso had been entered against said Mercantile Trust Company, and final decree entered thereon; that the said circuit court of the state of Florida was duly administering the property of the defendant company for the benefit of all its creditors; that on the 5th of April, 1894, the petitioner, Charles S. Adams, had been appointed receiver of all the properties of the defendant railway company, copy of which order was annexed to and made a part of said petition, as Exhibit A. The petitioner, Charles S. Adams, prayed the United States circuit court for the Northern district of Florida to make an order directing the receiver appointed by that court in the suit of the Mercantile Trust Company to turn over and deliver to said petitioner, as such receiver of the state court, all the properties of the said defendant railway company.

On May 30, 1894, Archer Harmon and others, claiming to be holders of bonds issued by the said railway company, filed an answer for themselves, alleging the said answer to be that of the Mercantile Trust Company, to the petition of Charles S. Adams. The record shows that the complainant the Mercantile Trust Company never did file any answer, over its corporate seal or by its counsel, to the said petition of Charles S. Adams, and that the said alleged bondholders had no authority of right to file their attempted answer to the said petition. The order of the court permitting the petition to be filed required "that the said Mercantile Trust Company be required to answer the same within ten days from the date of this order," to wit, on the 21st May, 1894.

On June 5, 1894, Charles S. Adams, intervener, in support of his petition, filed a certified copy of the record from the circuit court for Duval county, Fla., in the said suit of George F. Broughton against the said defendant the Jacksonville, Mayport & Pablo Railway & Navigation Company. This record from the state court shows that the bill was filed by Broughton, for himself and all the other creditors of the defendant company, against the said company and the Mercantile Trust Company. The bill recites the amounts due Broughton for his work and labor performed in the construction of the defendant's railroad on March 31 and October 25, 1892, to wit, \$1,846.60, \$1,660, and \$1,310, respectively, and the history of his claims, and that they constitute a lien upon the property and franchises, under the statutes of Florida; that the defendant company had executed its deed of trust to secure an issue of \$250,000 in bonds, and that none of said bonds were placed in the hands of the trustee until March 10, 1893; that a large sum of money was due to other persons for work and labor performed on and materials furnished to the said railway, all of which were a lien upon the property of the defendant company; that a number of suits at law have been commenced against the defendant company, and that the state and county taxes are due, and that the sheriff has levied on the road for the payment of the same; that the earnings and revenues of the company are being misappropriated by the president; that a sale of the road and all of the property of the defendant company would not bring enough to pay its debts; that a receiver be appointed, and an account be had of what is due the complainant and such other creditors as might come in and prove their claims; that the road be sold, and the proceeds be applied to the payment of the taxes and costs of the suit, and the residue to the payment of the claims proved as aforesaid.

The defendant railroad company filed its answer to the said bill, denying its indebtedness to the said Broughton, and denying all the other allegations in the bill, and the complainant Broughton filed replication to the said answer. On the 29th of August, 1893, an order was made, directed to the Mercantile Trust Company, requiring it to appear to said bill. On the 8th day of September, 1893, the state court heard the application for a receiver, and, upon consideration, appointed Charles S. Adams receiver, to take into possession said railroad, rolling stock, fixtures, rights of way, moneys, choses in action, books, papers, and terminal facilities, forthwith, and, further, directed said receiver to operate and run said road pending the litigation, and authorized him to borrow the sum of \$3,406.50, or so much thereof as might be necessary, to pay taxes due by the said company, for which a levy had been made by the sheriff of Duval county. On the 22d day of September, by consent of parties to the suit, the receiver was discharged, and the railroad property was ordered turned over and delivered to the defendant railroad company, the cost and expenses incurred in the operation of the property being reserved for the further order of the court.

November 13, 1893, proof of the service by publication of said notice was made in said cause. On the 17th of November, 1893, the judge of the said state court entered a decree that the said bill be taken pro confesso as to the said defendant the Mercantile Trust Company, in default of plea, answer, or demurrer to said bill. On January 3, 1894, the cause was duly referred to an examiner to take testimony on the issues made by the bill and answer. After the evidence in said cause was fully taken, the said cause came on to be heard in the said state court on March 6, 1894, and on the same day the said court made its final decree. The said state court, in its final decree, found that the bill had been taken as confessed against the Mercantile Trust Com-

pany, and that, on the answer of said defendant railway company and the testimony taken, "it is ordered, adjudged, and decreed that the complainant have the relief prayed in and by his said bill"; and the cause was referred to a master to take and state an account of the indebtedness due those who may come in and prove their claims before the master, and that the master give notice to the creditors and holders of bonds, and that he report the same to the court, and the order in which the claims and bonds should share in the proceeds of the sale of the property. On the 6th of June, 1894, the petition of Charles S. Adams came on for hearing before the circuit court, and the prayer of the petition was denied and the petition dismissed. From this decree the intervenor prosecuted his appeal to this court.

John C. Cooper, for appellant.

H. Bisbee and C. D. Rinehart, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). The suit instituted by Broughton in the state court against the Jacksonville, Mayport & Pablo Railway & Navigation Company brought under the direct control of the court all the property of said railway company, to be administered for all entitled to share the fruits of the litigation. The possession and control of the railroad were absolutely necessary to the exercise of the jurisdiction of the court. The filing of the bill, and the service of process thereunder, was an equitable levy upon the property. *Miller v. Sherry*, 2 Wall. 237; *Railroad Co. v. Pettus*, 113 U. S. 116-124, 5 Sup. Ct. 387. Pending the proceedings in that court under the said bill the said railroad and property may properly be said to be in gremio legis. *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, 6 Biss. 197, Fed. Cas. No. 14,401; *Railroad Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. 155. The Mercantile Trust Company was made a party to the suit, and, so far as the record goes, is bound by the proceedings had therein. Upon the face of the record, the subsequent institution of the suit to foreclose, in the interest of local bondholders, was for the purpose of evading, and practically ousting, the state court. While state and national tribunals are independent and separate, neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees. *Amy v. Supervisors*, 11 Wall. 136; *Williams v. Benedict*, 8 How. 107-112. The appellee relies upon the decision of Mr. Justice Bradley in the case of *Wilmer v. Railway Co.*, 2 Woods, 409-427, Fed. Cas. No. 17,775, in which Mr. Justice Bradley says:

"The test, I think, is this: Not which action was first commenced, nor which cause of action had priority or superiority, but which court first acquired jurisdiction over the property. If the Fulton county court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court. The parties must either go to that court, and pray for the removal of its hand, or, having procured an adjudication of their rights in this court, must wait until the action of that court has been brought to a close, and judicial possession has ceased. Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property, and, until it is seized, no matter when the suit was commenced, the court does not have jurisdiction."

We have examined this case with care, and find that the question before Mr. Justice Bradley was whether the court could—and, if it could, whether it would—take property out of the possession of a receiver appointed by a state court; and in concluding his opinion he says:

"In differing from Judge Woods, we do so with much respect for his opinion. The question must be admitted to be one of some nicety, but we prefer that course which avoids collision with a state court, when it coincides with our own convictions as to the law."

The same case shows that, at a preliminary stage, Judge Woods (afterwards Mr. Justice Woods, of the supreme court), having before him the question of jurisdiction to appoint a receiver in a case where, after bill of foreclosure filed and injunction issued in the federal court, a receiver had been appointed in a state court for part of the property, reviewed the authorities, and said:

"Is actual seizure of the property necessary to the jurisdiction of the court? In my judgment, it is not. In this case I think the jurisdiction of the United States circuit court for the Northern district of Georgia first attached to the property, because the suit in that court was first commenced, and service of subpoena made, and because (1) one of the main objects of the suit was to obtain possession of the property, and such possession was necessary to the full relief prayed by the bill, and (2) because, by the service of the restraining order enjoining the defendant company from delivering possession of the trust property to any person except a receiver appointed by this court in this cause, the court acquired constructive possession, and from the moment of the service of the restraining order the property was in *gremio legis*. I think these positions are sustained by the authorities. I subjoin a reference to a number of cases, in all of which the subject under consideration is discussed, and in some of which the precise point is decided, and the views above expressed are sustained: *Smith v. McIner*, 9 Wheat. 532; *Wallace v. McConnell*, 13 Pet. 151; *Peck v. Jenness*, 7 How. 624; *Williams v. Benedict*, 8 How. 107; *Wiswell v. Sampson*, 14 How. 52; *Taylor v. Carryl*, 20 How. 583; *Green v. Creighton*, 23 How. 90; *Freeman v. Howe*, 24 How. 457; *Chittenden v. Brewster*, 2 Wall. 191; *Memphis v. Dean*, 8 Wall. 64; *Taylor v. Taintor*, 16 Wall. 370; *New Orleans v. Steamship Co.*, 20 Wall. 392, 393; *Atlas Bank v. Nahant Bank*, 23 Pick. 489; *Wadleigh v. Veazie*, 3 Sumn. 165, Fed. Cas. No. 17,031; *Ex parte Robinson*, 6 McLean, 355, Fed. Cas. No. 11,935; *Bell v. Trust Co.*, 1 Biss. 260, Fed. Cas. No. 1,260; *Bell v. Railroad Co.*, 2 Biss. 390, Fed. Cas. No. 1,407; *Parsons v. Lyman*, 5 Blatchf. 170, Fed. Cas. No. 10,780; *Stearns v. Stearns*, 16 Mass. 171; *Conover v. Mayor*, etc., 25 Barb. 513; *Clepper v. State*, 4 Tex. 242; *Thompson v. Hill*, 3 Yerg. 167; *Bank of Bellows Falls v. Rutland R. Co.*, 28 Vt. 478; *Merrill v. Lake*, 16 Ohio, 405; *Ex parte Bushnel*, 8 Ohio St. 601; *State v. Yarbrough*, 1 Hawks, 78; *Gould v. Hayes*, 19 Ala. 448; *High*, Rec. 38-41, and note. Especial attention is called to the cases of *Wiswell v. Sampson*, *Chittenden v. Brewster*, and *Bell v. Railroad Co.*, *supra*. An examination of the cases cited will show that actual seizure of property has not been considered necessary to the jurisdiction of the court in a case where the possession of the property is necessary to the relief sought. The commencement of the action and service of process, or, according to some of the cases, the simple commencement of the suit by the filing of the bill, is sufficient to give the court jurisdiction, to the exclusion of all other courts."

The views expressed by Judge Woods have been accepted and followed, in this circuit, at least, and we fully concur therein, as a correct exposition of the law, and one particularly applicable to the present case; while the decision of Mr. Justice Bradley, doubted by himself, is open to the objection that thereby jurisdiction is frequently made to depend upon a race between marshals and sher-

iffs, likely to result in unseemly controversies between the state and federal courts. Considering the present case, however, as one in which neither the appointment nor the ousting of a receiver of any court is involved, but as presenting a question of comity between state and federal courts, we are of opinion that the court below erred in not granting the application of the receiver of the state court for the possession of the property which is so clearly necessary for the further exercise of that court's jurisdiction, and to which possession we think it so clearly entitled. The decree appealed from is reversed, and the cause remanded to the court below, with directions to enter an order and decree in favor of the intervener, restoring to his possession, and to the possession of the state court, the property of the Jacksonville, Mayport & Pablo Railway & Navigation Company.

DILLON v. OREGON S. L. & U. N. RY. CO. et al.

(Circuit Court, D. Oregon. March 20, 1895.)

RAILROADS—RECEIVERS—APPOINTMENT—COMITY.

Where a circuit court of the United States has appointed receivers for a railroad which lies only partly within its district, another court, within whose district a portion of the road lies, will, on application, appoint the same receivers,—the portions of the road not being capable of separate management without injury to the road; the appointment of other receivers by the second court not being necessary to the preservation of the rights of lienholders, who object to the receivers appointed; and the grounds of objection not having been presented to the first court as reasons for its removal of the receivers appointed by it and the appointment of others in their stead.

Suit by John F. Dillon, trustee, against the Oregon Short Line & Utah Northern Railway Company and others, to foreclose a mortgage. The American Loan & Trust Company applies for removal of the receivers appointed in such suit.

Winslow S. Pierce, for plaintiff.

John M. Thurston, for receivers.

Moorfield Storey, Joseph N. Dolph, and W. F. Sanders, for petitioner American Loan & Trust Co.

Before GILBERT, Circuit Judge, and BELLINGER, District Judge.

GILBERT, Circuit Judge. An application is made by the American Loan & Trust Company to set aside the appointment of receivers made in the above-entitled cause. The same motion is made on behalf of said company in a suit between the same parties pending in the circuit court of the United States for the district of Idaho, and in the suits of Joseph Richardson, Trustee, v. The Oregon Short Line & Utah Northern Railway Company et al., pending, respectively, in the circuit court of the United States for the district of Idaho and in the circuit court of the United States for the district of Montana, all of which motions, for the convenience of the parties, are heard before the court at Portland.

The Oregon Short Line & Utah Northern Railway Company was formed by the consolidation of other corporations that had been organized and had built railroad lines, and had incumbered the same by mortgages, prior to the consolidation, as follows: The Oregon Short Line Railway Company was incorporated under the laws of the territory of Wyoming on the 14th day of April, 1881. By act of congress of date August 2, 1882, it was made a corporation in the territories of Utah, Idaho, and Wyoming, under the same conditions and limitations, and with the same rights and privileges, which were enjoyed by it under its original articles of incorporation. On the 1st day of November, 1881, it issued first mortgage bonds to the amount of \$14,931,000, and secured the same by a mortgage or deed of trust upon its line of road, which extended from Granger, in Wyoming, to Huntington, in the state of Oregon,—a distance of 541.81 miles,—of which mortgage John F. Dillon is the sole trustee. The Utah & Northern Railway Company was organized under the laws of the territory of Utah, and by an act of congress of June 20, 1878, was made a railway corporation in Utah, Idaho, and Montana. On the 1st day of July, 1878, it issued its bonds, of which \$4,995,000 are now outstanding, and secured the same by a first mortgage upon the whole of its railroad line, extending from Ogden, in the territory of Utah, to the town of Franklin, in Idaho,—a distance of 80 miles,—and from Ogden, northward through Idaho, to Garrison, in Montana, with a branch from Silver Bow to a point near Butte City, in Montana, 466.61 miles in length. On the 1st day of July, 1886, it executed to the American Loan & Trust Company a second indenture of mortgage upon its railway properties to secure bonds to the amount of \$1,831,000. The Utah Southern Railway Company, a corporation of Utah, owned 105 miles of railway extending from Salt Lake City to Juab, in Utah, subject to a mortgage of July 1, 1871, to secure \$424,000 in bonds. Upon the 1st day of July, 1879, the road was incumbered by a second mortgage by said corporation to secure bonds to the amount of \$1,526,000. The Utah Southern Railroad Extension Company, of Utah, owned 130 miles of railway, extending from Juab, in Utah, to Frisco, in the same state. On July 1, 1879, it mortgaged the same to secure bonds amounting, in aggregate, to \$1,950,000. The Idaho Central Railway Company, of Idaho, owned 18.94 miles of railroad, extending from Nampa to Boise City, in Idaho. On the 1st day of January, 1887, it mortgaged the same to the American Loan & Trust Company to secure mortgage bonds to the amount of \$130,000. On July 27, 1889, all of said railways above mentioned, together with 45 miles extending from Ogden to Salt Lake, formerly known as the Utah Central Railroad, and 61 miles of road extending from Lehigh Junction to Tintick, in Utah, with a branch from Arlington to Silver City, known as the Salt Lake & Western Railway, and about 40 miles extending from Salt Lake to Terminus, with a branch, formerly called the Utah & Nevada Railway, and about 6 miles from Syracuse Junction, westwardly, in Utah, called the Ogden & Syracuse Railway, were consolidated and united into one corporation, forming the said Oregon Short Line & Utah North-

ern Railway Company, and said company became entitled to all the property and franchises of the said railways so consolidated.

Immediately after the consolidation, and upon the 1st day of August, 1889, the Oregon Short Line & Utah Northern Railway Company mortgaged all of said railways so consolidated, consisting of 1,456 miles, in the states of Wyoming, Idaho, Montana, and Oregon, Utah, and Nevada, to the American Loan & Trust Company, to secure bonds amounting to \$10,895,000. Thereafter, and about the 6th day of December, 1889, an agreement in writing was entered into between the Union Pacific Railway Company and the Oregon Short Line & Utah Northern Railway Company, whereby it was agreed that the respective railways of the parties to said agreement should be operated as a continuous line, and, so far as practicable, without change of cars, and that no discrimination, as regards rates or otherwise, should be made against one another in favor of any other line of railway or transportation company, and that all traffic to be received by the Oregon Short Line & Utah Northern Railway Company, to be carried to or by way of any place on the line of the Union Pacific Railway Company, or any railway or lines worked or controlled by it, or worked as continuous lines by agreement with it, should, so far as said Oregon Short Line & Utah Northern Railway Company could lawfully determine the route of such traffic, be carried by way of said Union Pacific Company's railway; and that all traffic received by the said Union Pacific Railway Company, to be carried to or by way of any place or places on the line of said Oregon Short Line & Utah Northern should, so far as the Union Pacific Railway Company could lawfully determine the route, be carried by the said Oregon Short Line & Utah Northern. And it was further agreed that the rates of charges for all descriptions of traffic carried by the railroads of both parties to said agreement, and delivered by one to the other, should be fixed from time to time by the agreement of both of the parties; that the gross receipts therefrom should be apportioned between them according to the distance the same should have to be carried upon the railway or system of each of them. But it was agreed that if the share of the gross receipts received by the Oregon Short Line & Utah Northern upon such apportionment, together with its gross receipts from its local and other business, and from all of its other sources of income, should be insufficient to enable it to meet and pay its working expenses, taxes, repairs, etc., and also the interest on bonds outstanding against said road and the roads consolidated therein, then the gross receipts from all such traffic should be so apportioned that the Oregon Short Line & Utah Northern should receive sufficient to enable it to meet and pay its said expenses, taxes, repairs, and said interest. Under this agreement the Union Pacific Railway Company took possession of all the railway line of the Oregon Short Line & Utah Northern.

On the 9th day of October, 1893, Oliver Ames, 2d, and others, shareholders of the Union Pacific Railway Company, filed a bill in equity in the circuit court of the United States for the district of Nebraska against the Union Pacific Railway Company, the Oregon

Short Line & Utah Northern Railway Company, and 26 other corporations, in which suit, on the 16th of October, 1893, 8 other corporations were added as parties defendant. In the bill it was alleged that all of the railways mentioned therein were operated by the Union Pacific Railway Company as a unit, so that the same formed one railway and water system, known as the Union Pacific System; that the maintenance of every part of the system was essential to the profitable operation of the remainder; that during the first half of the year 1893 there had been a great falling-off in the revenues of the system, owing to financial depression, prevailing throughout the country, and that there was likely to be still further falling off of said revenues, and that the said company was not able to earn, upon its own railway or upon the said system, sufficient to pay its operating expenses and fixed charges, and that it could not pay its indebtedness, in the ordinary course of business, and that neither the said Union Pacific Railway Company nor any of the other railway companies composing the system would have sufficient funds to pay the interest of their respective mortgage bonds as the same would become due, and that upon default the mortgages securing the same would be subject to foreclosure, and the system would be dismembered, and that thereby ruinous sacrifice would result to every interest, unless the court should deal with the property as a single trust, and take it into custody for the protection of every interest; that the creditors would assert their remedies in different courts in different states and territories, which would prevent the railway company from performing their duty to the government and the public. In the bill it was prayed that the court would administer the entire system, and preserve the unity thereof, and protect the rights of the complainants and all persons interested therein. Upon the filing of this bill it was ordered by the court wherein the same was filed that S. H. H. Clark, Oliver W. Mink, and E. Ellery Anderson be appointed receivers of the said system. A month later two other receivers were added to their number. Similar bills in equity were filed by the same plaintiffs against the same defendants in each of the circuit courts of the states wherein the property of the said Union Pacific System was situated, and the same persons were appointed receivers of the property within the jurisdiction of said courts. On the 28th day of August, 1894, John F. Dillon, the sole trustee of the said mortgages executed by the Oregon Short Line Railway Company, filed in the circuit court of the United States for the district of Wyoming his bill of complaint for the foreclosure of the same, and thereupon, upon his application, the said court appointed the said receivers of the Union Pacific System receivers of all the railroad, appurtenances, and property of the Oregon Short Line & Utah Northern Railway Company embraced in the mortgage, and within the jurisdiction of the district of Wyoming. Upon the 1st day of September, 1894, upon the filing of a like bill by the said trustee in the circuit court of the United States for the district of Oregon, an order was made appointing the same persons receivers of the railroad, lands, property, and franchise of the Oregon Short Line & Utah Northern

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Railway Company, covered by said mortgage, within the district of Oregon. On the ——— day of August, 1894, Joseph Richardson, the sole trustee of said mortgage upon the property of the Utah & Northern Railway Company, began a suit in the circuit court of the United States for the district of Idaho against the Oregon Short Line & Utah Northern Railway Company et al., to foreclose the said mortgage; and upon the 31st day of August, 1894, an order was made therein that S. H. H. Clark and others, who were the receivers in the cause of Ames v. The Union Pacific Railway Company, be appointed receivers of so much of the railroad and property of the Oregon Short Line & Utah Northern Railway Company, embraced in said mortgage, as lay within the jurisdiction of said court for the district of Idaho. Upon the 6th day of September, 1894, said Richardson, trustee, filed in the circuit court of the United States for the district of Montana a bill for the foreclosure of all of said mortgaged premises which lay within the district of Montana, and thereupon an order was made therein appointing the same receivers as before. All of these orders appointing receivers of the property of the Oregon Short Line & Utah Northern Railway Company were made without contest, and without notice to the American Loan & Trust Company. But, when the applications for the orders were presented to the courts of the Ninth circuit, the American Loan & Trust Company, having learned that such applications were to be made, informally appeared to request that the appointment of receivers be delayed until it should have time to present its objection to the appointment of the receivers then in charge of the Union Pacific System. The delay was not granted, but the orders were made upon the express permission of the courts that the American Loan & Trust Company might thereafter move for the removal of said receivers and the appointment of others, with the same effect as if the appointments had not been made, and as if the matter were still pending upon the applications of the several trustees of said first mortgages for the appointment of receivers of the Oregon Short Line & Utah Northern Railway Company.

The motions which are now presented to the court, for the purpose of removing said receivers and substituting others, are based upon the general charge that, in the nature of things, it is impossible that the receivers of the Union Pacific Railway System can fairly and impartially administer their trust in such a way as to serve the best interests of the lienholders of the Oregon Short Line & Utah Northern Railway Company; and it is charged that at all times since entering into the traffic agreement of December 6, 1889, the earnings of the Union Pacific System have been sufficient, if applied according to the said agreement, to have carried out its provisions, and thereby to have paid all the expenses, taxes, and repairs of the Oregon Short Line & Utah Northern Railway Company, together with the interest upon its bonds, but that the said traffic agreement had been disregarded, and that the receivers had apportioned the gross receipts in such a manner as they have seen fit, and have allotted to the Oregon Short Line & Utah North-

ern Railway Company only such sum as they have deemed to be its share of the receipts, and have allotted to the Union Pacific Railway Company the remainder, whereby the former company has been unable to pay the interest due upon its consolidated bonds on the 1st of April, 1894.

It is urged that, if the Oregon Short Line & Utah Northern were operated under a management wholly independent of the Union Pacific System, it would be free to enter into traffic contracts with other and competing roads, and that thereby its earnings might be greater than under the present management; and it is insisted that the lienholders of the road have the right to demand that the property over which their liens extend be segregated from the system, since the traffic agreement has been broken, and that it be free to be operated in such a manner that advantage may be taken of its situation and surroundings to earn the greatest possible income for those who are interested therein, and this regardless of the effect that may thereby be produced upon the remainder of the system.

The disposition of these applications must depend upon the effect to be given to the fact that the Oregon Short Line & Utah Northern Railway Company was first taken into receivership by the circuit court of the United States for the district of Wyoming, upon the foreclosure of the Dillon mortgage. That court had unquestionably jurisdiction of the subject-matter and of the parties. It was the proper court for the institution of the suit. The corporation defendant was organized under the laws of Wyoming, and had there its principal place of business. The fact that but a small percentage of its railway lines is within that state is unimportant. The right of the court whose jurisdiction is first invoked over a corporation whose property lies within various districts is not to be measured by the proportionate extent of the property interest in that jurisdiction. There is no rule that the court within whose limits the greater portion of the property is shall be the court of primary jurisdiction. It is sufficient that the corporation had its home in Wyoming, and had a portion of its property there. The legal authority of a receiver extends no further than the territorial limits of the jurisdiction of the court whose officer he is. Within that limit, his right of possession will be respected by all other courts. Without that limit, no court is bound to recognize his authority. But, by a principle of comity, courts whose jurisdiction is exterior to that of the court which appointed the receiver will concede to the latter the right to reduce to his possession and control the property of his trust which may there be found. But this comity will not be extended to the detriment of local creditors of the person or corporation whose property is in receivership. By another rule of comity, equally well established, and universally recognized by the circuit courts of the United States, the action of the circuit court which first acquires jurisdiction of the parties and of the subject-matter of a suit, by the appointment of a receiver, will be respected by the circuit courts of the other districts in which the property of the insolvent is

situated. The rule is not a fanciful one, nor is it based alone upon courtesy, or upon the respect which is properly due from one court to another of co-ordinate power; but it is a rule of utility and convenience, and it rests upon principles of sound policy. Where a railroad extending through different districts is in the hands of the court, either for the purpose of preservation pending litigation, or for the purpose of sale under a foreclosure suit, it is usually necessary that it be treated as an entire system. It is therefore indispensable, in such a case, that the court in which proceedings are first had, and which takes into its possession, by a receiver, that portion of the property lying within its jurisdiction, should draw to itself jurisdiction to make all necessary orders concerning the management of the road pending the litigation, and that its action should, so far as possible, be followed by the other courts in which the property is found. A different rule would, in many instances, lead to conflict and to hopeless confusion, and would involve the disintegration and dismemberment of roads which ought to be managed as a single property. The result would be that such roads would be divided into as many distinct lines as there are courts having jurisdiction over them. Said the court in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. 620:

"In the early history of foreclosure proceedings of this nature, it became customary, not merely that foreclosure proceedings should be conducted in the one court, but that, to avoid all questions of title, ancillary proceedings should be conducted in the courts of other circuits; and to conserve the property pending the foreclosure, to guard it against local suits, and preserve it from dismemberment, the custom has also been for the receivers appointed in the court of primary administration to be also appointed in the courts of ancillary administration."

The same view has been expressed in numerous cases. *Jennings v. Railroad Co.*, 23 Fed. 569; *Young v. Railroad Co.*, 2 Woods, 618, Fed. Cas. No. 18,166; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 59 Fed. 518; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 278. There are two reported cases in which the rule of comity has been disregarded,—the cases of *Atkins v. Railway Co.*, 29 Fed. 162, and *Phinizz v. Railroad Co.*, 56 Fed. 273. In the first of these, the *Wabash, St. Louis & Pacific Railroad Company*, a consolidated corporation owning lines of railway in several states, had been placed in the hands of receivers by the circuit court of the United States for the Eastern district of Missouri. The receivers were ordered to operate the entire system under the orders of that court, and of other courts exercising ancillary jurisdiction. One of the latter was the circuit court for the Northern district of Illinois, in which the same receivers were appointed in ancillary proceedings. Thereafter, the plaintiff filed a bill in the Illinois court to foreclose two several mortgages made by certain of the consolidating corporations upon roads no part of which lay within the state of Missouri. Upon these foreclosure suits, application was made to the court of the Northern district of Illinois to set aside the order appointing the receivers who had been named by the court in Missouri. Upon such application,

Gresham, J., held that, while he had no authority to review the action of the court at St. Louis, he could not concede to that court paramount jurisdiction over property lying wholly with the state of Illinois, and none of which was within the jurisdiction of the Missouri court; and thereupon he appointed independent receivers of the roads so within his own jurisdiction. In commenting upon that decision, Mr. Justice Brewer, in *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 29 Fed. 621, said:

"The circuit court of the Seventh circuit district, disregarding the comity which has heretofore existed between the federal courts, has removed these receivers, and appointed a distinguished citizen of the state of Michigan as their successor for the lines within the jurisdiction of that court. I say in disregard of the comity which had existed between courts of different circuits, for, under the pretext of enforcing local liens, said orders are too transparent to deceive any one, and for two reasons: First, there will be no line extending through various states without the creation in those states of local liens by mortgage, judgment, or otherwise; and, secondly, a foreclosure of those local liens may proceed independent of any receivership."

In *Phinizy v. Railroad Co.*, Simonton, J., holding court in the circuit court of the United States for the district of South Carolina, set aside the appointment of a receiver that had been made in his court in pursuance of an order first made in the circuit court of the United States for the Southern district of Georgia; but he rested his decision upon the ground that it was shown that the Georgia court had appointed its receiver at the instance of another company, that controlled the stock of the defendant road, to further the interest of the dominant company's system, and not in the interest of the creditors, and, further, that that court had, in substance, since held that its action in the premises was unauthorized.

If the Oregon Short Line & Utah Northern Railway were susceptible of dismemberment without injury to either portion; if that portion of its line within the state of Wyoming were a separate branch, capable of a separate management; or if the action of this court were necessary to the preservation of the rights of the lienholders by whom the applications are made,—it might be urged that a case is presented which would justify the court, in the exercise of its discretion, to disregard the settled rule of comity. But no such exceptional state of facts exists. There is nothing presented in the record in these cases which makes the general rule inapplicable. The reasons which are urged for the removal of the receivers already appointed, and the appointment of others in their stead, have not been presented to the consideration of the circuit court for the district of Wyoming. That court has had no opportunity to pass upon them. Those reasons are as potent and convincing in that court as in this, and it must be assumed that all courts equally will mete out to the suitor the justice and the relief to which he is entitled. The precedents which establish the rule of comity are as binding as the precedents upon which other rules of law and of practice rest, and they are not the less controlling from the fact that the action of this court in dealing with the question now before it cannot be made the subject of review in an appellate court. Circumstances might

indeed, in certain cases, authorize the court, in the furtherance of justice, to depart from the rule, and to ignore the action of other courts; but what we decide in this case is that, in our judgment, such circumstances are not here presented. The motion will be denied, with leave to the applicant to renew the same after the matters therein involved shall have been submitted to the circuit court of the United States for the district of Wyoming.

BELLINGER, District Judge (concurring). The contention for the petition is that the court has jurisdiction as to all of the lines in question except that portion in Wyoming, and that it ought to exercise that jurisdiction, if convinced that the two trusts with which the single receivership is charged are incompatible; that comity should not refuse justice. But comity is justice. It avoids complications that may embarrass the title to the property in suit, and lessen its value, to the injury of creditors and owners. The object of any receivership is to preserve the property committed to it intact; and the cases requiring it are mainly cases where the danger to be guarded against is the danger that the property will be seized upon under process issued out of different courts, and dismembered, through the contests of rival interests. The interest of a fund in court requires its harmonious administration. Where the property extends through more than one jurisdiction, the courts of such different jurisdictions must act as one court in its administration; and to this end there must necessarily be a court of primary action,—a court of initial proceeding,—whose determination will ordinarily be followed by the other courts having jurisdiction. The court whose jurisdiction is first invoked becomes, by a rule of comity, the court of primary action in all subsequent proceedings. This rule of comity is not merely a matter of courtesy, as argued in this proceeding. It is a rule tacitly adopted by courts for their mutual convenience. It is a rule of procedure necessary to the due administration of justice in such cases as are under consideration. In view of the contrariety of judicial opinion,—of the disagreement of courts and the dissent of judges,—it cannot be said that comity between courts involves a refusal of jurisdiction, or a surrender of judicial independence. It is, in effect, a rule of jurisprudence necessary to a proper administration of a single property like that in suit, extending through different jurisdictions. The rule has its limitations. It does not require that a court of ancillary jurisdiction shall refuse those resident within its jurisdiction, and having claims upon the property, the relief to which they are entitled, nor that such court will be precluded, by the decisions of the court of primary jurisdiction, from making an independent inquiry, and granting relief, in a proper case, where a refusal to do so would involve a denial of justice. But these exceptions do not apply in the present case. So far as appears, this application can as well, as conveniently, and as effectively be made in the court of primary jurisdiction as here.

BAYLOR v. SCOTTISH-AMERICAN MORTG. CO. et al.
(Circuit Court of Appeals, Fifth Circuit. February 25, 1895.)

No. 344.

1. DEEDS—RECORD AS NOTICE—WHAT ENTITLED TO REGISTRATION.

A headright certificate for Texas lands was invalidly located in Nueces county, but was afterwards floated to a league of land in Taylor and Runnels counties. The owner of the certificate having died, one of his heirs made a conveyance describing the land in Nueces county, without referring to the certificate under which it was located. This deed having been filed in the general land office of the state, a certified copy thereof was obtained, to which was added a certificate of the commissioner of the land office showing that the land was located under the certificate above mentioned. This copy and certificate were then registered in Taylor and Runnels counties. *Held*, that under the Texas statute (Rev. St. art. 2253) there was no authority for recording such certificate, and hence that the record thereof did not operate as constructive notice that the deed in fact covered the lands upon which the final location of the certificate was made.

2. SAME—INNOCENT PURCHASERS—QUITCLAIM DEEDS.

A deed of Texas lands recited that the grantor had "granted, bargained, sold, and quitclaimed, and by these presents do sell, quitclaim, and transfer, and deliver, * * * all my right, title, and interest, * * * to hold, all and singular, said above-described land, together with, all and singular, the rights and appurtenances thereto or in any wise belonging, unto * * * his heirs and assigns, forever." *Held*, that this deed was not a quitclaim, but a conveyance of the land, and was sufficient to protect an innocent purchaser for value. *Garrett v. Christopher*, 12 S. W. 67, 74 Tex. 453, followed.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This was a bill by W. C. Baylor against the Scottish-American Mortgage Company, James B. Simpson, C. H. Huffman, William Brewer, and J. E. Elgin, to remove a cloud from the title of certain lands. The circuit court rendered a decree for complainant in respect to one-half the land, and for the defendants in respect to the other half. Complainant appealed.

The land in question, known as the "George W. Wheelock League," lies in Taylor and Runnels counties, state of Texas, and was located by virtue of floated certificate No. 55. The certificate was originally located upon certain land in Nueces county, but this location was shown by the evidence to be void, by reason of being in conflict with an older grant, and the certificate was therefore floated to the land described in the complaint, and located thereon by a subsequent survey and patent to the heirs of George W. Wheelock. The property having been community estate of Wheelock and wife, one-half became vested at his death in his widow, afterwards Mrs. Ann Walling, and the other half in his grandson and only heir, George W. Barton. Complainant claimed through mesne conveyances, under deeds from these two parties; the first deed being from Ann Walling to William E. Rogers, and the second from George W. Barton to T. D. Collins. Both of these deeds described the land in Nueces county, and the Walling deed stated that it was located by virtue of headright certificate No. 55, belonging to George W. Wheelock, but the Barton deed omitted any such state-

ment. These two deeds were filed in the land office at Austin, and became records of that office, but copies thereof, certified by the commissioner of the land office, were recorded in Taylor and Runnels counties. After the above deeds were so recorded, and after the patent had issued granting the land in Taylor and Runnels counties to the heirs of George W. Wheelock, Mrs. Ann Walling and George W. Barton executed two other deeds, each purporting to convey one-half these lands to one J. P. Greenwade. The defendants derive their title through the said Greenwade, claiming to be bona fide purchasers without notice of complainant's superior title. Although the deed from George W. Barton to T. D. Collins, of the land in Nueces county, failed to state that the land described was located under the Wheelock certificate, the certified copy of the deed, which was recorded in Taylor and Runnels counties, had attached to it the following certificate from the acting commissioner of the general land office of Texas:

I, L. E. E. Kellner, chf. clk. and act. comr. of gnl. land office for the state of Texas, hereby certify that the foregoing is a true and correct copy of the original transfer on file in this office, and that it forms a link in the chain of title to one-half interest in a league of land, being part of headright certificate No. 55, issued to E. L. R. Wheelock, admr. on the estate of George W. Wheelock, dece'd, by the board of land commissioners of Robertson county, on the first day of July, 1839, for one league of land; and I further certify that this copy is delivered to the interested party under Act 2d June, 1873, and is to have the same force and effect of the original. In testimony whereof I have hereunto set my hand, and caused to be affixed the official seal of this office, this ninth day of August, 1873.

[Seal.]

L. E. E. Kellner,
Chf. Clk. and Act. Com'r.

In the defendant's chain of title was the following deed from J. P. Greenwade to George W. Barton:

The State of Texas, County of Bosque.

Know all men by these presents, that I, J. Peter Greenwade, of said county and state, for and in consideration of the sum of two hundred and fifty dollars to me in hand paid by Geo. W. Barton, of said county and state, the receipt of which is hereby fully acknowledged, have granted, bargained, sold, and quitclaimed, and by these presents do sell, quitclaim, and transfer, and deliver, to said Geo. W. Barton, all my right, title, and interest in and to the Geo. W. Wheelock league survey of land, located in Taylor Co., Texas, which was patented to the heirs of said Geo. W. Wheelock on July 28th, 1874, by Pat. No. 286, vol. 20, and abs. No. 423, to have and to hold, all and singular, said above-described tract of land, together with, all and singular, the rights and appurtenances thereto or in any wise belonging, unto the said Geo. W. Barton, his heirs and assigns, forever. Witness my hand this 15th day of Sept., 1884.

J. P. Greenwade.

The following opinion was filed in the court below by Rector, District Judge:

In this case complainant shows a clear title to the Geo. W. Wheelock league of land, in Taylor and Runnels county, Texas. The only questions are: (1) Did the Scottish-American Mortgage Company have constructive notice of complainant's title at the time it (said company) loaned the money on said land? and (2) was the deed from J. P. Greenwade to Geo. W. Barton, dated September 15, 1884, a quitclaim deed, or a conveyance of the land such as would protect a bona fide innocent purchaser?

As to the first question, it is admitted by defendants that they did have constructive notice that the deed from Mrs. Ann Walling to W. E. Rogers

conveyed one-half of the Geo. W. Wheelock league certificate, and to such half they abandon all claim. They, however, deny that they were affected with constructive notice of the deed from George W. Barton to J. D. Collins, first filed in the land office at Austin, and a certified copy thereof from the land office recorded in Taylor county, where said certificate was finally located and patented. I am of the opinion that article 2253, Rev. St. Tex., did not authorize the recording of the certificate of the commissioner of the land office, which is relied on in this case to give notice to subsequent purchasers that the conveyance from Barton to Collins really included one-half of certificate No. 55, by virtue of which the land in controversy was located in Taylor and Runnels counties.

The second question turns on whether the deed from J. P. Greenwade to George W. Barton, dated the 15th of September, 1884, is a quitclaim deed, or a conveyance of the land. Following the case of *Garrett v. Christopher*, 74 Tex. 453, 12 S. W. 67, we hold that said deed was not a quitclaim, but a conveyance of the land, and that it protected the defendants, as innocent purchasers for value. We find for complainant one-half the land, and that he recover all costs of defendants, and that defendants recover the other half of the land.

Eugene Williams, for appellant.

A. T. Watts, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. The record showing no reversible error, the decree appealed from is affirmed.

LAREDO IMP. CO. et al. v. STEVENSON.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1895.)

No. 492.

1. CORPORATIONS—POWER TO INCREASE STOCK—TEXAS STATUTE.

A statute of Texas, passed in 1871, provided that any corporation might increase its capital stock, to any amount not exceeding double the amount of its authorized capital, by a vote of the stockholders. In 1874 amendments were incorporated with the act providing that any private corporation might amend or change its charter by filing such amendments or changes, authenticated as an original charter, and also providing that no amendments or changes violative of the constitution or laws of the state, or of any of the provisions of the act, should be of any force or effect. *Held*, following the decision of the supreme court of Texas (*Kampmann v. Tarver*, 29 S. W. 768), that the limitation upon the power of corporations to increase their stock, imposed by the original act, was not removed by the amendments, and that corporations formed under the amended act have no power, by changing their articles of incorporation, to increase their capital beyond double its original amount.

2. SAME—ESTOPPEL.

Where a corporation is absolutely without power to issue stock, or to increase its stock above a certain limit, no act or consent of a stockholder who receives stock issued without authority can estop him to deny its validity, or his liability to pay for it.

3. SAME—DECREE UPON SERVICE OUTSIDE JURISDICTION.

A Texas corporation increased its stock beyond the limit permitted by law. A receiver of the corporation was appointed, and an order was served, outside the state, on a subscriber to the stock, to show cause why the receiver should not be directed to sue for unpaid subscriptions. A decree was entered directing such suits to be brought, but containing a

proviso that nothing therein contained should be construed as estopping any person from denying his liability as a stockholder. *Held*, that the subscriber was not estopped by this decree to deny his liability.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

This was an action by the Laredo Improvement Company, to the use of E. R. Tarver, receiver, and E. R. Tarver, receiver of the Laredo Improvement Company, against William H. Stevenson, to recover the amount of unpaid subscriptions to the stock of the corporation. The circuit court directed a verdict and judgment for the defendant. Plaintiff brings error.

E. R. Tarver, the plaintiff in error, as receiver of the Laredo Improvement Company, an insolvent corporation, brought this action in the court below against William H. Stevenson, the defendant in error, to recover \$40,050 for unpaid subscriptions to stock of the insolvent corporation. At the close of the trial before a jury, the court below instructed them to return a verdict in favor of the defendant, and it is to reverse the judgment rendered upon this verdict that this writ of error was sued out. The facts disclosed at the trial were these: On August 15, 1888, certain persons became incorporated under the general laws of the state of Texas as the Laredo Improvement Company, with a capital stock of \$100,000. On March 26, 1889, the Laredo Improvement Company amended its articles of incorporation, and, by such amendments, ostensibly increased its capital stock to \$1,200,000. After more than \$600,000 of this stock, at its par value, had been subscribed and issued, the defendant Stevenson subscribed for \$44,500 of said stock, at its par value. The defendant was elected a director of the company August 24, 1889, and on May 20, 1890, he voted the shares of stock for which he subscribed. The action was brought to recover the unpaid subscriptions for this stock. The corporation became insolvent January 1, 1891; and in proceedings in the district court of Webb county, Tex., prosecuted by a creditor of the corporation, a receiver was duly appointed, and upon proper notice an order or decree was made adjudging that all the unpaid subscriptions were required to pay the debts of the corporation, and directing the receiver to collect them of the stockholders by suit or otherwise. In the proceedings in the district court of Webb county an order to show cause why the amount of his liability as a stockholder should not be fixed, and why the receiver of the corporation should not be directed to institute suit thereon, was issued, and was personally served upon the defendant at the city of St. Louis, in the state of Missouri, before the order was made adjudging the amount of liability upon this stock, and directing suit to be brought for the enforcement of this liability.

In 1871 the legislature of the state of Texas passed a general act relating to private corporations, which contained the following provision, which is now article 576, c. 3, tit. 20, 1 Sayles' Civ. St.: "Any corporation may increase its capital stock to any amount not exceeding double the amount of its authorized capital, by a vote of the stockholders, in conformity with the by-laws thereof." Laws Tex. 1871, p. 66. In 1874 the legislature of Texas reenacted this act, with some amendments. The following provisions of articles 571 and 573 of the Revised Statutes of Texas were incorporated as amendments to section 10 of the original act: "Art. 571. Any private corporation heretofore organized or incorporated, or which may hereafter be organized or incorporated, for any of the purposes mentioned in this chapter, may amend or change its charter or act of incorporation by filing, authenticated in the manner required by this chapter as to an original charter of incorporation, such amendments or changes with the secretary of state." "Art. 573. No amendments or changes violative of the constitution or laws of this state or any of the provisions of this title shall be of any force or effect." Laws Tex. 1874, p. 122; Sayles' Civ. St. tit. 20, c. 2.

The court below instructed the jury that the stock alleged to be owned by the defendant was issued by the corporation without authority to issue it, under the laws of the state of Texas, and that for that reason there could be no recovery in the action.

Edward C. Kehr (Eugene C. Tittman and George E. Mann, on the brief), for plaintiff in error.

Lyne S. Metcalfe, Jr., and Chester H. Krum, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Counsel for plaintiff in error argue that the ruling of the court below was erroneous on three grounds, viz.: (1) Because the limitation of their power to increase their capital stock imposed upon corporations by article 576, supra, was removed by the provisions of article 573, supra, which allows corporations to amend their articles without restriction; (2) because the defendant is estopped by voting his stock, and by the representations of the officers of the company that the capital had been increased to \$1,200,000, from now asserting, against creditors of the corporation, that his stock was not legally issued; and (3) because his ownership of the stock, and liability thereon, were adjudicated by the district court of Webb county, Tex., after the service of the order to show cause upon him in Missouri, and he is bound by that judgment.

Corporations created under statutory authority are the mere creatures of the statute. Their powers are measured by the statute under which they have their existence. Beyond the limits of the powers there granted, and those fairly incidental thereto, they can neither act nor agree to act. Corporations thus created have no implied power to change the amount of capital prescribed in their charters, and all attempts to do so, not expressly authorized by the statutes under which they exist, are void. *Scovill v. Thayer*, 105 U. S. 143, 148; *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599; *Railroad Co. v. Schuyler*, 34 N. Y. 30; *Railway Co. v. Allerton*, 18 Wall. 233; *Stace and Worth's Case*, 4 Ch. App. 682, note; *Omaha Bridge Cases*, 10 U. S. App. 98, 174, 2 C. C. A. 174, 51 Fed. 309.

This brings us to the consideration of the question whether or not the limitation of the power to increase their stock imposed upon corporations by article 576 was removed by the provisions of article 573, which allows them to amend their articles generally. We are, however, spared the examination of this question. Its determination rests entirely upon the construction of the statutes of Texas, and since the trial of this case the supreme court of that state has decided it. In *Kampmann v. Tarver* (Tex. Sup.) 29 S. W. 768,—a case involving the validity of the increase of capital stock made by this very corporation,—the supreme court of Texas held, in an opinion delivered February 7, 1895, that the limitation imposed by article 576 was still in force, that no corporation created under the amended act of 1874 could lawfully increase its capital stock beyond double its original amount, and that all stock issued in excess of that limit was void. This decision concludes the discussion of this question. The national courts uniformly follow

the construction of the constitution and statutes of a state given by its highest judicial tribunal, in all cases that involve no question of general or commercial law, and no question of right under the constitution and laws of the nation. *Dempsey v. Township of Oswego*, 4 U. S. App. 416, 435, 2 C. C. A. 110, 51 Fed. 97; *Rugan v. Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. 415, 420; *Travelers' Ins. Co. v. Township of Oswego*, 7 C. C. A. 669, 674, 59 Fed. 58; *Madden v. Lancaster Co.*, 12 C. C. A. 566, 65 Fed. 188, 192; *Clairborne Co. v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489; *Bolles v. Brimfield*, 120 U. S. 759, 763, 7 Sup. Ct. 736; *Detroit v. Osborne*, 135 U. S. 492, 499, 10 Sup. Ct. 1012. Some of the reasons for this rule are stated in *Madden v. Lancaster Co.*, 12 C. C. A. 566, 65 Fed. 193, and it is unnecessary to repeat them here. Our conclusion is that this corporation had no power to increase its capital stock to more than double its original amount, and that all stock issued in excess of that amount, including that issued to the defendant *Stevenson*, was absolutely void.

Is the defendant estopped by the fact that he once voted his stock, and that the officers of the corporation represented that its capital had been increased to \$1,200,000, from asserting, against the creditors of the corporation, that the stock issued to him was void? This question must be answered in the negative. Where a corporation has power to issue stock or to increase its capital stock, and this power is defectively or informally exercised, the acts and acquiescence of the stockholder may estop him from denying the validity of the stock or his liability therefor. *Upton v. Tribilcock*, 91 U. S. 45; *Chubb v. Upton*, 95 U. S. 665; *Pullman v. Upton*, 96 U. S. 328; *Handley v. Stutz*, 139 U. S. 417, 425, 11 Sup. Ct. 530; *Veeder v. Mudgett*, 95 N. Y. 295, 310. But where the corporation is absolutely without power to issue the stock, or to increase the capital stock above a certain limit, no act or consent of the stockholder who receives stock issued without authority can estop him from denying the validity of the stock, or his liability therefor. The holder of such stock is under no obligation to pay for it, because he has received no consideration for such an obligation. The stock issued to him is absolutely void. He is not estopped to deny its validity, as against a creditor of the corporation, for the foundation of estoppel is deceit, and the creditor cannot be deceived as to the power of a corporation to issue such stock. He is bound to examine and know the law which limits the powers of the corporation with which he deals, and, whether he examines it or not, he is charged by the law with the knowledge of it. *Scovill v. Thayer*, 105 U. S. 143, 149; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63; *Reed v. Machine Co.*, 141 Mass. 454, 5 N. E. 852; *Lathrop v. Kneeland*, 46 Barb. 432; *Merrill v. Gamble*, 46 Iowa, 615; *Merrill v. Reaver*, 50 Iowa, 404; *Clark v. Turner*, 73 Ga. 1; *Lincoln v. Express Co. (La.)* 12 South. 937.

Nor is the defendant estopped to deny his liability to pay for this void stock because, in proceedings against the insolvent corporation in the district court of Webb county, Tex., that court adjudged that it was necessary to collect all the unpaid subscriptions to this

stock, in order to pay the debts of the corporation, and directed the receiver to proceed, by suit or otherwise, to accomplish this end, after an order to show cause why such a judgment should not be rendered had been served on the defendant in Missouri. There are two sufficient reasons why no such estoppel arises in this case. One is that no process, summons, or notice was served on the defendant in the state of Texas, and his personal liability could not be established without such service. In *Pennoyer v. Neff*, 95 U. S. 714, 727, Mr. Justice Field, speaking of a defendant, declared, as the opinion of the supreme court, that "process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability." The other reason is that the district court of Webb county expressly adjudged, in the decree it rendered, that this defendant should not be so estopped. That decree contains the following provision: "Nothing herein shall be construed as stopping any person named herein from denying liability as a stockholder." The judgment below must be affirmed, with costs, and it is so ordered.

DUEBER WATCH-CASE MANUF'G CO. v. E. HOWARD WATCH &
CLOCK CO. et al.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE—ANTI-TRUST LAW OF 1892.

An action was brought in the United States circuit court for the Southern district of New York by a manufacturing company against numerous competitors, in various states, alleging the formation of a combination, and an attempt to create a monopoly, "in violation of the statutes of this state and the United States," whereby plaintiff's business was injured. The formation of the combination was laid on and prior to November 16, 1887, but it was alleged that after the passage of the act of congress of July 2, 1890, defendants ratified, renewed, and confirmed their previous contracts, combinations, etc. Judgment was demanded for treble damages "under and by virtue of the statute." Plaintiff was not a resident of the district where the action was brought, and the case was heard upon the demurrer of a defendant who was also a nonresident, but was "found" within the district; thus making a case in which jurisdiction is expressly conferred by section 7 of the said act of July 2, 1890. The demurrer was sustained, and in all the assignments of error it was contended that the facts charged in the complaint made out a case under that act. *Held*, that the action must be deemed to be founded upon the said act of July 2, 1890.

2. SAME.

In an action brought by a manufacturer of watch cases against numerous other manufacturers thereof, residing in various states, to recover treble damages under the act of congress of July 2, 1890 (26 Stat. 209), prohibiting unlawful restraints and monopolies of interstate commerce, the complaint alleged that the plaintiff operated an extensive factory, first in Kentucky and afterwards in Ohio; that previous to November 16, 1887, it sold all its goods to a great number of dealers "throughout the United States and Canada"; that prior to that date defendants had agreed with each other to maintain arbitrary and fixed prices for their watch cases; that, for the purpose of compelling plaintiff to join with them therein, defendants on said date mutually agreed that they would not thereafter sell any goods to persons who bought or sold goods manufactured by plaintiff; that they caused notice thereof to be served upon the many dealers

in such goods throughout the United States and Canada, who had formerly dealt in plaintiff's goods, whereupon many of such dealers withdrew their patronage from plaintiff; that after the passage of the act of July 2, 1890, defendants ratified, renewed, and confirmed their previous agreements, and served notice of such ratification upon all said dealers in plaintiff's goods, whereby said dealers were compelled to refuse to purchase plaintiff's watch cases. *Held*, that the complaint failed to state a cause of action under the statute; Lacombe, Circuit Judge, holding that no monopolizing or combination to monopolize interstate commerce, contrary to the second section of the act, was shown, for the reason that the allegations did not preclude the inference that each defendant may have sold his entire product in the state where it was manufactured; and that the contracts did not produce an unlawful restraint of trade, under the first section, because the combination and agreement to fix arbitrary prices did not appear to include all manufacturers of watch cases, but was only a partial restraint in respect to an article not of prime necessity, and therefore came within the recognized limits of lawful contracts; and that the further agreement not to sell to customers of plaintiff was a lawful means of enlarging and protecting the business of the defendants. Shipman, Circuit Judge, concurring on the more technical ground that the acts of the defendants, whether viewed as an attempt to create a monopoly or as a contract in restraint of trade, were not shown to concern interstate commerce, because there were no allegations showing the residence of any dealers who withdrew their patronage from complainant, and it therefore did not directly appear that any of them resided outside of the state where plaintiff's goods were manufactured. Wallace, Circuit Judge, dissenting on the ground that the allegations were sufficient to show that the attempts to monopolize and restrain did operate upon interstate commerce; and that, while the contracts might not be unlawful in themselves, yet the purpose for which they were alleged to be made, namely, to compel plaintiff to join in the agreement for fixing arbitrary prices, and to injure and destroy its business if it refused to do so, was oppressive and unjust, and rendered the acts of defendants unlawful under both sections of the statute.

This was an action by the Dueber Watch-Case Manufacturing Company against the E. Howard Watch & Clock Company and numerous other individuals and corporations, to recover damages alleged to have been caused to plaintiff's business by the alleged unlawful acts and combinations of defendants. The case was first heard in the circuit court upon the demurrer of the E. Howard Watch & Clock Company to the first amended complaint, and the demurrer was sustained, the opinion of the circuit court therein being reported in 55 Fed. 851. A demurrer was afterwards sustained to the second amended complaint, but no opinion was written, and plaintiff now brings error to review this latter judgment.

Robert Sewell, for plaintiff in error.

Edward B. Hill and Elihu Root, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The complainant corporation is a citizen of Ohio, the demurring defendant corporation a citizen of Massachusetts, engaged in the business of manufacturing and selling watch movements, and having a place of business in the city of New York, state of New York. Of the nineteen other defendants, ten are individuals whose citizenship is not set forth in the complaint. It is averred that they are engaged in business, two of them in New York City under one firm name, two others in

Philadelphia and New York City under another firm name, three others in the city of New York under another firm name, and three others in Cincinnati under still another firm name. The nine remaining defendants are corporations, two of them citizens of Massachusetts, two citizens of New York, two citizens of Connecticut, two citizens of Illinois, and one a citizen of Pennsylvania.

The complainant avers that plaintiff is a corporation duly created and existing under the laws of Ohio, and engaged in the business of manufacturing gold and silver watch cases. That at the times mentioned in the complaint it owned and operated an extensive factory at Newport, Ky., and subsequently at Canton, Ohio; that it maintained the same at great expense, and had the capacity to manufacture and offer for sale in the open market 25,000 watch cases per month. In the third paragraph it is averred "that prior to November 16, 1887, plaintiff had a ready market throughout the United States and Canada for all the goods it could manufacture, and in fact sold all of said goods to a great number of dealers therein throughout said territory, and thereby fully earned and realized to itself a substantial legitimate profit of at least \$75,000 per annum." Next follow averments as to the incorporation and partnership of the several defendants, who, it is stated, are respectively engaged in the business of manufacturing or selling watches, watch cases, or watch movements. In the eighteenth paragraph it is averred that on or about November 16, 1887, the defendants, and others to plaintiff unknown, at and in the city of New York, mutually agreed together each for himself with all the others that "they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever who thereafter should buy or sell any goods manufactured by this plaintiff." It is further averred that thereafter defendants caused notice of this agreement or compact to be given to the many dealers in watches, watch cases, and watch movements throughout the United States and Canada; and gave said notices to "many of the then and theretofore purchasers and dealers in plaintiff's goods manufactured as aforesaid"; whereupon a large number of such purchasers and dealers withdrew their patronage, and ceased thereupon entirely to purchase and deal in any wise in plaintiff's goods. The complaint further alleges that after said November 16, 1887, defendants refused to sell their goods to purchasers of and dealers in plaintiff's goods who had offered to buy defendants' goods, stating as the reason for their refusal that said dealers also bought and sold and dealt in plaintiff's watches, notifying such purchasers and dealers that if they would promise not to deal in plaintiff's goods, then, and so long as they kept such promise, they might purchase the goods of the defendants or either of them; otherwise not. In the twenty-third paragraph it is alleged that prior to November 16, 1887, the defendants had agreed among themselves, "and which said agreement has been in operation and effect between them ever since, that they would agree upon and agree to maintain an arbitrary fixed price to the public for all the goods manufactured by them, and in pursuance of said agreement the said defendants had agreed

upon an arbitrary price, and fixed the same for all the goods manufactured by them." The agreement of November 16, 1887, is alleged to be "in addition to and furtherance of said prior agreement, and made and entered into for the sole purpose of compelling this plaintiff to join with them in said first-named agreement." All these acts of defendants are alleged to have been done "for the purpose of establishing a monopoly in the supply of watches to the public, contrary to the policy of the law, and in violation of the statutes of this state and the United States, and to cut off this plaintiff from any participation in such business unless it joined in said illegal and vicious conspiracy, and the acts of defendants thereunder, in furtherance thereof, as alleged, and to crush competition, and enable the defendants to maintain the prices fixed as they pleased by them as aforesaid for their commodities with regard only to their private emolument and profit, contrary to the benefit of the public; the said defendants, by the said combination, conspiracy, and agreements and acts thereunder, maliciously intending to injure this plaintiff, and drive it out of business, and prevent it from selling its watch cases," etc. It is further alleged that "by the extended influence and power acquired by the combination over the trade" defendants forced and prevented persons from dealing with the plaintiff, or purchasing its goods, under the threat of a refusal themselves to deal with such purchasers; that said threats were effectual, and did prevent a great number of persons who otherwise would have purchased large quantities of the goods of the plaintiff from purchasing the same, and did effect in fact against the plaintiff a complete boycott and ostracism from the trade, and prevented the lawful and ordinary competition of business which plaintiff had a right to enjoy. The concluding paragraph of the complaint alleges that after the passage by congress of the act of July 2, 1890, "all the former purchasers and dealers in plaintiff's watch cases and other dealers in watch cases were, as plaintiff is informed and believes, ready and willing to buy large quantities of said plaintiff's goods, and this plaintiff would have regained all the business and the profits thereof whereof it had been deprived by the acts aforesaid of defendants; but that said defendants, after the passage of the said act of congress, ratified, confirmed, renewed, and continued the contracts, agreements, and combinations hereinbefore alleged, and in like manner, and with the same intention as hereinbefore alleged, served notices of their ratification, confirmation, renewal, and continuance of said agreements and combinations upon all said dealers in plaintiff's watch cases, whereby said dealers have continued to this day, forced by said renewed threats of defendants, and compelled thereby, and not otherwise, to refuse to purchase plaintiff's watch cases, or to deal anywise therein, whereby the said defendants illegally and maliciously damaged the plaintiff in the sum of \$150,000." Judgment is demanded, not for the \$150,000, but, "under and by virtue of the statute of the United States hereinbefore referred to, for three times the amount of damages so sustained by it in the premises, to wit, for the sum of \$450,000."

The federal statute of July 2, 1890 (26 Stat. 209), declared upon in the complaint is entitled "An act to protect trade and commerce against unlawful restraints and monopolies." The relevant parts of this statute are as follows:

"Section 1. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal." [Then follow provisions declaring the act a misdemeanor, and providing for punishment.]

"Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations shall be guilty of a misdemeanor." [Then follow provisions as to punishment therefor.]

"Sec. 7. Any person who shall be injured in his business by any other person or corporation by reason of anything forbidden or declared unlawful in this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

This action is manifestly one under the act of July 2, 1890. It is brought in a district where neither the plaintiff nor the demurring defendant resides, but where the demurring defendant is found. In the face of a complaint so framed as to present a cause of action under the statute, a defendant, if "found" here, could not object to the jurisdiction. It is expressly given by the seventh section. It would be manifestly unfair to permit a plaintiff to bring a defendant into this court on a complaint declaring upon the statute, and thereafter, when such defendant has failed to question its jurisdiction under the statute, and has appeared generally in the case, to transform the cause of action into one at common law, and insist that defendant has waived any objection to the jurisdiction. Moreover, although the complaint contains allegations as to combinations and threats long prior to the passage of the act of 1890, the averment of pecuniary damage to the plaintiff, which is specified in the twenty-seventh or concluding paragraph, is averred to have been sustained in consequence of the "renewed threats" of defendants (that is, those renewed after the passage of the act), which compelled dealers to refuse to purchase plaintiff's watch cases or to deal in any wise therein. Moreover, judgment is demanded, not for plaintiff's actual damages, but for treble damages, "under and by virtue of the statute." The counsel for plaintiff in error asserts in his filed brief that "the action is founded solely upon the act of congress passed July 2, 1890, the [seventh] section whereof expressly provides that the circuit court of the United States shall have exclusive jurisdiction of such action." There are 23 separate assignments of error, in each and all of which it is contended that the facts charged in the complaint make out a case under the act of 1890. Therefore, unless the complaint sets forth a cause of action under the act of 1890, the demurrer should be sustained.

The only acts of defendants as to which plaintiff can in this action contend that they are "forbidden or declared to be unlawful by this act" are those done after its passage. They are set forth in the twenty-seventh paragraph, and are as follows: (1) Defend-

ants "ratified, confirmed, renewed, and continued" an agreement between themselves, that they would agree upon and agree to maintain an arbitrary fixed price to the public for all the goods manufactured by them. (2) They "ratified, confirmed, renewed, and continued" an arbitrary price, and fixed the same for all goods manufactured by them. (3) They "ratified, confirmed, renewed, and continued" an agreement that they would not thereafter sell any goods manufactured by them to any person, firm, association, or corporation whatsoever who thereafter should buy or sell any goods manufactured by the plaintiff. (4) They served notices of such ratification, confirmation, renewal, and continuance of these three agreements upon all those persons who were former dealers in plaintiff's watch cases. The remaining averments of the twenty-seventh paragraph refer not to defendants' acts, but to the consequences of those acts; the principal consequence being that the former purchasers and dealers in plaintiff's watch cases and other dealers in watch cases were compelled to refuse to purchase plaintiff's goods.

The question to be decided is whether these acts are within either the prohibition of the first section of the statute of 1890 as a contract or combination in "restraint of trade," or within the prohibition of the second section as a "monopolizing" or as an "attempt to monopolize." Whatever differences of opinion there may be as to the meaning of these words when used in this statute, there is and can be no dispute as to one qualification expressed in the act,—the trade or commerce restrained or monopolized or attempted to be monopolized must be interstate or international. The statute expressly so says, and, whatever its phraseology, it must be so construed if it is to stand, since it is only such trade and commerce that congress has authority to regulate. No monopolizing or attempt or combination or conspiracy to monopolize any part of such trade or commerce is set forth in the complaint. The several manufacturers defendant are charged with an attempt to secure to each of them a sale of his or its own products to the exclusion of those of the plaintiff, but there is nothing to show that each defendant does not sell his or its entire product in the very state where it is manufactured. The sale within a state of articles manufactured in the same state is no part of interstate trade or commerce. *U. S. v. E. C. Knight Co.* (Jan. 21, 1895) 15 Sup. Ct. 249. The circumstance that, after manufactured products are thus sold within the state, they may be again sold for introduction into another state, and thus become a subject of interstate commerce, does not change the situation, for it is only when a commodity has begun to move as an article of trade from one state to another that commerce in that commodity between states has commenced. *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475. The complaint, therefore, fails to charge an offense against section 2 of the act of 1890.

The complaint alleges that the acts of defendants subsequent to July 2, 1890, have forced and compelled persons who theretofore dealt in plaintiff's goods to refuse to purchase the same, and avers that prior to November 16, 1887, plaintiff sold its goods to a

great number of dealers throughout the United States and Canada, plaintiff manufacturing such goods first in Kentucky, and afterwards in Ohio. And plaintiff's counsel contends that this sufficiently charges such a restraint of interstate and international trade as is obnoxious to the first section of the statute. The phrase used in the act of 1890, viz. "restraint of trade," is no new one. It had theretofore been used by courts applying the doctrines of the common law in determining the validity of contracts. It is to be presumed that the lawmakers, when they chose this phrase, intended that it should have, when used in the statute, no other or different meaning from that which had always been given to it in judicial decisions and in the common understanding. The title indicates that the phrase is so used, for the act is described as one "to protect trade and commerce against unlawful restraints and monopolies"; and, though the title to an act cannot control its words, it may furnish some aid in showing what was in the mind of the legislator. *U. S. v. Palmer*, 3 Wheat. 610. The "restraint of trade" which is obnoxious to the provisions of the first section must be of such kind as was, before the passage of the act, recognized as unlawful. In *re Greene*, 52 Fed. 104; *U. S. v. Trans-Missouri Freight Ass'n*, 58 Fed. 58, 7 C. C. A. 15. It may be assumed that the total amount of any given commodity which will be purchased by a community is limited, and when several sellers of such commodity enter into a combination in the form of a partnership, and by ingenious advertising, or by the devices of business competition, or by the offer of favorable terms to buyers, enlarge their own trade in such commodity, they restrain to some extent the trade of one or more of their competitors therein. But no one, not even the plaintiff in error, contends that the statute forbids any such acts, although, if the words be taken with absolute literalness, the phrase "restraint of trade" is broad enough to cover them. A most elaborate discussion of the meaning of this phrase "restraint of trade," with a careful review of all the leading authorities bearing upon the question, is found in the opinion of the United States circuit court of appeals for the Eighth circuit in *U. S. v. Trans-Missouri Freight Ass'n*, 58 Fed. 58, 7 C. C. A. 15. The conclusion reached by that court—and on that branch of the case there was no dissent—is that where it is a question as to private parties engaged in private pursuits, and not dealing in staple commodities of prime necessity, "it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade." And that "contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon the trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some extent to check competition." A like statement of the law is found in *Navigation Co. v. Winsor*, 20 Wall. 64, 66, where the supreme court holds that "an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it.

In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made."

It remains only to inquire whether the contract or combination set out in the complaint is in restraint of interstate or international trade in the sense in which the phrase "restraint of trade" is used in the act of 1890. The first alleged unlawful action of defendants charged upon them subsequent to the passage of the act is a renewal and confirmation of an agreement among themselves to "maintain an arbitrary fixed price to the public for all the goods manufactured by them," and a carrying out of such agreement by thus fixing and maintaining a price. The goods in question are not articles of prime necessity, as were the flour, coal, and other staple commodities referred to in many of the cases cited upon the argument; nor were the manufacturing defendants engaged in any public or quasi public business, as were the railroads or the gaslighting companies referred to in other cases. Each one of the defendants had an undoubted right to determine for himself the price at which he would sell the goods he made, and he certainly does not lose that right by deciding to sell them at the same price at which a dozen or so of his competitors sell the goods which they make. Collectively the defendants owe no duty to any one of their competitors to regulate the price they fix for their goods so as not to interfere with the price he fixes for his own. And it is difficult to see how the public is injuriously affected by any such agreement between the combining manufacturers. If the price so fixed is the normal and usual one theretofore prevailing, certainly the public cannot complain; still less if the price be reduced. If a combination of the capital and business abilities and factory appliances of many different manufacturing establishments enables them to produce an equally good output at a reduced cost, so that they can sell such output cheaper than any single manufacturer could, surely the public does not suffer. If, on the contrary, the combining defendants fix the price too high, they restrain their own trade only; the public will buy the goods it wants, not from them, but from their competitors. There are no averments in the complaint to show that the defendants are all, or even substantially all, of the manufacturers of watch cases in the United States, or even in any single one of the different states wherein their manufactories are located. For aught that appears, they represent but a small part of the watch-case industry, and there is nothing to prevent the number of their competitors from increasing to whatever extent the public demand for such goods may require. This is no such case as that presented in *Arnot v. Coal Co.*, 68 N. Y. 558, where, as was said, "the region of the production of [anthracite coal] is known to be limited." There is nothing in the complaint nor in common knowledge to show that the production of watch cases may not be practically unlimited. An agreement, therefore, between some of the makers of watch cases to sell their commodities at a uniform price, which they fix upon with regard only to their private emolu-

ment and profit, is not an agreement in general restraint of trade, or unreasonably injurious to the public welfare, within the authorities.

The other contract or combination which plaintiff contends to be unlawful is the agreement of defendants not to sell goods of their manufacture to any one who thereafter should buy or sell goods manufactured by the plaintiff. To the extent that such refusal to deal with those persons who dealt with plaintiff induced such persons to cease dealing with the plaintiff, and to buy watch cases from one or other of the defendants, the agreement did not operate in general restraint of trade, the total amount of purchases and sales remaining constant, so far as the complaint shows. It did, no doubt, operate in partial restraint of trade, viz. to restrain some part of plaintiff's trade in the watch cases it manufactured. But it does not follow that such restraint was unreasonable, nor heavier than the interest of the favored party required. An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or to sell to any one with whom he thinks it will promote his business interests to refuse to trade. That is entirely a matter of his private concern, with which governmental paternalism has not as yet sought to interfere, except when the property he owns is "devoted to a use in which the public has an interest"; and such public interest in the use has as yet been found to exist only in staple commodities of prime necessity. *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468. It is a business device, probably as old as business itself, to seek to increase the number of one's customers, and the extent of their purchases, by treating more favorably those who become exclusive customers. Certainly there is nothing unlawful or unfair in the statement to the trade by the maker of any kind of merchandise, "My goods are for sale only to those who will buy from me exclusively, not to others." And the case is in no way different if a half a dozen individuals combine into a partnership, or an hundred individuals combine into a corporation, and adopt the same method to enlarge their business. If this be so,—and no authority to which we are referred holds to the contrary,—it is difficult to see in what respect it is unlawful for a score of different manufacturers to enter into a like arrangement to push the sales of their own goods, or to secure some business benefit to themselves by increasing the number of their exclusive customers, when there is nothing to show that the parties so combining constitute substantially all, or even a majority, of the manufacturers of such goods, even in the half dozen states where their factories are located, and when the field for manufacture is open to all. It is not an unlawful business enterprise for sellers to seek to secure the entire trade of individual buyers, and an agreement between sellers, who wish to confine their dealings to such buyers only, not to sell to others, is not an unfair or unreasonable measure of protection for such trade. Nor can it be claimed that such an agreement between sellers who represent but a part of the trade is injurious to the public, which has all the rest of the trade to deal

with. "Unless an agreement involves an absorption of the entire traffic, * * * it is not objectionable to the statute [of 1890]. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least." U. S. v. Nelson, 52 Fed. 646. It is difficult to see wherein the agreement complained of is injurious to the public. Certainly it is not one in general restraint of trade. It seems to be a reasonable business device to increase the trade of one set of competitors at the expense, no doubt, of their business rivals, who are equally free to avail of similar devices to secure their own trade. As such it is not obnoxious to the statute. The agreements or contracts complained of being not unlawful, the giving notice to the world of their existence is no offense. The judgment sustaining the demurrer should be affirmed.

SHIPMAN, Circuit Judge (concurring). I concur with Judge LACOMBE in the conclusion that the circuit court properly sustained the demurrer of the E. Howard Watch & Clock Company in the above-entitled cause. I am not now prepared to adopt, as a reason for that conclusion, what I understand to be Judge LACOMBE'S opinion, that the agreement and conduct of the combined defendants, which are set forth in the complaint, do not constitute a violation of the first or second sections of the act of July 2, 1890. My reason for regarding the complaint as demurrable is the more technical one that the allegations in regard to the acts which the defendants committed, or in regard to the facts which are charged to have existed, do not show that the defendants restrained any interstate commerce, or monopolized any part of such trade or commerce. What the statute struck at was "combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations" (U. S. v. E. C. Knight Co. [Jan. 21, 1895] 15 Sup. Ct. 249), but it will not be contended that section 7 of the statute gives a cause of action to any person against another person who had merely planned to commit or unsuccessfully attempted to commit the prohibited acts. The illegal contract or attempted monopoly must have resulted in an injury of some sort to the plaintiff's interstate business. It should therefore appear directly, and not by way of inference, that the acts of the defendants, or their attempts to monopolize interstate commerce, resulted in its restraint or monopoly, to the plaintiff's injury. *Hutchins v. Hutchins*, 7 Hill, 104. "An action will not lie for the greatest conspiracy imaginable if nothing be put in execution, but, if the party be damaged, the action will lie. From whence it follows that the damage is the ground of the action." *Savile v. Roberts*, 1 *Ld. Raym.* 378. The important allegations in regard to the conduct of the combined defendants and the results of the acts are that the complainant owned an extensive watch-case manufactory in Kentucky, and subsequently in Ohio, and had the capacity to manufacture and offer for sale 25,000 watch cases per month, and that before November 16, 1887, it sold all of said

goods to a great number of dealers throughout the United States and Canada. It may be admitted that this substantially alleges that the complainant engaged in interstate commerce. It is also alleged that the defendants agreed, on or about said day, that they would not thereafter sell any goods manufactured by them to any person who should buy or sell any goods manufactured by the complainant, and that the many dealers in watch cases throughout the United States and Canada, and that many of the complainant's existing and previous customers, were notified of this agreement; that upon receipt of such notice a large number of the then and theretofore purchasers of the plaintiff's watch cases withdrew their patronage, and ceased thereupon entirely to purchase or deal in any wise in plaintiff's goods; that all the acts of the defendants were done and performed for the purpose of establishing a monopoly in the supply of watches to the public, contrary to the policy of the law, and in violation of the statutes of the state of New York and of the United States. But the residence of no withdrawing customer is alleged. No interference with interstate commerce is shown, except by inferring that some of the withdrawing customers lived in another state than Ohio; and, if they had bought the complainant's goods, interstate transportation would have taken place. The general allegation that the acts done in pursuance of the compact of November 16, 1887, and before the passage of the act of 1890, were done for the purpose of establishing a monopoly in the supply of watches, in violation of the statutes of New York and of the United States, is not an allegation that the acts restrained, or that the attempt actually monopolized, interstate trade or commerce.

It is next alleged that after the passage of the act of July 2, 1890, "all the former purchasers and dealers in said plaintiff's watch cases and other dealers in watch cases were, as plaintiff is informed and verily believes, ready and willing to buy large quantities of said plaintiff's goods, and this plaintiff would have at once regained all the business and the profits whereof it had been deprived by the acts aforesaid of the defendants, but that said defendants, after the passage of the said act of congress, ratified, confirmed, renewed, and continued the contracts, agreements, and combinations hereinbefore alleged, and in like manner, and with the same intention as hereinbefore alleged, served notices of their said ratification, confirmation, renewal, and continuance of the said agreements and combinations upon all said dealers in plaintiff's watch cases, whereby said dealers have continued to this day, forced by said renewal threats of defendants, and compelled thereby, and not otherwise, to refuse to purchase plaintiff's watch cases, or to deal in any wise therein." The allegation is that the former purchasers and dealers, who were intimidated by the previous notices, and who had stopped purchasing, continued, in consequence of the new notice, to be intimidated, and were forced by the renewed threats to refuse to purchase the plaintiff's watch cases. The names of the states in which these intimidated persons resided are not given. No new diversion of trade and no

new interference with interstate commerce are alleged. Admitting that the complaint sufficiently avers renewed acts of the defendants, there is the same absence of allegation that any customer, old or new, outside of the state of Ohio, refused to purchase, or that interstate commerce was interfered with. The complaint was, of course, not based upon the theory in the pleader's mind that the statute prohibited an attempted monopoly and a consequent injury, whether the trade or commerce monopolized was domestic or interstate, but he seems to have been cautious in regard to averring that the attempted monopoly had affected interstate commerce. Where a plaintiff declares upon a statute, especially upon one penal in its character, imposing, as this one does, three times all actual damages as a punishment for offenses against its provisions, his complaint should contain explicit averments, which would, if not controverted, bring his cause of action within the provisions of the statute. The pleader in this case has failed to thus aver that trade between the states or with foreign countries has been restrained by action of the defendants, and the judgment of the circuit court sustaining the demurrer should, in my opinion, be affirmed.

WALLACE, Circuit Judge. I agree with the majority of the court that this action must be deemed to be founded upon the act of congress of July 2, 1890, and that the demurrer to the complaint was well taken unless the complaint sets forth a cause of action given by that statute. I dissent, however, from the conclusion that the complaint does not set forth such a cause of action. Briefly stated, the averments of the complaint are that prior to the time of the enactment of the statute the plaintiff was engaged in manufacturing and selling watches in the states of Ohio and Kentucky, having a market therefor throughout the United States, and selling its goods to a great number of dealers in other states; that the defendants, also manufacturers of watches, had agreed among themselves to maintain an arbitrary fixed price for all their goods; that thereafter, in order to compel plaintiff to join them in that compact, and prevent it from selling its goods unless it did so, the defendants combined in an agreement not to sell any watches made by any of them to any dealers who should thereafter buy of the plaintiff, and notified the dealers in watches throughout the United States of the agreement; that thereafter the defendants did refuse to sell such dealers as had bought of plaintiff, and thereby they prevented a great number of dealers from buying of plaintiff, and effected a complete boycott of its trade; and that, after the statute was passed, the same combinations and acts were renewed and continued by the defendants, with the malicious purpose, and with the result, of suppressing plaintiff's trade. The complaint does not explicitly allege that this combination was entered into or these acts were done by the defendants for the purpose of preventing the plaintiff from selling to customers in other states; but from the facts alleged the conclusion is irresistible that this purpose was comprehended in the

conspiracy of the defendants, and the law presumes that they contemplated the ordinary and natural consequences of their acts. The statute declares various acts affecting trade or commerce among the several states or with foreign nations criminal, some of them being acts which are not criminal at common law. It also gives a civil remedy, cognizable by the federal courts, to any person or corporation injured by reason of such acts. The statute can have no application to acts affecting purely infra-state trade,—the commerce only between citizens of the same state,—not only because its language does not permit it, but because the power of commercial regulation given to congress by the constitution is restricted to interstate commerce, foreign commerce, and commerce with the Indian tribes. By one section it declares it to be a misdemeanor to monopolize, or attempt to monopolize, or combine or conspire to monopolize, any part of the trade or commerce among the several states or with foreign nations; by another it declares illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of such trade or commerce. The same punishment is affixed to each of the different offenses. The questions in the case are whether such a combination or conspiracy as is set forth in the complaint operates upon interstate trade or commerce, and whether it is in restraint of trade, within the meaning of that term as used by congress in the statute. I cannot doubt that a combination intended and adapted to strangle the trade between the dealer who sells his goods in one state and his customers in other states of the Union who buy them,—a trade which necessarily involves the transportation of the goods from one state to another,—is intended and adapted to affect interstate commerce, and is, therefore, within the scope of the prohibition of the statute. The power of regulation is not confined to commerce which begins with the transit of goods, but operates upon all commerce of which the transit is an ordinary incident. This is illustrated by the legislation of congress in regard to trade-marks. The original trade-mark statute was held to be void because it was intended to embrace trade-marks used in infra-state commerce as well as in interstate commerce. *Trade-Mark Cases*, 100 U. S. 22. Thereupon congress passed another statute protecting trade-marks used in commerce with foreign nations or with the Indian tribes. In conferring jurisdiction of suits to protect such trade-marks upon the federal courts congress declared that such courts should not take cognizance unless the trade-mark in controversy “is used on goods intended to be transported to a foreign country,” thus plainly indicating an intention to give a remedy although the trade-mark has not been used upon goods actually transported or in course of transportation. See *Ryder v. Holt*, 128 U. S. 525, 9 Sup. Ct. 145. It has been repeatedly said in the opinions of the supreme court that commerce among the states, as that term is used in the constitutional provision which vests in congress the power of regulation, includes the buying and selling of commodities, and the transportation incidental thereto. *County of Mobile v. Kimball*, 102 U. S.

691-702; *Gloucester Ferry Co. v. State of Pennsylvania*, 114 U. S. 196-203, 5 Sup. Ct. 826; *Kidd v. Pearson*, 128 U. S. 1-20, 9 Sup. Ct. 6. The Knight Case does not disaffirm the proposition, but reiterates it. What the Knight Case decides is that a combination to control the manufacture of a product within a single state is not in restraint of interstate commerce, notwithstanding the fact that such commerce may be indirectly affected by it. The court say that the fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. But the court also used this language: "Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and instrumentalities, and articles bought, sold, or exchanged, for purposes of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce." The acts charged against the defendants are intended and adapted to impinge upon the "contracts to buy, sell, or exchange goods to be transported among the several states," made and to be negotiated by the complainant with its customers in other states; and it cannot matter whether those contracts are negotiated in the state where the goods were produced or in the state where the customers of complainant reside.

Are the acts charged in restraint of trade? The primary purpose of the conspiracy set forth was doubtless to compel the plaintiff to join in a compact with the other defendants to maintain an arbitrary price or scale of prices for their goods, or otherwise to drive the corporation out of business; but its legitimate and necessary result was to likewise deprive dealers in watches generally, carrying on their business in many states, of the untrammelled exercise of their right to buy from the plaintiff. The books are full of cases in which a covenant not to carry on a business or vocation has been declared to be in restraint of trade, although the contract was only to restrict the covenantor. As is said in *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173: "The illegality of contracts affecting public trade appears in the books under many forms. The most frequent is that of contracts between individuals to restrain one of them from performing a business or employment." So conspiracies aimed at the trade or occupation of a single person have not only been declared civilly actionable, but criminal, because affecting the public as well as the immediate individual. In the early case of *Rex v. Eccles*, 3 Doug. 337, the indictment alleged that the defendants had conspired to "deprive and hinder" one "from following and exercising" his trade as a hatter; and Lord Ellenborough alluded to it as one for conspiracy "in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public." *Rex v. Turner*, 13 East, 228, 231. Doubtless, in prohibiting contracts or combinations in restraint of trade it was the intention of congress to prohibit only those which were previously recognized at common law as belonging to that category, and not to prohibit

any which only effect a reasonable restraint. Such contracts or combinations as operate only in partial restraint of trade, are made for a just and honest purpose, and are for the protection of the legitimate interests of the parties, are consistent with the public convenience and the general welfare. And it is undoubtedly true that the tendency of modern judicial opinion is to regard with more liberality than formerly prevailed all contracts or combinations which are designed to protect parties from unnecessarily injurious competition, even though their indirect results may be to subject the public to a monopoly. I do not think the combination set forth in the complaint can be approved upon any such considerations. No body of manufacturers is justified in combining to coerce a competing manufacturer to join them and sell his goods at a price to be fixed by them, and to destroy his business in the event of his refusal to do so; and it matters not that they propose to destroy his business by peaceful methods of influencing his customers not to deal with him. "Men can often do by the combination of many what severally no one could accomplish, and even what, when done by one, would be innocent." *Morris Run Coal Co. v. Barclay Coal Co.*, supra. "Any one man, or any one of the several men, acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase." *State v. Glidden*, 55 Conn. 46, 8 Atl. 890. "Every man has the right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy, whether the means employed are actual violence or a species of intimidation that works upon the mind." *State v. Stewart*, 59 Vt. 273, 9 Atl. 559. The weight of authority supports the proposition that a combination is not only actionable, but is a criminal conspiracy, whenever the act to be done has the necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of confederates, and giving effect to their purposes, whether of extortion or of mischief. The doctrine of some of the adjudications that a conspiracy is not criminal unless its object is to compass some criminal purpose, or some purpose not criminal by criminal means, is not the prevailing opinion. It suffices to quote the language of Chief Justice Shaw in *Com. v. Hunt*, 4 Metc. (Mass.) 111, 123, as follows:

"Without attempting to review and reconcile all the cases, we are of opinion that, as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. We use the terms 'criminal or unlawful' because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy and punishable by indictment."

The statute upon which this action is founded discriminates between combination and conspiracy, and it not only makes both

criminal, but it makes contracts in which there is no element of a conspiracy or combination also criminal if in restraint of trade. It is therefore quite immaterial whether the acts charged in the complaint are sufficient to constitute a criminal conspiracy at common law. It suffices if the combination set forth is oppressive in its nature, and mischievous in its effects. I do not question the right of the defendants to combine for their own protection against unfair competition, and in that behalf, their commodity not being one of prime necessity, to agree not to sell to those who do not buy exclusively of them, or who buy of the complainant or some other obnoxious competitor; but I repudiate the doctrine that they can combine to induce the customers of a rival manufacturer not to deal with him unless he will join their combination. Upon the averments in this complaint, which are of course to be taken as true for the purposes of the demurrer, this case is one in which the defendants are acting not from motives of self-protection, but oppressively, and are actively concerting to destroy the business of a rival by inducing other dealers not to trade with him because he will not sell his goods at their prices. In *People v. Fisher*, 14 Wend. 1, the defendants were indicted under a statute making it criminal for two or more persons to conspire to commit any act "injurious to trade or commerce." They were journeymen shoemakers, and had concerted together to fix the price of making coarse boots, agreeing that if a journeyman shoemaker should make any such boots at a compensation below the rate established he should pay a penalty, and, if any master shoemaker should employ a journeyman who had violated their rules, that they would refuse to work for him, and would quit his employment. In sustaining the indictment, and declaring such acts criminal, the court used this language:

"The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair, but he has no right to say that another mechanic shall not make them for less. The cloth merchant may say that he will not sell his goods for less than so much per yard, but has no right to say that another merchant shall not sell for a less price. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to effect such an object are injurious not only to the individual particularly oppressed, but to the public at large. * * * The interference of the defendants was unlawful. Its tendency is not only to individual oppression, but to public inconvenience and embarrassment."

This language exactly fits the present case. For these reasons I think the complaint states a good cause of action, and the judgment sustaining the demurrer should be reversed.

ANHEUSER-BUSCH BREWING ASS'N v. BOND.

(Circuit Court of Appeals, Eighth Circuit. February 20, 1895.)

No. 491.

1. DEMURRER—ADMISSIONS.

A demurrer to an answer admits the facts well pleaded therein, but only for the purposes of the demurrer; and, when it is overruled, the facts must be proved as though there had been no demurrer.

2. CONTRACTS—VALIDITY—RETROACTIVE LAWS.

The validity of a contract to pay for beer bought to be resold in the Indian Territory is not affected by the fact that the introduction and sale of beer in the Indian Territory was thereafter made an offense by Act July 23, 1892, amending Rev. St. § 2139.

3. SAME—INDIAN LAWS—CONFLICT OF LAWS.

The validity of a contract between citizens of the United States, valid by the laws of the United States and of the state where made, is not affected by the customs or laws of the Indians in whose territory it was to be carried out.

Appeal from the United States Court in the Indian Territory.

Suit by the Anheuser-Busch Brewing Association against R. I. Bond to foreclose a mortgage. Decree for defendant. Plaintiff appeals.

N. B. Maxey (H. L. Haynes and G. B. Denison were with him on the brief), for appellant.

John W. McCloud, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The Anheuser-Busch Brewing Association, appellant, filed its bill in equity in the United States court in the Indian Territory against R. I. Bond, the appellee, to foreclose a mortgage executed on the 17th day of June, 1892, on four store-houses and fixtures and three stocks of drugs situated in the Indian Territory. John Ellis & Co., a firm composed of J. M. Bond and John Ellis, were indebted to the Anheuser-Busch Brewing Association in the sum of \$10,000, for the payment of which the appellee had become surety for Ellis & Co. The mortgage was conditioned to secure the payment of this debt 12 months from the date thereof. By a provision in the mortgage, the mortgagor had the right to retain the possession of the mortgaged property, and conduct the drug business in each of the drug stores, and agreed to keep the stock of drugs in each up to their amount and value at the date of the execution of the mortgage. The bill alleges and the answer admits that, by an arrangement between the parties, the appellee's liability on account of the mortgage debt was reduced to \$1,479.65, for which sum the appellee executed his note to the appellant. The answer sets up two defenses: First, that the plaintiff, for a sufficient consideration, released John Ellis from liability to pay the mortgage debt; and, second, that the consideration for the mortgage debt was beer, purchased from the Anheuser-Busch Brewing Association by Ellis & Co., for sale by them in the Choctaw Nation, in the Indian Territory, and that the Anheuser-Busch Brewing Association had notice of this fact;

that it was contrary to the policy of the law of the United States and the laws of the Choctaw Nation to sell beer in the Indian Territory; and that the mortgage was therefore given for an illegal consideration, and void. The defendant filed a demurrer to the complaint, which was afterwards withdrawn, and the plaintiff filed a demurrer to the answer, which was overruled; and afterwards, the case coming on to be heard, the court decreed as follows:

"And now, on this 26th day of February, 1894, the demurrer of the plaintiff to answer of the defendant having been heretofore overruled, and the plaintiff having refused to amend its complaint, and this matter coming on to be heard, upon motion of the defendant for judgment in his favor upon the pleadings and rulings of the court, said motion is sustained, and judgment is rendered for the defendant."

The hearing was had on bill and answer. The answer did not deny the material allegations of the bill, which stated a good cause of action, and was sufficient to entitle the plaintiff to a decree. The burden of proving the affirmative defenses set up in the answer was on the defendant, but no evidence was introduced to support them. The contention of the counsel for appellee that, by demurring to the answer, the plaintiff thereby admitted the facts set up therein, for all purposes and at every stage of the cause, is not tenable. For the purpose of testing the legal sufficiency of an answer in bar, a demurrer admits every fact which is well pleaded; but, when the demurrer is overruled, this admission has served its purpose, and the facts set up in the answer, unless otherwise admitted, must be proved precisely as if no demurrer had been filed. Under the Code in force in the Indian Territory, no replication is required to new matter in an answer which does not set up a counterclaim or set-off. Mansf. Dig. § 5043.

The ground chiefly relied on in this court to support the decree below, and the ground upon which it was stated at the bar that the lower court proceeded in rendering a decree for the defendant, is that the sale of beer in the Indian Territory was contrary to public policy and the laws regulating intercourse with the Indian tribes. This transaction took place while section 2139 of the Revised Statutes of the United States was in force. In the case of *Sarlls v. U. S.*, 152 U. S. 570, 14 Sup. Ct. 720, the supreme court held that this section did not include lager beer, and that it was not an offense against the laws of the United States to introduce same in the Indian Territory. Subsequent to the sale of the beer which it is alleged constituted the consideration for the mortgage in suit, congress amended section 2139 by an act approved July 23, 1892 (chapter 234, 27 Stat. 260), so as to make it include ale and beer, but this amendment cannot operate retroactively on the contract in suit. It is clear that at the date of this transaction it was lawful under the laws of the United States to introduce and sell beer in the Indian Territory. The decision of the supreme court is conclusive on this question. The validity of contracts between citizens of the United States, which are binding

and valid under the laws of the United States and of the states where made, is not affected by the customs or the laws of the Indian tribes or nations, and we need not therefore inquire what those laws or customs are.

The provision in the mortgage to the effect that the mortgagor should retain the possession of the drugs, and "conduct the drug business," does not invalidate the instrument as between the parties. Conceding that the provision renders the mortgage void as against the other creditors of the mortgagor, the mortgagor himself will not be heard to complain of such a provision or reap any advantage from it. *Lund v. Fletcher*, 39 Ark. 325; *Martin v. Ogden*, 41 Ark. 186.

The decree of the United States court in the Indian Territory is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

WILLIAMSON et al. v. KROHN.

(Circuit Court of Appeals, Sixth Circuit. February 25, 1895.)

No. 227.

1. TRUSTS—FRAUD—TRUSTEE DEALING FOR HIS OWN ADVANTAGE.

N. and three associates, who held all the issued stock of the C. Bridge Co., amounting to \$1,500,000, the same having been subscribed but not paid for, made an agreement with one K., in consideration of the cancellation of a contract for the construction of the bridge, in which K. was interested, by which they agreed to assign to him an 8 per cent. interest in the bridge company. Subsequently, N. and W., two of the associates, were authorized by the corporation to use its bonds, and by the stockholders to use their stock, in making a contract for the construction of the bridge. They made a contract with the K. Co. to construct the bridge for \$1,000,000 of the bonds of the bridge company and the \$1,500,000 of stock, which was to be deemed paid up by the execution of the K. Co.'s contract, it being stipulated that \$200,000 of the stock should be returned to N. and W. for their services in organizing the bridge company. Simultaneously, they made another contract with the K. Co., by which they agreed to procure certain land, needed for approaches to the bridge, for \$300,000 and \$600,000 of the stock of the bridge company, the K. Co. agreeing to furnish them \$300,000 in cash and deliver to them the \$600,000 stock. The \$300,000 was expected by N. and W. to be sufficient to secure the land, and they, in fact, did afterwards secure it for \$250,000. N. and W. informed K. of the first contract, and told him they had saved \$200,000 of the stock, but said nothing to him of the second contract, or of the \$600,000 in stock. They offered K. 8 per cent. of the \$200,000 stock, and obtained from him, in consideration thereof and of payment in cash of another claim of K., a receipt in full of all claims whatever. When he afterwards discovered the existence of the second contract, K. tendered back to N. and W. the money he had received on the settlement, and demanded 8 per cent. of the \$600,000 stock. *Held*, that N. and W. were charged with a trust in behalf of K., and could not derive an advantage to themselves, to his prejudice, and, accordingly, that K. was entitled to a decree requiring them to transfer to him his share of the \$600,000 in stock.

2. EQUITY—PARTIES—SUIT TO COMPEL TRANSFER OF STOCK.

Held, further, that, as the stock was the property of the individual parties who were before the court, the C. Bridge Co., though a proper, was not a necessary, party to the suit. Swan, District Judge, dissenting.

8. FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF CORPORATION.

A corporation formed by the consolidation of two corporations of different states may be sued in the federal courts, as a citizen of one of such states, by a citizen of the other.

Appeal from the Circuit Court of the United States for the District of Kentucky.

This was a suit by Louis Krohn, a citizen of Ohio, against John A. Williamson and R. W. Nelson, citizens of Kentucky, and the Central Railway & Bridge Company, a consolidated corporation of Ohio and Kentucky, to compel the assignment of certain stock in said bridge company. The circuit court rendered a decree against the individual defendants, and dismissed the bill as to the corporation. 62 Fed. 869. Defendants Williamson and Nelson appeal. Affirmed.

The bill in this case was filed by the complainant, Louis Krohn, for the purpose of compelling the defendants Williamson and Nelson to transfer to him \$48,000, par value, of the capital stock of the Central Railway & Bridge Company, and to require the said company to transfer the stock upon its books, and issue a certificate therefor to him. Such was the principal object of the suit. The facts upon which this relief is asked, and as found by this court, appear from the pleadings and proof in the case to have been substantially as follows: The Central Railway & Bridge Company was, as alleged in the bill, a corporation organized under the laws of Kentucky, with an authorized capital stock of \$2,500,000, for the purpose of constructing, maintaining, and operating a bridge from the city of Newport, in Kentucky, to the city of Cincinnati, in Ohio. It was in fact a corporation constituted under the laws of Kentucky and Ohio by the consolidation of a Kentucky corporation of the same name and an Ohio corporation, both of which original corporations were organized for the same purpose, that is, of building and operating the bridge. The defendants Williamson and Nelson, together with two other persons, John W. Kirk and L. R. Hawthorn, had subscribed for and were the holders and owners of \$1,500,000 of the stock of said corporation, which was all of the stock then taken, and no part of which had been paid for. Prior to October, 1889, the company had entered into a contract for the construction of its bridge with the Ohio River Construction Company, in which latter company Krohn had an interest. For some reason not material to the present purpose, the construction company had not made much progress in the work, the only outlay appearing to have been \$336, furnished by Krohn for the construction of a pier, to prevent the lapse of rights secured to the bridge company by an ordinance of the city of Newport. The construction company failed to execute its contract, and it was at length abandoned. Thereupon Krohn was taken into the Central Railway & Bridge Company by an assignment to him of an 8 per cent. interest therein by all the shareholders of that corporation. The assignment was in writing, of which the following is a copy:

"We, the undersigned, hereby agree to assign to Louis Krohn the same interest in the Central Railway & Bridge Company that said Krohn now holds in the Ohio River Construction Company, which it is agreed is eight per cent., the said Krohn to bear his proportion of future expenses incurred by the Central Railway & Bridge Company whenever the other holders of stock in said bridge company contribute to said expenses their proportion; the consideration hereof being the cancellation of the contract between the Ohio River Construction Company and the Central Railway & Bridge Company, in which said Krohn is interested.

[Signed]

R. W. Nelson.

"John W. Kirk.

"John A. Williamson.

"L. R. Hawthorn.

"Newport, Ky., Oct. 23, 1889."

One C. B. Simrall, another party interested in the Ohio River Construction Company, to the extent of 5 per cent. of its capital, was at the same time

taken in under a similar contract. The Central Railway & Bridge Company encountered great difficulty and embarrassment in making any adequate provision for building its bridge, and, after adopting various expedients which failed, the stockholders united with the company in authorizing the defendants Williamson and Nelson, who were the president and vice president of the company, respectively, to use the stock and the resources of the company in making a contract for the construction of the bridge. Those gentlemen proceeded to Cleveland, Ohio, and opened negotiations for such a contract with the King Iron-Bridge & Manufacturing Company for that purpose. They gave the King Company an option for its acceptance within a specified time of a contract which they offered to that company. While these negotiations were pending, Williamson and Nelson bought in Simrall's interest in their company for \$261. They also endeavored to buy Krohn's interest, but failed. On March 31, 1890, they concluded a contract, in the name of the Central Railway & Bridge Company, with the King Company for the construction of the bridge and the acquisition of the necessary lands for the approaches thereto. The contract was in writing, and by it the King Company agreed to build the bridge and furnish the money for purchasing the land, materials, and labor necessary for providing the approaches for the consideration of \$1,000,000 of the bonds of the railway and bridge company, secured by mortgage of its entire property, and the \$1,500,000 of subscribed stock, which was by the terms of the contract to be deemed paid up by the execution of the covenants of the King Company. It was further stipulated in the contract that the King Company should return \$200,000 of the paid-up stock of the railway and bridge company to Williamson and Nelson in compensation for their services in securing the organization of that company and obtaining its privileges and franchises.

On the same day, and in connection with the preceding contract, Williamson and Nelson and D. P. Eells, of Cleveland, entered into another contract with the King Company, which recited the other, and thereby agreed with that company to procure the land for the approaches to the bridge for \$300,000 and \$600,000 of the stock of the Central Railway & Bridge Company, as specified in the contract. But it was estimated by the parties to the transaction that the cost of executing the contract would not exceed the sum of \$300,000, and Williamson, Nelson, and Eells entered into a guaranty with the King Company that the cost should not exceed that sum. Eells, though a party to this contract, had no actual interest in the \$600,000 of stock, and a little later made a formal assignment to Williamson and Nelson of all his rights thereto. On their return to Cincinnati, Williamson and Nelson informed Krohn of the first-mentioned contract with the King Company, and that they had saved \$200,000 of the stock, which they proposed to divide with him, giving him 8 per cent. thereof. They said nothing to him, however, of the other contract. They insisted upon his giving them a receipt in full of all claims whatsoever. Krohn was not willing to give such a receipt, insisting that, among other things, he was entitled to receive the \$336 which he had advanced for the Ohio River Construction Company, and interest. This not being conceded, Krohn consulted an attorney, and was preparing to bring suit against Williamson and Nelson. Suit being threatened, they concluded to acquiesce in his demand, and assigned to him 8 per cent. of the \$200,000 of stock and paid him \$1,050 to cover his original demand, and also the counsel fees and expenses he had incurred in preparing to bring his suit, which he then also insisted upon. On this being done, Krohn executed and delivered to them the receipt they had demanded, and which was as follows:

"Received of R. W. Nelson, John W. Kirk, John A. Williamson, L. R. Hawthorn, and the Central Railway and Bridge Company sixteen thousand dollars of the capital stock of the Central Railway & Bridge Company, in full satisfaction and discharge of all obligations against them and each of them, and especially as regards an obligation dated October 23d, 1889, of which the paper on the face of which this is written is a true copy. And, also, the sum of \$1,050 and interest, in full of all claims whatsoever to date, March 16, 1892.

"Louis Krohn."

Krohn at the time of giving this receipt had no knowledge of the contract between the King Company and Williamson, Nelson, and Eells, and the as-
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signment of his interest therein by Eells, whereby the \$600,000 of the Central Railway & Bridge Company stock was returned to Williamson and Nelson. These gentlemen proceeded with the execution of their contract with the King Company for the procurement of the lands for the approaches to the bridge, and accomplished it at an expense of about \$250,000, being some \$50,000 less than the \$300,000 specified in the contract. Williamson received of this \$5,040 for his services in that matter, and Nelson, who acted therein as counsel, being a lawyer, the sum of \$6,250. In their settlement with Eells, some \$5,000 was turned over to him as his share of the profits. Just how much Williamson and Nelson made out of the contract, to say nothing of the \$600,000 of stock, does not clearly appear. After the lapse of some time, in consequence of disclosures made in the progress of a suit between Simrall and Williamson and Nelson, growing out of their dealings with him, Krohn became informed of the contract between Williamson, Nelson, and Eells and the King Company for obtaining the land for the approaches, and the disposition which had been made of the \$600,000 of stock of the Central Railway & Bridge Company. On learning of that transaction, Krohn tendered back what he had received in money on the settlement above mentioned, and demanded from Williamson and Nelson an assignment of 8 per cent. of the \$600,000 of stock which they had received, his claim being that they acted as his trustees in reference to his interest in the shares of the corporation, and that the \$600,000 of stock was not in fact used in the contract which they negotiated for the Central Railway & Bridge Company and its stockholders with the King Company. His claim was rejected, and he thereupon brought this suit. The court below sustained the bill, and decreed an assignment by Williamson and Nelson to Krohn of \$48,000 of the stock, being 8 per cent. of the \$600,000, but dismissed the bill as to the Central Railway & Bridge Company, upon the view that that was the Kentucky constituent of the consolidated corporation of the same name, and that the stock sought to be recovered was not the stock of the original Kentucky corporation. Williamson and Nelson have appealed.

John W. Warrington, W. W. Cleary, and George Washington, for appellants.

William Goebel, for appellee.

Before LURTON, Circuit Judge, and SEVERENS and SWAN, District Judges.

SEVERENS, District Judge, having stated the facts of the case as above, delivered the opinion of the court.

It is not important, as we think, to determine with precision the question, somewhat discussed upon the argument of this case, whether the effect of the assignment of an interest of 8 per cent. in the Central Railway & Bridge Company by Williamson, Nelson, Kirk, and Hawthorn to Krohn on the 23d day of October, 1889, transferred the legal title to a proportionate number of the \$1,500,000 shares of stock which had been subscribed for by them, or only an equitable title therein; for the consequences would be the same upon either construction, so far as the purposes of the present suit are concerned. The assignment would be deemed to cover that stock, for the reason, among others, that it was the only interest about which the assignors had the power to contract. If only an equitable interest therein was assigned, Krohn had the right to have the legal title transferred to him by an issue of the proper certificates therefor. That being so, a court of equity would treat that as done which the complainant had the right to have accomplished. "What ought to be done, is considered in equity as done;"

and the meaning of that is, that, whenever the holder of property is subject to an equity in respect of it, the court will, as between the parties to the equity, treat the subject-matter as if the equity had been worked out, and as impressed with the character which it would then have borne." Adams, Eq. 135.

The complainant, with the other shareholders, co-operating with the Central Railway & Bridge Company, whose purpose it was their object to promote, placed their shares of stock under the control of the defendants Williamson and Nelson, with power to dispose of them as a consideration, or in part consideration, for the construction of a bridge, that being the prime object to be attained. Those persons were thereupon charged with a trust, not only in behalf of the corporation, but of each stockholder, as well, who had placed his stock at their disposal for the purpose of effecting the common object. Their action in dealing with the stock must be regarded as subject to the rules and principles which apply to persons standing in that relation. The trustee must act in strict fidelity to his principal. He is not at liberty to exercise his powers in such a way as to derive an advantage to himself to the prejudice of his principal, and, if he does so, the principal is entitled to call upon him to surrender all the fruits he has gathered. *Ringo v. Binns*, 10 Pet. 269; *Fosbrooke v. Balguy*, 1 Mylne & K. 226; *Pooley v. Quilter*, 2 De Gex & J. 327; *In re Bloye's Trust*, 1 Macn. & G. 488; *Kimber v. Barber*, 8 Ch. App. 56; *Charter v. Trevelyan*, 11 Clark & F. 714; *Tyrrell v. Bank*, 10 H. L. Cas. 26; *Powell v. Powell*, 80 Ala. 11; *Baugh's Ex'r v. Walker*, 77 Va. 99; *Armstrong v. Elliot*, 29 Mich. 485. Applying this well-established doctrine of courts of equity to the transaction of the appellants, in behalf of the corporation and the stockholders thereof, with the King Iron-Bridge & Manufacturing Company, it is impossible to sustain the right claimed by the appellants to appropriate to their own use that part of the \$600,000 of stock which the complainant had intrusted to them for a particular purpose, if it was not bona fide used for that purpose. Admitting this, the appellants insist, nevertheless, that their conduct was not open to censure, and that they acquired the title to the stock in question by legitimate means. It is necessary, therefore, to investigate the means by which the result was, as they claim, brought about. The contract which they negotiated in behalf of their principals with the King Company was in terms to pay \$1,000,000 in first-mortgage bonds and \$1,500,000 of the paid-up capital stock of the Central Railway & Bridge Company for the construction by the King Company of the bridge and its approaches, and the obtaining title to the land required for those constructions. To begin with, they inserted in that contract a stipulation for the return to them of \$200,000 of the stock which was by the terms of the contract to be deemed paid up, in compensation for their personal services in organizing and promoting the corporation. This \$200,000 of stock was not in truth any part of the consideration to be paid to the King Company, but was returned to the agents of the other party for the personal benefit of the agents. The King Company did not owe

the appellants for their services, and that part of the transaction was wholly foreign to the business and duties with which the appellants stood charged. Cotemporary with the construction contract was another contract, which was part of the same transaction, whereby the appellants personally undertook to secure the land for the approaches to the bridge for the sum of \$300,000 in cash, or its equivalent, and \$600,000 of the Central Railway & Bridge Company stock, which, by passing through the other contract, was to be treated as paid up. These contracts, being executed at the same time, and one being recited as in consideration of the other, are to be read and treated as one. The evidence leaves no room for doubt that the \$300,000 in cash was regarded by all the parties as ample for the purpose of buying the land they agreed to secure, and in the sequel it turned out that the appellants made a good profit in the bargain which they secured for themselves in connection with and as part of the contract they made for their principals, even if the cash alone were to be treated, as we think it must be, as the whole of the actual consideration of their bargain. And it is incredible that they supposed that they were really being paid by the King Company this \$600,000 of paid-up stock, in addition to the sum of \$300,000, for the securing of land, which latter sum was supposed to be, and in reality was, its full cost and more. Having already received a sufficient sum to pay all their outlay, and ample consideration for their personal services in performing the contract, they could not demand a further sum for profit. The utmost they could require was indemnity; and this, it is demonstrated, they have already received without any use of the stock. It was in fact not used by the appellants as a consideration in the contract they made in behalf of the principals with the King Company, and hence there is no foundation in that contract upon which they could build a title to it. It seems manifest to us that the result of the transaction cannot be reconciled with the principles upon which the court is required to act. We are unable to understand upon what consistent theory the appellants reported to Krohn that they had saved the \$200,000 of stock through the construction agreement, and thereupon divided it with him, when in fact it was claimed by them as having been received for a debt due to them personally, and in which Krohn had no interest whatever. It may be that this was right because they had no authority to use the stock for settling their claim against the corporation, if they had any; but there is nothing in the evidence from which we are permitted to find that the stock was surrendered to Krohn for any such reason. The unavoidable inference is, taking into account the withholding of the fact that \$600,000 of the stock had been received by them through the other agreement, that they let him in to share the \$200,000 of stock to pacify him, and divert him from further inquiry. Perhaps they justified this to themselves upon the fact—for it no doubt was the fact—that it was through their skill and persistent energy that the building of the bridge was secured without having a dollar in the treasury of the corporation available for the purpose. But it is too obvious to require

further remark that the court cannot sanction such a method of settling one's claims as was here adopted, if that was the view upon which the appellants proceeded.

A question was suggested at the hearing whether the Central Railway & Bridge Company was not a necessary party to the suit, and the case of *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154, was referred to. But we are satisfied that while the corporation was a proper party, in order to completely realize all the objects of the bill by securing a transfer of the stock upon its books, it was not a necessary party. It is not a case of dealing with the unissued stock of the corporation. The stock to which the controversy relates was, at the time of the transaction involved, not the property of the corporation, but of the stockholders to whom it had been issued, who in turn were indebted to the corporation for the par value thereof. The fact that the appellants were also acting in these transactions as the agents and trustees of the corporation does not alter the fact that the stockholders had each contributed a separate property, to be used, if need be, for the common purpose upon a trust, clearly implied, to return it if it should not be required for such purpose. The trust which the bill is brought to enforce would then be completely executed. "When the trust is ended, and the authority of the trustee as such ceases, it is his duty to restore the property to the persons who are then entitled to it either by the terms of the instrument or by operation of legal rules; to accomplish this object, he is bound to make such conveyances as the parties may require in order to vest the title in them." 2 Pom. Eq. Jur. § 1065. The corporation and the appellants may settle their affairs without the presence of the present complainant, and the corporation has no concern with the question who is the owner of the stock in controversy. The case of *King v. Barnes*, 109 N. Y. 267, 16 N. E. 332, was a case involving similar questions, and the reasoning of the court clearly supports the view we adopt. The case of *Crump v. Thurber*, above cited, is not applicable. The observation there made by the court, that the corporation was a necessary party to the suit, had reference to the particular status of that case. The suit was brought in a state court against a corporation of the same state and a stockholder therein who was a nonresident, beyond the reach of process. The nonresident stockholder was proceeded against by publication of notice as being one who asserted a claim to the stock in controversy. Since, in that state of the case, the court had no power to render a personal decree requiring the stockholder to transfer the stock, the only relief obtainable was a decree against the corporation to compel it to transfer the stock on its books, and for such relief it is obviously quite true that the corporation was an indispensable party. The case is not an authority for the general proposition that the corporation is a necessary party to a suit between parties contending for the ownership of its issued stock.

At the hearing in the court below the bill was dismissed as to the defendant corporation. This was done apparently upon the ground that, as assumed, it was the original Kentucky corporation, and not

the consolidated company, whose stock was the subject of the controversy. We think this was a misapprehension. It is true the corporation is alleged to be one organized under the laws of Kentucky. But this is an apt and proper description of the consolidated company. It was also organized under the laws of Ohio. For the purposes of the present suit, however, it was rightly sued by its corporate name as a Kentucky corporation. The subpoena for the defendant corporation was served upon the president of the consolidated corporation, and the bill alleged a controversy about its stock. It is clear from the record that this corporation was the one sued, and not the original Kentucky corporation which had been merged therein. Nor did the fact that the consolidated corporation was a defendant oust the jurisdiction of the court. It was competent for the complainant to sue it as a citizen of Kentucky, notwithstanding the fact that it was also consolidated under the laws of Ohio. *Muller v. Dows*, 94 U. S. 444; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. 1004. But the complainant has not appealed from the decree, and it is difficult to find any ground upon which the appellants can be heard to complain of the dismissal of the bill as to the corporation. They assign it as erroneous. But no injury to them is apparent. If occasion should ever arise to determine any question between the corporation and the holders of this \$600,000 of stock, nothing here adjudged will affect such question, the only question here determined being one of the ownership of the 8 per cent. of \$600,000 of stock as between the complainant and the appellants.

The defense that a settlement has taken place, and a receipt in full of all claims been given by Krohn, requires but little to be said. It is manifest that when the settlement took place he had no knowledge of the wrong of which he complains, and supposed that all the rest of the stock had gone into the consideration paid for construction. Not only was this so, but the truth was actually concealed from him by the parties who then had his stock, and were settling with him for a smaller block of the stock, which they professed was the amount saved from the execution of their trust. It is not pretended that any mention of the \$600,000 of stock was made, or that any settlement for Krohn's share of it was actually made. The substance of the contention is that the receipt must be construed to cover it. It is no doubt broad enough in its terms, but is very obnoxious to the rule that such an instrument, when given under a mistake of fact, and especially when the mistake is induced by the other party, does not preclude the party making it from recovering according to the fact. *Farnam v. Brooks*, 9 Pick. 212; *Parker v. Nickerson*, 112 Mass. 195; *Kimber v. Barber*, ubi supra; *Pom. Eq. Jur.* § 959. It is further to be observed that the fact that fiduciary relations existed between the parties imposed an active duty upon the appellants to disclose the whole truth. We are of opinion that the decree below should be affirmed, with costs, and it is so ordered.

SWAN, District Judge (dissenting). I agree that, in a proper proceeding, complainant would be equitably entitled to the relief sought against defendants Williamson and Nelson; but, in my opinion, the corporation in whose stock complainant claims an interest is a necessary party to this suit, as upon it the decree must operate. It is not enough that complainant's right to the stock in controversy is established against the individual defendants, but the duty of the corporation to transfer the stock should also be adjudged, and this cannot be done without its presence. The dismissal of the bill against the corporation deprived the court of the power to grant the relief prayed. *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154; *Railway Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738.

MERRIMAN et al. v. CHICAGO & E. I. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. March 20, 1895.)

1. APPEAL—REHEARING.

It is too late to present a question for the first time on a petition for rehearing.

2. CREDITORS' BILL—LIS PENDENS—LIEN.

Plaintiffs, by a creditors' bill, acquired a lien on whatever equity of redemption their debtor, D., had in a railroad, sold to E. under foreclosure. Thereafter, in a suit to which plaintiffs were not parties, a decree was entered waiving all rights of D. to claim an equity of redemption, in consideration of the issue of certain bonds by E. to officers of D. Held, that the issue of the bonds to such officers did not make D. chargeable to plaintiffs for the value thereof, on the theory that the bonds were thus substituted for the equity of redemption.

3. LIENS—RIGHTS OF JUNIOR LIENHOLDER.

One having a lien on an equity of redemption cannot complain of the disposition of the money paid therefor, as long as the liens prior to his exceeded the value of the equity of redemption.

On rehearing. For principal opinion, see 12 C. C. A. 275, 64 Fed. 535.

BAKER, District Judge. Counsel in their brief in support of the petition for rehearing say:

"In the opening statement of the court it is said that the appellants concede that 'unless the original bill was a creditors' bill, which created a lien on \$500,000 of bonds of the Eastern Illinois Company, which it was about to issue to certain officers of the Danville Company, and which it did issue before the filing of the amended and supplemental bill,' the cause was properly dismissed as to the Eastern Illinois Company. This statement is, we think, somewhat broader than that made in our argument, but we are not prepared to say that it is not warranted by it. The view we now present is in conflict with the course of our original argument, in that we now distinctly claim that, when the original bill was filed, the lien was created upon the value of the equity of redemption, while we formerly stated it as a lien upon these bonds which the Eastern Illinois Company had agreed to furnish as a substitute for that equity of redemption."

The counsel for the appellants, therefore, in effect concede that the question which they formerly argued and submitted was correctly decided; and they now ask a rehearing on grounds which are in conflict with the course of their original argument. Aban-

doning as indefensible the grounds on which they sought a reversal of the decree in the first instance, they now ask the court to grant them a rehearing, so that they may for the first time seek a reversal on grounds in conflict with their former contention. When the court has correctly decided the questions upon which its judgment has been invoked by the appellants, they cannot, as a matter of right, require the court to consider any other questions upon a petition for a rehearing. If such a practice were permitted, the case might be presented in parcels, and the litigation would, in this manner, be needlessly protracted. And this principle applies with peculiar force where, as in the present case, counsel ask a rehearing to enable them to present the case upon a theory in conflict with the course of their original argument. *Fuller v. Little*, 61 Ill. 22; *Yater v. Mullen*, 24 Ind. 277; *Brooks v. Harris*, 42 Ind. 177, 180. It is, by the well-settled principles of the law, too late to present a question for the first time on a petition for a rehearing, and, in consenting to consider that question in the present instance, we do not mean to make an innovation which shall be regarded as a precedent in future cases.

The present contention of the appellants is that the original bill created a lien upon the equity of redemption of the Danville Company in the railroad and property in the possession of the Eastern Illinois Company, and that the bonds became, upon their issuance, a substitute for such equity of redemption. Counsel state their claim as follows:

"We view the case presented on the record as establishing beyond dispute that the Eastern Illinois Company, after having by collusion procured an apparent release of the Danville Company's equity of redemption in this property, and after an equitable lien had been created on that equity by the original bill herein, obtained from the debtor an effective release of this equity, and thereby substituted its \$500,000 of bonds for the value of that equity, and converted them into an asset of the Danville Company."

Shortly stated, the claim now is that the Eastern Illinois Company is chargeable with the value of the \$500,000 of bonds issued by it to the officers of the Danville Company, on the ground that by issuing them they were converted into an asset of that company.

The Eastern Illinois Company had become by mesne conveyances the owner of the railroad and property of the Danville Company under a judicial sale made pursuant to a decree of foreclosure and an order of sale. The sale so made was confirmed by a decree of the court. On an appeal taken from such decree to the supreme court of the United States, such proceedings were there had as resulted in a reversal of that decree. Thereafter, on July 7, 1882, Fosdick and Fish filed in the United States circuit court for the Northern district of Illinois an amended and supplemental bill against the Danville Company, the Eastern Illinois Company, and others, for the foreclosure of the mortgage or trust deed executed by the Danville Company, and for other relief. The Eastern Illinois Company filed in said cause a cross bill, setting up a title to the mortgaged premises and property under a judicial sale made by virtue of the decree in the suit on the original bill.

The appellants herein were not parties to the above-mentioned proceedings. They made an application for leave to intervene and become parties to that suit, but their application was denied by the court. The parties of record to the above-mentioned proceedings settled the litigation between themselves, which resulted in a release of errors, and a decree confirming the title of the Eastern Illinois Company to the railroad and property of the Danville Company acquired under the above-mentioned decree and sale, upon the issue and delivery by it to certain officers of the Danville Company of the \$500,000 of bonds in question. If the appellants' original bill created a lien upon anything, it was a lien upon the equity of redemption of the Danville Company. The contract for the settlement of the suit of Fosdick and Fish against the Danville Company, the Eastern Illinois Company, and others in no way affected the rights of the appellants, if they had acquired any by their original bill, because they were not parties to that contract, nor to the suit thereby settled. As to the appellants it was *res inter alios acta*. Counsel in argument concede this. They say:

"They [the appellants] could only seek to reach the equity of redemption, and could not reach the bonds. The Danville Company, their debtor, was not a party to the Eastern Illinois Company's contract. It had no right or equity in the bonds, and, as a matter of fact, could not have complied with the terms of the contract made by Judson, because it did not own its own stock which was a part of the nominal consideration for that contract; the complainants, as its creditors, could not have enforced a specific performance of that contract, or acquired any right to the bonds. They could not even control the Danville Company to make it confirm the decree."

It is insisted, however, that by the contract and decree the bonds were substituted for the equity of redemption. If such substitution was thereby effected, it was contrary to the understanding and intention of the parties. There was no agreement to buy the equity of redemption of the Danville Company. The Eastern Illinois Company at all times denied that the Danville Company had any equity of redemption. It agreed to the contract of settlement, and to the issuance of its bonds, to procure a decree whose effect was to deny that the Danville Company had any equity of redemption in the railroad and property acquired by it at the judicial sale. So far as the appellants are concerned, the contract of settlement and the decree did not affect their rights. If they ever acquired any enforceable lien on the equity of redemption, it remained in all its integrity after, the same as before, the settlement was made and the decree was entered. No legal or equitable right of theirs entered into or formed any part of the consideration of the bonds in question. Besides, the bonds never had any legal inception while they remained unissued in the hands of the Eastern Illinois Company. It is now conceded that the appellants did not and could not acquire any lien upon the bonds so long as they remained unissued. They could claim no right, legal or equitable, to the bonds until they had passed, as the valid obligations of the Eastern Illinois Company, into the possession of some other party. Having no lien upon or equity in the unissued bonds, the appellants

could not, in a legal sense, be injured by their issuance, whether the parties who received them took them for or without consideration. If any right to the bonds or their proceeds ever accrued to the appellants, it did not accrue until the bonds had become vitalized by their issuance and delivery to the parties named in the contract. The parties to whom these bonds were issued, and not the Eastern Illinois Company, must be pursued as trustees holding them in trust for the use of the appellants. These parties have acquired, as against the Eastern Illinois Company, a valid and indefeasible title to the bonds. That company committed no legal or actionable wrong against the appellants by the issue and delivery of the bonds. It cannot be made to account to the appellants for the bonds or their proceeds, because it has no beneficial interest in them. It is simply the maker of the bonds, and a debtor to the holders of them. If any right of action against it arose in favor of the appellants from the contract and the decree, it arose from its having acquired the equity of redemption of the Danville Company, and not from its issuing the bonds in question. If the Eastern Illinois Company acquired by the contract and the decree any equity of redemption not theretofore possessed by it, the appellants were not injured thereby. Whatever equity of redemption the Danville Company had in the railroad and property of the Eastern Illinois Company, so far as the appellants are concerned, remained liable to be subjected to the appellants' claims. In no aspect of the case are they entitled to a decree compelling the Eastern Illinois Company to account to them for the bonds or their proceeds. These views are decisive of the new ground of contention presented by the petition for a rehearing. Although not required to do so, we add that the appellants do not claim the right to a decree subjecting the alleged equity of redemption of the Danville Company to sale in the hands of the Eastern Illinois Company, and, on the case made by the original bill and the proofs, we do not think the court below committed any error in dismissing the bill, for want of equity, as to the Eastern Illinois Company. We cannot perceive that the settlement and the decree in question gave the appellants any new or additional rights beyond those acquired at the time suit was brought on their original bill. On the rights thus acquired, they have failed to make a case.

WOODS, Circuit Judge (concurring). If it be conceded, as now asserted, "that the original bill was a creditors' bill seeking satisfaction of the complainants' judgments out of the assets and property of the Danville Company, and particularly out of the value of the equity of redemption belonging to that company in the property which had passed into the hands of the Eastern Illinois Company," it does not follow that the lien thereby created upon the alleged equity of redemption attached to the bonds in question, as a substitute for the equity, when they were afterwards issued. The bonds were not in fact intended by the parties to the transaction to be such substitute. They were not given in whole or in part in consideration of the surrender of that equity, though it is of

course true that by giving the release of errors, which was only a part of the consideration for the issue of the bonds, the Danville Company waived all right of its own to assert such equity. But if the equity existed and the appellants by bringing their bill acquired a lien upon it, that lien was not affected by the execution of the bonds, and their proper course, as against the Eastern Illinois Company, was to prosecute their suit under the original bill to final decree, subjecting the equity, if established, to sale for the satisfaction of their demands. Upon any possible theory, the existence of that equity is essential to their case. Moreover, if the equity and the lien thereon asserted under the original bill be admitted, and in addition it be conceded that under the amended and supplemental bills the bonds, as a substitute for the equity, came under the same lien, it does not follow, in my opinion, that the appellants were harmed by the decree from which they have appealed. By asserting such substitution they necessarily abandoned all attack upon the title acquired by the Eastern Illinois Company and acknowledged that the bonds represented the full value of the equity which their original bill was designed to reach. This is admitted in the brief in support of the petition for a rehearing, where it is said:

"The bill does not attack the method which it charged had been adopted between the Eastern Illinois Company and the officers and stockholders of the Danville Company for releasing the equity of the Danville Company in the property to the Eastern Illinois Company. It does not seek to prevent that scheme of transferring the right being carried into effect, and it did not seek to have the decree set aside. It made no objection to the price which had been fixed as the value of the equity; and it could have made no objection to that price, because it was sufficient to satisfy complainants' judgments. The attack of the bill is solely on the proposed payment of the value of that equity, or of the sum which should be substituted therefor, to the Danville Company, or to those persons who intended to use it for their individual benefit, if the scheme should be carried into effect."

On that basis the question plainly is whether the appellants, as judgment creditors of the Danville Company, were entitled to have the bonds applied to the payment of their demands. The Danville road had been sold to the vendors of the Eastern Illinois Company, upon a decree of foreclosure of first mortgage bonds of which Fosdick and Fish were trustees, for \$1,450,000, leaving the decree unsatisfied to the amount of \$6,325,712.85. After the sale, and after the purchase by the Eastern Illinois Company, the decree had been reversed by the supreme court. If there was a right of redemption from the sale it was because of that reversal, and if that was the effect of the reversal, then the mortgages which had been merged in the decree were thereby reinstated and were again a lien upon the property for the entire amount thereof, as if there had been no foreclosure and sale. Besides, there was the second mortgage, of which Elwell was the trustee, for more than \$600,000, to which the lien of the appellants was subordinate. Without payment of prior liens in full the appellants could have no interest in the equity of redemption, or in the bonds considered as a substitute therefor; and if the holders of the prior liens permitted

their officers and agents, or strangers, to appropriate the equity, or its proceeds or substitute, it is no cause for complaint by the appellants, unless the values so disposed of exceeded the prior liens and included something which justly belonged to them. That has not been shown, and the contrary is in effect admitted by the theory of the petition for a rehearing.

The petition is denied.

HATCH v. FERGUSON et al.

(Circuit Court of Appeals, Ninth Circuit. February 25, 1895.)

No. 164.

1. RATIFICATION—ESTOPPEL—UNAUTHORIZED CONVEYANCE.

One H., a white man, and his wife, J., an ignorant and inexperienced Indian woman, were seised of 160 acres of land acquired under a pre-emption claim, and had also partially completed the residence required to secure another 160 acres under the homestead laws. H. began proceedings to commute for the price, and buy the homestead before completing his residence, but died before the proceedings were completed. J. renewed the proceedings, and completed the same. While they were pending, J. gave to one F., the executor of her husband, a power of attorney to sell her lands. Before the issue of the patent to J., F., under her power of attorney, sold all her interest in both tracts to one H. for a price per acre which was equal to the value at the time, but was paid only for one-half the number of acres in each tract; F. and H. then supposing J. owned no more, and intending to deal only as to that quantity. J., before the execution of the power of attorney, had intended to sell the land. She knew of the sale, received the proceeds, and used the same in the purchase of other property, and, without objection, allowed a purchaser from H. to make extensive improvements on the property, greatly enhancing its value. J. afterwards sought to set aside the sale on the ground that the power of attorney was obtained by F. through misrepresentation and fraud, and that she did not intend to sell the land. *Held*, that as to the one-half interest in each tract intended to be conveyed by the deed made by F., as J.'s attorney, to H., the sale was ratified, and J. estopped to dispute the same, whether or not she had power, at the time the sale was made, before the issue of the patent for the homestead land, to convey the same, and whether or not the power of attorney was obtained from her by F. through misrepresentation and fraud.

2. PRINCIPAL AND AGENT—REVOCATION OF AUTHORITY—REFORMATION OF DEED.

Some time after the sale to H., F. learned that J. was entitled to the whole of the homestead tract, and asked and received from H. payment for the half thereof not paid for when the deed was given. The weight of evidence showed that this did not occur till after J.'s suit to set aside the deed was commenced, to which both F. and H. were parties. *Held*, that the commencement of the suit having revoked F.'s authority, whatever it was, payment for the land at this time gave no rights to H., and J. might have had the deed reformed to agree with the agreement between F. and H. at the time of the sale.

3. BONA FIDE PURCHASER—NOTICE—OFFICER OF CORPORATION.

H. conveyed the whole homestead tract and the half of the pre-emption tract to one N. It was not clear whether H., in making the purchase from F., had or had not acted as agent for N. N. sold the land to the E. Co., a corporation, of which H. was president. The negotiations for this purchase of the land were wholly conducted by other officers of the E. Co., and the bargain was agreed upon at a meeting of the executive committee having charge of the matter for the company, at which H. was not

present. *Held*, that the E. Co. was not chargeable with H.'s notice of the infirmity of the title to the second half of the homestead tract, and, as a bona fide purchaser thereof for value, was entitled to hold the same.

Appeal from the Circuit Court of the United States for the District of Washington.

This was a suit by Josephine Hatch against E. C. Ferguson, Henry Hewitt, Jr., and the Everett Land Company, to set aside a conveyance. The circuit court rendered a decree for the defendants. 57 Fed. 959. Complainant appeals.

A. D. Warner and James Hamilton Lewis, for appellant.
Brown & Brownell, for appellees.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. Josephine Hatch, an Indian woman, and a citizen of Oregon, brought a suit against the appellees to set aside her conveyance of lands in the state of Washington. The complainant is the widow of Ezra Hatch, who was a citizen of the state of Washington, and who died on July 8, 1890. At the time of his death, Ezra Hatch had acquired title, under the pre-emption laws of the United States, to 160 acres in Snohomish county, state of Washington, which land may herein be designated as the "pre-emption claim." He had also resided four years upon a certain other 160-acre tract in the same county, which he had entered under the homestead law of the United States. Just prior to his death he contemplated selling his homestead claim, and in order to do so he had arranged to commute, and pay the government price therefor, rather than continue his residence another year, and acquire title under the homestead laws. His advertisement for that purpose was made, but upon the day set for taking final proof he died. He left a will devising all his interest in his two claims to his children. After his death his widow published her advertisement to commute the homestead claim, and upon the 19th day of September, 1890, made her proofs, as required by section 2301, Rev. St. U. S. On the following day she executed to the defendant Ferguson, who was the executor and guardian of the minor children, under the will of Ezra Hatch, a power of attorney authorizing him to sell her lands in the state of Washington. Final certificate was issued to her upon her payment of the commutation money, on the 26th day of September, 1890, and on the 29th day of November, 1891, patent to the homestead was issued. On the 21st day of October, 1890, Ferguson, under the power of attorney so given him by the widow, executed to the defendant Hewitt a deed of her interest in both the pre-emption and the homestead claims. It was then supposed that Josephine Hatch owned an undivided one-half interest, or a community interest, in both claims, and the sale was made upon the basis of \$25 per acre, which, for 160 acres, amounted to \$4,000. Hewitt paid Ferguson \$2,000 in cash, and gave a mortgage upon both claims to secure a like sum. It was afterwards ascertained that the widow owned all of the homestead claim, which made

the number of her acres, conveyed by her, 240 instead of 160. After this fact was discovered, and after the commencement of this suit, Hewitt paid Ferguson \$2,000 more, for the other 80 acres in the homestead claim, which was covered by the conveyance. The complainant alleged that the power of attorney to Ferguson was procured, and the conveyance to Hewitt was made, pursuant to a fraudulent conspiracy between Ferguson and Hewitt to defraud the complainant of her land; that she was ignorant of the English language, and that she was told by Ferguson at the time of signing the power of attorney that the same was a bond of friendship only, and that she did not intend to sell her land; and that the price at which the same was sold was grossly inadequate. The circuit court, after hearing the proofs, dismissed the bill.

It is contended on the appeal that the complainant was grossly deceived in signing the power of attorney, and that the same was void; that the complainant could not lawfully sell her homestead claim before the issuance of the final receipt; that the power of attorney to Ferguson was void for the further reason that it was made before the receipt was issued; that the terms of the power of attorney were not such as to authorize the sale of after-acquired land; that on the date of the execution of the power she had no interest in the homestead which could be conveyed; and that the power of attorney, being obtained by fraud, is a forgery, and could not be the basis of a conveyance of title, even to a bona fide purchaser.

The view we take of the evidence renders the discussion of these questions unnecessary. At the time of the death of Ezra Hatch the homestead claim was unimproved. The logging timber had been cut and removed, but the land was uncleared. It was situate upon a peninsula lying between the Snohomish river and Puget Sound. Its value at that time was probably no more than \$1,500,—the price at which it is said Ezra Hatch had offered it for sale. By the time of the sale to Hewitt, the latter had begun to purchase other lands in that vicinity with a view to acquiring or controlling all the land in the peninsula, and forming a land company and building a city. As the plan progressed the values rose, from the fact of his purchases. The price paid to Mrs. Hatch is not shown to have been inadequate at the date of her sale. The testimony is voluminous and conflicting concerning the execution of the power of attorney, and the circumstances attending the same. Upon the part of the complainant and her witnesses, the testimony is that the defendant Ferguson sent for the complainant to come to his office, where he had a power of attorney prepared, ready for execution; that he had a conversation with her there in the Chinook language, in which he told her that the paper was an instrument in the nature of a bond of friendship; and that she executed the same, not knowing that it was a power of attorney; that she abandoned the land soon after, because directed to do so by Ferguson, whom she knew to be her husband's executor and her children's guardian, and who, as she thought, had

power to direct her movements; that although she removed to some distance, to a little town called "Marysville," where lots were purchased for her, and a house was built for her residence, she did so at the instance of Ferguson, and took no part in the purchase of the lots or the improvements thereon, or the furniture that was procured for her use; and that the land sold by her, instead of being of the value of \$25 per acre, was worth several times that amount. Upon the part of the defendants, there is testimony that the power of attorney was fully explained to the complainant by Ferguson at the time it was signed, and that the notary public who took the acknowledgment of the same inquired of the complainant's daughter, a young woman who was within a few days of coming of age, whether her mother understood the instrument, and was answered that she did, and who further testified that he understood the Chinook language sufficiently to know what was said by Ferguson to the complainant at that time, and that he heard him explain to her the nature of the instrument.

If the case were to rest solely upon the evidence of what occurred at the time of signing the power of attorney, there might, perhaps, be proof sufficient to authorize the court to rescind the conveyance; but the case so made by the complainant is met by strong proof that prior to that date she had intended to sell the property, and that subsequent to that date she had received the proceeds, with full knowledge of the terms of the sale, and had herself used the proceeds in the purchase of other property, and had for a period of 18 months acquiesced in the sale, and stood by while the Everett Land Company (to whom Hewitt had transferred the property by mesne conveyances) made extensive and costly improvements upon the lands they had acquired upon the peninsula, whereby the value of the land that she had sold became very greatly enhanced. The proof that she had intended to sell the land prior to the meeting with Ferguson is afforded in the fact that almost immediately after her husband's death, and before she had had any conference whatever with Ferguson concerning the sale of the land, she advertised to commute the homestead upon which she and the children were residing, and to pay therefor the price of \$1.25 per acre, rather than acquire title by residing thereon another year, and in the fact that she had no money wherewith to pay the commutation price, but expected to borrow the same until she should have sold her land. There is also direct evidence that she declared her intention to sell the land. She admits that shortly after the conveyance she removed from the homestead to Marysville, and that prior to that time Ferguson had informed her of the sale. She admits that she made no objection to the sale, or to the terms thereof. The testimony proves conclusively that it was her choice to reside at Marysville; that she selected lots there, and negotiated for their purchase, and authorized Ferguson to pay \$600 for the same; that she approved the plans for a house, and authorized a neighbor to contract for its construction upon the lots; that Ferguson paid therefor out of the proceeds; that she selected furniture for the house, and requested Ferguson to pay for the same; that

she received money from Ferguson at different times, and finally, in March, 1891, she negotiated for and purchased a 40-acre tract of land with the remainder of the \$4,000 which was the consideration for her deed to Hewitt. It was not until the commencement of this suit, about 17 months after the sale, that she expressed to the defendants her dissatisfaction therewith, and complained that she had not received enough for her land. In the meanwhile the Everett Land Company had expended large sums of money upon this and other lands they had purchased in the same vicinity, and the value of that tract had become largely enhanced thereby, so that when this suit was begun, in March, 1892, the complainant alleged in her bill that the value of the land in controversy was \$5,000 per acre. These facts clearly amount to a ratification of the conveyance to Hewitt. The law applicable to the case, as expressed by Chancellor Kent, is as follows:

"There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, he shall not afterwards be permitted to exercise his legal right against such person." *Wendell v. Van Rensselaer*, 1 Johns. Ch. 354.

The same doctrine has been expressed in the decisions of the supreme court of the United States. *Bank v. Lee*, 13 Pet. 107; *Drakely v. Gregg*, 8 Wall. 242; *Morgan v. Railroad Co.*, 96 U. S. 716; *Smith v. Sheely*, 12 Wall. 358; *Bronson v. Chappell*, Id. 681. In the case last cited the court said:

"Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or, by his conduct, adopts and sanctions such acts after they are done, he will be bound, although no previous authority exists, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion."

The complainant, it is true, was an ignorant woman, and was unable to speak or understand the English language; but that fact, while it may lead the court to more carefully scrutinize the evidence upon which her ratification is said to be based, does not dispense with the observance of the rule of law applicable to all persons, whether ignorant or not,—that their acts in accepting the proceeds of a transaction such as this, and acquiescing in the same, are tantamount to a ratification thereof, and estop them from questioning its validity, as against third parties who have acted upon the faith thereof. The complainant is not to be classed among weak-minded persons. She was not so ignorant as not to understand the nature of a sale of real estate. She knew enough about her rights to advertise for the commutation of her homestead. She undoubtedly understood what had been done when Ferguson notified her of the sale to Hewitt. She knew that she must seek a home elsewhere, and that her attorney held in his hands the proceeds of the sale of her lands. She called upon him for those proceeds, and used the same in the purchase of other prop-

erty. It is difficult to conceive of a ratification more complete. She is thereby estopped to question the validity of the title of the Everett Land Company to all the land that was intended to be conveyed in the deed to Hewitt. But there was other land conveyed. Her deed to Hewitt, while it contains no precise description of the extent of the grantor's interest in the land, conveys all her right, title, and interest in the two claims. Ferguson and Hewitt conducted all the negotiations concerning the sale, and they are the only witnesses as to what it was the intention to convey. They both say that the agreement was that Mrs. Hatch's interest in the two claims should be sold to Hewitt for a consideration of \$25 an acre, and that it was understood between them both that the quantity of that interest was 80 acres in each tract, or, in other words, that she owned a half interest in each claim. Ferguson says:

"My understanding was that Mrs. Hatch had an undivided one-half interest in each of these claims. I was not aware of anything to the contrary until the partition sale."

Hewitt says:

"We supposed at the time that she had a half interest in both claims." "We concluded that her interest was a half interest only, and, at \$25 an acre, that would make \$4,000." "I thought I was buying half of each claim."

He also testified, it is true, that it was his understanding that he was to pay \$25 per acre for Mrs. Hatch's interest, whatever that interest might be; but the possession of this understanding, if such he had, upon his part, cannot overcome the force of his direct testimony, and that of Ferguson, as to what interest it was the intention to convey. It thus appears that the transaction was made with reference to one-half of each claim, and no more. Ferguson says that subsequently he was led to make inquiry concerning the amount of the interest which Mrs. Hatch had had in the homestead claim, from the fact that the partition suit brought by Hewitt against the minor heirs of Ezra Hatch on April 7, 1891, referred solely to the pre-emption claim, and did not include the homestead. He then, for the first time, learned that Mrs. Hatch, at the time of the sale, had owned the whole of the homestead, and that the deed made by him had conveyed the whole thereof to Hewitt. He says that he then demanded from Hewitt \$2,000 more, as consideration for the extra 80 acres, but that Hewitt made no response to his demand, and never paid the same until after the commencement of this suit, in March, 1892. Hewitt testifies that he discovered, at some time after his purchase from Mrs. Hatch, that she had owned the whole of the homestead, instead of the half, as he had supposed, and that the deed to him conveyed the whole of that claim. He said nothing to Ferguson in regard to the matter, but he says that Ferguson discovered it at about the time of the partition suit, and that Ferguson never asked for the remainder of the money until about the time it was paid, which was a month after the commencement of this suit, and that the reason that he did not pay it sooner was that he was hard up, and needed the money.

Under this state of facts, the question arises, what were the

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rights of the respective parties at the time the deed from Mrs. Hatch to Hewitt was delivered? Although that deed, in terms, conveyed all her interest in the homestead claim, it was clearly the intention of the parties to the transfer to convey only one-half thereof. Their bargain was for one-half, and the purchase price of one-half only was contracted to be paid and was paid. The conveyance of the whole interest was an error, the correction of which could have been compelled by the grantor, so as to conform to the intention of the parties. The minds of the contracting parties had not met upon a bargain by which the whole claim was to pass. Neither Mrs. Hatch nor Ferguson, her agent, could have compelled Hewitt to pay for the land so conveyed to him in excess of that which he had bargained for. There was no obligation upon the part of Hewitt to pay the extra \$2,000, nor upon the part of Ferguson to receive the same. In equity, Mrs. Hatch was still the owner of one-half of the homestead. Were the subsequent dealings between the parties such as to consummate the sale of the other 80 acres, so that Mrs. Hatch may be said to have parted with her right and title in and to the same? At the commencement of the suit, from the nature of the allegations which were contained in the bill of complaint, there was clearly a revocation of the power of attorney that had been given to Ferguson. He had no right after that date to convey the lands of the complainant, or in any way to bind her. The Everett Land Company and Hewitt, both being parties defendant to the suit, and charged with notice of such matters as were therein alleged, were thereby notified of the attitude in which the complainant stood to Ferguson, and knew that Ferguson had no further right to act for her. The payment, therefore, of the \$2,000, after the commencement of this suit, by Hewitt to Ferguson, and its acceptance and retention by the latter, have no bearing upon the determination of the question. Its decision must depend upon the acts done after the delivery of the deed from Mrs. Hatch to Hewitt, and before the commencement of this suit. There is nothing to show that between those dates there was an agreement or understanding between Ferguson and Hewitt whereby the deed to the homestead claim was to stand for the whole of Mrs. Hatch's interest therein, or the grantee in the conveyance was to pay for the 80 acres which had been unintentionally conveyed to him. The whole of the evidence concerning their dealings consists in the testimony of Hewitt that as early as the 30th day of December, 1890, when he conveyed the whole of the homestead claim to Norton by warranty deed, he had discovered the error, but that he made no mention thereof to Ferguson, and had no conversation with him concerning the matter until the latter demanded the payment of the \$2,000, at or about the time the same was paid, and the testimony of Ferguson that after the commencement of the partition suit, which was the 7th day of April, 1891, he discovered that Mrs. Hatch had owned the whole of the homestead claim, instead of the one-half, as had been supposed, and that he demanded payment of an additional \$2,000 from Hewitt upon that account.

What answer was made to such demand is not disclosed in the evidence, and the fact of the demand is denied by Hewitt, who says that Ferguson never asked for the other money until the time when it was paid. Mrs. Hatch, presumably, knew nothing of her rights in the homestead claim, nor of the extent of her interest therein, except such information as was given her by her agent. There is no evidence that he ever told her of his discovery that she had owned the whole instead of the half of the homestead claim, or that he had demanded the payment of the additional \$2,000 from Hewitt.

The question then arises whether the Everett Land Company acquired title to this property as an innocent purchaser, without notice of the equities remaining in Mrs. Hatch. There is some dispute in the testimony as to whether or not Hewitt, in making the purchase from Mrs. Hatch, acted for himself or for his brother-in-law, Norton. The weight of the evidence is that he purchased for the latter. If he bought for himself, however, and subsequently sold to Norton, the latter acquired title to the whole claim, as an innocent purchaser, for there is no evidence that he knew anything of the antecedent circumstances. Having thus acquired the title, Norton could convey his interest to any one, and his vendee would be unaffected by notice. If, on the other hand, Hewitt purchased as the agent of Norton, the latter was chargeable with the knowledge possessed by his agent; and the question whether the Everett Land Company purchased as an innocent purchaser depends upon the effect to be given to the fact that Hewitt, the president of that company, had, from his participation therein actual knowledge of all the circumstances attending the purchase from the complainant. The Everett Land Company was incorporated on the 19th day of November, 1890, and Henry Hewitt was its president during the whole period covered by the transactions in question. The evidence shows, however, that he took no part in the negotiations leading up to the sale from Norton to the corporation. The negotiations were between Norton and one Weymiss, who was the general manager of the corporation, and a member of its executive committee. The decision to purchase the property for the corporation was made by the executive committee, or the members thereof that were resident in New York. Hewitt was at that time in Tacoma. Norton stated his terms to Weymiss, and after some negotiations a telegram was sent him from New York, signed, "Everett Land Company, Executive Committee," accepting the terms that he had offered. The committee instructed Hewitt to attend to the transfer and the payment of the purchase money. It does not appear that Hewitt participated, either as a member of the board of directors or as a member of the executive committee, in arriving at the conclusion to make the purchase. While there are cases holding that knowledge of a fact acquired by a single director is in no case notice to the corporation, unless (1) it is actually communicated to the board as a body, or (2) it has been acquired by the officer while acting officially in the business of the company, other

cases, and perhaps with the weight of authority, hold that where a director, having such knowledge, acts as a member of the board, upon the matter affected by the information, the corporation will be bound, whether such knowledge was acquired privately, or in the course of the business of the corporation. In *Bank v. Campbell*, 4 Humph. 395, the court held that, where a party had several agents, notice to one is notice to the principal, where the one having notice is engaged in the transaction; and, since every director of a bank is its agent, notice to one director, in a transaction in which he acts as one of the board, is notice to the bank, although the notice may not have been communicated to him in relation to the particular transaction in which he is about to act. In *Craigie v. Hadley*, 99 N. Y. 131, 1 N. E. 537, the court said:

"The general rule is well established that notice to an agent of a bank or other corporation, intrusted with the management of its business or of a particular branch of its business, is notice to the corporation in transactions conducted by said agent, acting for the corporation, within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing, or on some prior occasion."

In *Bank v. Cushman*, 121 Mass. 490, the court said:

"If the note is discounted by a bank, the mere fact that one of the directors knew the fraud or illegality would not prevent the bank from recovering; but if the director who has such knowledge acts for the bank, in discounting the note, his act is the act of the bank, and the bank is affected with his knowledge. A bank or other corporation can act only through its officers or other agents. As in other cases of agencies, notice to the agent, in the course of the transaction in which he is acting for his principal, of facts affecting the nature and character of the transaction, is constructive notice to the principal."

Of similar import are *Terrell v. Bank*, 12 Ala. 506; *Bank v. Davis*, 2 Hill, 464; *Bank v. Campbell*, 4 Humph. 394; *Bank v. Payne*, 25 Conn. 444; *Foundry v. Dart*, 26 Conn. 376.

The purchase by the Everett Land Company not only comes within the exceptions to the general rule that are recognized in the foregoing decisions, but it is embraced in the further exception, equally well established, that, where the officer who has the knowledge has also such connection with or interest in the subject-matter of the transaction as to raise the presumption that he would not communicate the fact in controversy, there is no imputation of notice to the corporation. *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282; *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758; *Bank v. Gifford*, 47 Iowa, 575; *Wickersham v. Zinc Co.*, 18 Kan. 481. Hewitt had conveyed the land to Norton with covenants of general warranty. He was liable as warrantor for any defect in the title. The circumstances—the sale and warranty to Norton, the fact that the latter was his brother-in-law—were sufficient to inform the corporation that Hewitt's interests in this transaction might run counter to those of the corporation; and it would appear that the other directors of the company recognized this fact, since they took into their own hands the negotiations with Norton, and only called upon Hewitt to carry out the bargain they had made. The Everett Land Company is therefore the innocent purchaser of all the land which the complainant conveyed to Hewitt. The decree is affirmed, with costs to the appellees.

SALINAS et al. v. STILLMAN et al.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1894.)

No. 263.

1. MISTAKE—SUFFICIENCY OF ALLEGATIONS—LACHES.

Congress made an appropriation to acquire title to the Ft. B. reservation. After the act was passed, seven persons, heirs of one S., brought an action of trespass to try title to the reservation, against K., the commanding officer of the troops stationed thereon, in which several other persons intervened, claiming title. When the case was about to come on for trial, two of the plaintiffs and nearly all the interveners entered into an agreement, for the purpose of securing promptly a judgment which would make it possible to give a title acceptable to the United States, and to secure the appropriation, by which they undertook to co-operate on the trial in securing a verdict which would vest the title in two of the interveners, and, after such verdict had been secured, and the title passed and money paid, to submit their respective claims to certain arbitrators, who should divide the money between them. This agreement was not communicated to the court. The trial resulted in a verdict for the two chosen interveners, the land was conveyed to the government, and the money paid. Seven years later two of the plaintiffs in the action of trespass, one of whom was a party to the agreement, and an intervener in that action, who was also a party to the agreement, brought this suit to set aside the agreement for mistake, and the judgment in the action of trespass for mistake, and as a fraud upon the court. The only allegation as to mistake was that, for want of counsel and well-considered legal advice, W. (one of the complainants) was led into error in signing the agreement. *Held*, that, in view of the length of time elapsing before any attack was made on the proceedings, and the indefiniteness of the allegation of mistake, no case was made for setting aside the agreement or judgment on the ground of mistake.

2. PRACTICE—DECEIVING COURT—AGREEMENT TO AVOID LITIGATION.

Held, further, that there was no necessity for bringing the agreement to the attention of the court which tried the action of trespass, and its execution was not a fraud upon the court.

3. PUBLIC POLICY—SERVICES IN SECURING LEGISLATION.

The act making the appropriation provided that it should be paid directly to the owners of the property. The agreement between the parties to the action of trespass provided that, as soon as the money was received from the government, a considerable sum should be paid to an agent who assisted in procuring the appropriation. *Held* that, in the absence of any averment as to the nature of the services of such agent, it would not be presumed that his services were illegal, and that this provision constituted no objection to the agreement.

Appeal from the Circuit Court of the United States for the Western District of Texas.

The preliminary facts appear to be as follows:

On March 3, 1885, the congress of the United States made the following appropriation:

"To enable the secretary of war to acquire good and valid title for the United States to the Fort Brown reservation, Texas, and to pay and extinguish all claims for the use and occupancy of said reservation by the United States, the sum of one hundred and sixty thousand dollars; provided, that no part of this sum shall be paid until a complete title is vested in the United States; and the full amount of the price including rent shall be paid directly to the owners of the property." 23 Stat. 507.

On June 30, 1886, the heirs of Miguel Salinas, to the number of seven, brought an action of trespass to try title in the district court of Cameron county, state of Texas, against W. L. Kellogg, commanding officer at Ft. Brown, to recover possession and title, fruits, and revenues of certain lands

described, which comprised the Ft. Brown reservation. This suit was afterwards removed into the United States circuit court for the Western district of Texas, and therein numerous persons, to the number of 22, intervened, claiming title. On July 13, 1887, two of the plaintiffs and nearly all of the interveners entered into an agreement, a copy of which, as an exhibit to the bill, is found in the record, the reasons for which agreement are found in the preamble thereto, as follows:

"That whereas, in March, 1885, the congress of the United States made an appropriation of the sum of one hundred and sixty thousand dollars (\$160,000) to get a good clear title, free of all arrears, to the property known as 'Fort Brown,' which property and the title thereof are in litigation in this suit, and it is apprehended that unless in this court and by the judgment thereof a perfect title can be adjudged to certain of the parties, so as to meet the requirements of the Washington authorities, there is great danger of losing the said appropriation altogether; and whereas, this court will not last further than this week, and there is little probability of the parties to this agreement, who claim title to the whole of said property and the said money, working out to a complete and accurate adjudication by the judgment of this court, to be based on the verdict of the inevitable jury, all the rights of each party hereto who claim fractional interests in the said property, and it is therefore primarily desirable and necessary to have such a verdict and judgment in this action as will be attended with no complications, and be satisfactory to the department at Washington, and secondarily desirable to agree upon a method of working out and ascertaining the exact rights and interests of each party hereto after the judgment, and the conveyance to the government by the parties so adjudicated to be the owners, and the payment of said money therefor; and whereas, the sum of twenty thousand dollars (\$20,000) will then be due and owing to certain agents at Washington, who assisted in procuring the said appropriation, who must first be paid from said fund when received; and whereas, there are certain parties to this action who claim interests in said property hostile and antagonistic to the interests of the parties hereto, which claims we believe will fail on the trial now presently to come off: Now, therefore, it is mutually stipulated and agreed by the parties represented in this agreement as follows," etc.

And in said agreement it was stipulated that all parties thereto should unite in promoting and procuring a verdict and judgment in the cause to the effect that the whole of said property and all dues thereto appertaining should be vested in and be held by James Stillman, of New York, and Thomas Carson, administrator with will annexed of the late Mrs. Maria Josefa Cavazos, deceased, who were styled "reconvening defendants" in said action; that, upon thus procuring such a verdict and judgment, the appropriate deed of conveyance should be made by said owners to the United States, and the usual warrant of the secretary of war upon the treasurer of the United States for the amount of said appropriation procured and obtained, and the sum of \$20,000 due as aforesaid at Washington immediately paid from said funds by the arbitrators thereafter named; that the balance of said fund should be deposited without delay in the banking house of Ball, Hutchings & Co., of the city of Galveston, to the credit of certain named arbitrators, to wit, Messrs. Wm. P. Ballinger, T. N. Waul, and David B. Culberson; that the parties to the agreement should submit their claims to these arbitrators, the arbitrators should meet as early as practicable, and the money should be divided between the claimants in proportion to the interest of each, as determined by the arbitrators, whose findings should be binding and conclusive. The agreement made provision for supplying the place of any arbitrator who was unwilling or failed to act. On the day following the date of the agreement, a trial was had of the action pending in the court before a jury, wherein, as the plaintiffs made no appearance, the cause was heard upon the pleas of reconvention of all the interveners, and a verdict rendered in favor of Stillman and Carson, administrator, etc., in the proportion of one undivided half each of the property in suit. Following the verdict, judgment was rendered against the plaintiffs, defendants, and other interveners, in favor of Stillman and Carson, administrator, etc.

On January 12, 1894, the present bill was filed by three joint complainants, to wit, Juan Salinas, who was one of the parties plaintiff in the suit at law,

and also one of the parties to the agreement in question; Vincente Salinas, who was one of the plaintiffs in the suit at law, but who denies that he was a party to the agreement in question; and H. E. Woodhouse, who was an intervener in the suit and a party to the agreement, attacking the said agreement for mistake upon the part of Juan Salinas and Henry E. Woodhouse in signing the same, and for inherent vices, and attacking the judgment as a fraud upon the court, because the agreement mentioned was not brought to the knowledge of the court and jury on the trial, thereby, as alleged, preventing a judicial determination of the issues as formed by the pleadings. The bill makes no defendants *eo nomine*, and prays for no process against any one, though in the middle of the bill there is a recital of the names of many persons who had become parties to the action at law, including the United States, but not disclosing the relations or interests of any one of them; and it is then averred that "said parties are now made parties hereto, together with Henry Wagner, of Cameron county, Texas." The only averment in the bill relating to any interest in the subject-matter of Henry Wagner is as follows: "Your petitioners further say that Henry Wagner is a resident citizen of Cameron county, Texas, and the city of Brownsville; is a successor of Wm. L. Kellogg, and one of the successors of Zachary Taylor, aforesaid; is now in possession of the land in suit of The Heirs of Miguel Salinas v. Wm. L. Kellogg, which is made the subject of petitioners' claims herein." The bill prays for relief as follows: "In consideration of the foregoing, and inasmuch as your petitioners are without legal remedy, these petitioners pray that said alleged judgment so rendered on the 14th day of July, 1887, be set aside, vacated, annulled, and held for naught; that your petitioners be accorded and afforded opportunity to proceed with the trial of petitioners' rights as set out and claimed in this petition, and in the original petition in the *The Heirs of Miguel Salinas v. Wm. L. Kellogg*, and in the intervention of H. E. Woodhouse filed in said cause, a copy of which original petition is attached, made an Exhibit A, and made a part hereof; and for any and all relief which to your honors seem just and equitable." Although no process appears to have been prayed for, issued, or served, Henry Wagner appeared and filed a general demurrer to the bill for want of equity. Thomas Carson, as administrator with the will annexed of Maria Josefa Cavazos, deceased, also appeared and filed general and special demurrers. The circuit court sustained the general demurrers of Wagner and Carson, some of the special demurrers of Carson, and, the complainants declining to amend, dismissed the bill. The complainants appeal to this court, assigning as errors, in substance, that the circuit court erred in sustaining the demurrers to the bill.

T. J. McMinn, for appellants.

H. J. Leovy and J. P. Blair, for appellees.

Before **PARDEE** and **McCORMICK**, Circuit Judges, and **BRUCE**, District Judge.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The complainants' bill is framed in disregard of the equity rules of the supreme court of the United States and the generally recognized rules of equity pleading, but we gather from it that the complainants therein are seeking to set aside and annul a judgment, rendered at law in an action in which they and many others were parties, because the judgment was preceded by an agreement between some of the parties to the action in which provision was made for the recovery of the title, rents, and profits of real estate in favor of two of the parties thereto, to the exclusion of the rest, but under which eventual distribution should be made to all the parties according to interest as determined by the arbitration therein provided for. The agreement is attacked because of al-

leged error and mistake on the part of the complainants, in that, at the time of signing the same, the complainants were misled and misinformed as to the real purport and effect of the agreement by reason of the absence at the time of their counsel previously employed, and by the representations and persuasion of the attorneys of other parties; because the agreement was calculated to operate a fraud upon the court in the trial of the action then pending at law; because certain provisions therein contained were against public policy; because two of the arbitrators named in the agreement were of counsel for certain of the parties in interest; and because the provisions with regard to arbitration were not otherwise in accordance with the provisions of the Revised Statutes of Texas relating to arbitrations. It is also intimated in the bill that by reason of the agreement the title eventually to be given the United States would be in some way defective. The claim that the agreement was void for mistake on the part of the complainants in not being informed as to its real purport and effect, even if otherwise sufficient to warrant relief,—which is doubtful,—loses nearly, if not all, of its force when we consider the length of time which elapsed between the agreement and the institution of the present suit, to say nothing of the averments in the bill, in which it clearly appears that the complainants' real grievance is that the principal parties thereto did not at the time intend to carry out the agreement, and that they have during all these years delayed and refused to carry out the same. Besides this, the averments of the bill with regard to error and mistake on the part of the complainants are altogether too indefinite and general in regard to any mistake upon the part of the complainants.

We have searched the bill in vain to find a specific averment that at any time any or either of the complainants was actually misled or deceived as to the purport and effect of the agreement. The averment that "for want of counsel, and on account of the absence of well-prepared and well-considered legal advice, petitioner Woodhouse was led into error;" is the nearest approach to any averment of the kind, and that is wholly insufficient. The agreement being between only two of the plaintiffs and part of the interveners in the action at law, and providing only for an ascertainment of the interest of the parties to the same after a favorable verdict should be obtained in the action, we are wholly unable to see that there was any necessity whatever for bringing the agreement to the notice of the court, or any impropriety whatever in failing to have it entered of record. So far as it was an attempt by the parties to settle their difference out of court by arbitration, or in any other amicable manner, the proceeding is to be commended rather than adversely criticised. Parties may adjust their differences out of court, and afterwards give effect to the settlement by a judgment or decree of court, which will be as binding and conclusive as any other adjudication. *Nashville, C. & St. L. R. Co. v. U. S.*, 113 U. S. 261, 5 Sup. Ct. 460. The contention that the agreement was against public policy seems to be wholly based upon the fact that by the terms of the same a portion of the

moneys eventually to be derived from the United States for the purchase of the Ft. Brown reservation was to be paid to certain agents at Washington who assisted in procuring the said appropriation. It is true that the act of congress making the appropriation provides that the "full amount of the price including rent shall be paid direct to the owners of the property"; it is also true that contracts for services in procuring legislation by lobbying are against public policy; but, conceding this, it by no means follows that any fraud could or would have been perpetrated on the United States if, after the money had been paid by the United States directly to the owners of the property, the owners of the property had thereupon recognized and paid for legitimate services rendered by agents in procuring the appropriation. In the case of *Trist v. Child*, 21 Wall. 441, the distinction is clearly recognized between contracts for lobbying services and contracts for professional or other services legitimately rendered by agents. The bill is silent as to the character of the services rendered in Washington for which payment was to be made. We naturally indulge in the presumption that they were lawful. At the same time it is to be noticed that if the complainants' charge that the agreement was against public policy, and a fraud upon the government, is well founded, it by no means follows that the complainants in the present case can obtain relief on that ground. On the contrary, the court would be likely to apply the maxim *in pari delicto* against at least two of the complainants. The charge that two of the arbitrators named in the agreement were of counsel for parties in interest, and therefore disqualified to act, is without any merit, particularly when taken in connection with the fact that the bill utterly fails to show that the complainants were unaware of such employment and interest at the time the agreement was entered into.

It is true that the Revised Statutes of the state of Texas provide a mode of submitting causes for arbitration, which statutes do not appear to have been complied with in toto in the agreement in question; but the last article (56) of the title on the subject concludes as follows:

"Nothing herein shall be construed as affecting the existing right of parties to arbitrate their differences in such other mode as they may select." See Rev. St. Tex. tit. "Arbitration."

We are of opinion that the circuit court ruled correctly on the general and special demurrers to the complainants' bill, and that the assignments of error in this court are not well taken. As the complainants refused to amend in the circuit court, and stood on their bill, which was clearly defective in substance and for want of parties and as to the relief sought, we are constrained to sustain the circuit court in dismissing the bill. At the same time, we notice that, under the facts recited in the bill, the complainants have an equity which may hereafter require judicial recognition. The agreement attacked undoubtedly created a trust in favor of the parties thereto, and equity may require that such trust shall be recognized and enforced. In a suit for such purpose, the de-

cree dismissing the bill in the present case without reservation may be interposed, and perhaps with effect, as *res judicata* against the present complainants. To avoid this, and to save any equitable rights the complainants may actually have, a majority of this court are of opinion that the decree should be amended so as to show that the bill was dismissed without prejudice, but at complainants' cost. The decree of the circuit court appealed from is reversed, and a decree is rendered in favor of Henry Wagner and Thomas Carson, administrator with the will annexed of Maria Josefa Cavazos, deceased, dismissing the complainants' bill without prejudice, but with costs of this and the circuit court.

KEMP v. NICKERSON et al.

(Circuit Court, D. Massachusetts. March 20, 1895.)

No. 344.

LACHES—STALE CLAIM.

K., an heir at law of one N., more than 23 years after the death of N. and the probate of his will, filed a bill against N.'s executors and trustees, alleging that under the will such executors and trustees had no exclusive property in or control over certain assets of the testator, and seeking distribution thereof as intestate estate. The bill gave no reason for the delay, and charged no imposition or fraud. *Held*, on demurrer, that the suit was barred by plaintiff's laches.

This was a suit by Phoebe D. Kemp against Seth Nickerson, Jr., and others, executors of John Nickerson, deceased, to obtain distribution of a part of the estate of the decedent. Heard on demurrer to the bill.

Harvey D. Hadlock, for complainant.

Robert M. Morse, for defendants.

COLT, Circuit Judge. This case was heard on demurrer to the bill. It appears from the bill that the plaintiff is an heir at law of John Nickerson, who died in 1869, leaving an estate estimated at \$150,000; that an instrument purporting to be his last will and testament was approved and allowed by the probate court held at Barnstable in the commonwealth of Massachusetts; that the defendants were appointed executors and trustees under the will, and took upon themselves the duties thereof. The bill further alleges on information and belief that said instrument was prepared and signed when the said testator was in extremis. The bill further alleges that under the ninth clause of said instrument the defendants have no exclusive property in or control over the bank and railroad stocks coming into their hands as executors and trustees, and that the same should be distributed under the laws of Massachusetts as intestate estate. From the allegations in the bill it may be presumed that the will was probated in 1869, the year of the testator's death. This suit was not brought until 1893, or more than 23 years thereafter. There is no reason given in the bill why the plaintiff did not earlier institute suit, nor any excuse for her long delay; no impediment

on her part is alleged, or concealment in relation to the will or the probate thereof; nor is any imposition or fraud charged. One of the grounds of demurrer is the laches of the plaintiff in the prosecution of this claim. Without passing upon the other grounds of demurrer, I think this suit, under the well-settled rule governing stale claims, is barred by reason of the long unexplained delay and gross laches of the plaintiff. *Broderick's Will*, 21 Wall. 503; *Marsh v. Whitmore*, Id. 178; *Badger v. Badger*, 2 Wall. 87; *Godden v. Kimmell*, 99 U. S. 201; *Brown v. County of Buena Vista*, 95 U. S. 157; *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610; *Richards v. Mackall*, 124 U. S. 183, 8 Sup. Ct. 437; *Pearsall v. Smith*, 149 U. S. 231, 13 Sup. Ct. 833; *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 13 Sup. Ct. 944; *Harwood v. Railroad Co.*, 17 Wall. 78; *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418; *Hume v. Beale's Executrix*, 17 Wall. 336; *Mackall v. Casilear*, 137 U. S. 556, 11 Sup. Ct. 178; *Stearns v. Page*, 7 How. 818; *Hanner v. Moulton*, 136 U. S. 496, 11 Sup. Ct. 408; *Bowman v. Wathen*, 1 How. 189; *Boon v. Chiles*, 10 Pet. 177, 223; *Bright v. Legerton*, 29 Beav. 60; *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 714. Demurrer sustained; bill to be dismissed, with costs.

PHOENIX FURNITURE CO. v. PUT-IN-BAY HOTEL CO. et al.

(Circuit Court, N. D. Ohio, W. D. February 20, 1895.)

No. 1,088.

1. **MECHANICS' LIENS—LABOR OF ARCHITECT IN PREPARING PLANS AND SUPERINTENDING CONSTRUCTION.**

A statute giving a lien to a person "who performs labor or furnishes machinery * * * for erecting, altering, repairing or removing of a house, * * * by virtue of a contract," etc. (*Laws Ohio 1894*, p. 135), includes not merely those performing manual or unskilled labor, but extends to the labor of an architect in preparing plans and specifications, and in superintending construction, where it appears that such plans and specifications were prepared with a view to the particular location where the building was actually erected, and in pursuance of a contract having a substantial financial basis.

2. **SAME.**

Quaere, whether a lien could be maintained for the plans and specifications disconnected with the labor of superintendence.

3. **SAME—PLACE OF FILING LIEN.**

Under such circumstances the lien claim is properly filed in the county where the building was erected and the labor of superintendence performed, although most of the labor of preparing the plans and specifications was performed in a different county.

This was a suit by Phoenix Furniture Company against the Put-in-Bay Hotel Company and others to enforce a mechanic's lien.

George H. Beckwith and A. L. Smith, for complainant.

M. G. Bloch and J. K. Hamilton, for E. O. Fallis & Co.

A. P. Crane and W. H. A. Read, for John M. Crocker.

RICKS, District Judge. The journal entry referring this case to a special master is not before me, neither are its terms referred to in the master's report; so I am not sure as to the exact nature of

the order under which the reference was made. But I have no recollection of the court's passing upon any legal questions involved, so that I assume that the case falls within that of *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, and *Davis v. Schwartz*, 15 Sup. Ct. 239, in so far as the weight to be given to the master's findings of facts is concerned.

There are no serious questions of fact involved in any of the exceptions pressed by counsel for any of the parties. The most important questions are questions of law, and are involved in the claims of E. O. Fallis & Co. and John M. Crocker. Fallis & Co. claim a mechanic's lien for preparing plans and specifications for the building known as the "Hotel Victory," and for the general superintendence of the work of constructing the same. This claim is resisted very earnestly on the following grounds: First. That, under the laws of the state of Ohio, an architect is not entitled to a mechanic's lien, either for preparing plans and specifications for a building, or for the general superintendence of the work of constructing the same. Second. That they failed to comply with the plain requirements of the statute relative to the filing of the same, and insist that inasmuch as the plans and specifications were prepared in Lucas county, Ohio, the lien should not be filed in Ottawa county, Ohio. Third. That no valid contract was ever made between the Put-in-Bay Hotel Company, or its authorized agent, and E. O. Fallis & Co. Fourth. That the work was abandoned in the fall of 1889, and the lien was not filed within four months thereafter. Fifth. The omission to set forth in the lien filed by Fallis & Co. the changes subsequently made in the original plans of the hotel confines such lien to the amount of the original contract. Sixth. The cost of the hotel does not amount to the sum claimed by the defendants Fallis & Co., on which they have computed their lien. Seventh. That Fallis & Co. are estopped from asserting a lien as against the first mortgage.

The mere statement of these several grounds for exception would indicate the facts in dispute, and, in so far as the master has reported upon them, I think they are conclusive, in the absence of anything to show that they are unsupported by the evidence. Upon all these questions of fact the master has found in favor of the defendants E. O. Fallis & Co., to wit: That there was a valid contract between the Put-in-Bay Hotel Company and Fallis & Co.; that the lien was filed within four months after the work was completed; that the cost of the hotel amounts to the sum claimed by the defendants Fallis & Co.; and that there are no questions of fact which estop them from asserting their lien against the first mortgage.

I shall not undertake to argue at length in this opinion the legal questions involved. It seems to me just and equitable that this statute in favor of lienors should be given as broad a construction as the intent of the legislature will permit. The statute reads as follows:

"A person who performs labor, or furnishes machinery, * * * for erecting, altering, repairing or removing of a house, * * * by virtue of a con-

tract with the owner or his authorized agent, * * * shall have a lien." Laws 1894, p. 135.

The contention that the word "labor" in this statute means only manual labor or unskilled labor would put upon it a very narrow and strained construction. There is no reason in equity or in law why the architect who conceives and puts upon paper the design for such an immense building as this Hotel Victory is, and who puts upon paper with such minuteness of detail the specifications and drawings as to enable any one skilled in such business to erect, with perfect proportions and proper stability, such a mammoth structure, should not be protected in his contribution to the completion of such work, as well as the carpenter, the plumber, the painter, or the frescoer who performs manual labor. The court certainly ought not to strain the statute to exclude labor of this high character and grade, unless it is plainly the intent of the legislature that it should bear such interpretation. The master has entered into the discussion of this question with detail, referring to the authorities and statutes, and I fully concur in his finding that the architect in this case is entitled to a lien not only for the plans and specifications, but for the labor and assistance in the construction of the building in pursuance of these plans; for it appears from the testimony very clearly that these architects were not called upon to design a plan to be used at some indefinite location, and at some future time not fixed, and in pursuance of a scheme wholly speculative, but they were called upon to draw plans and specifications for this building, to be located at this place, and in pursuance of a contract having a substantial financial basis. In view of the facts as established, it is not necessary to determine whether this lien could be maintained for the plans and specifications, disconnected with the labor and superintendence; and it is perhaps best not to enter into a consideration of this abstract question.

The contention that the claimants failed to comply with the statute when they filed their lien in Ottawa county, while the plans and specifications were prepared in Lucas county, is, it seems to me, not sustained by either reason or law. While it may be true that the labor on the plans and specifications was principally done in Lucas county, yet the mere result of that labor in Lucas county was to put upon paper figures and facts and drawings which were valueless until used and put into the form and proportions of a building. That could only be done in Ottawa county. That was where the practical use was made of whatever labor was done in Lucas county. The benefit having resulted to the parties because of the application made of the labor of the architects in Ottawa county, the lien should be filed there, where the building and the real estate were situated.

G. A. GRAY CO. v. TAYLOR BROS. IRON-WORKS CO., Limited, et al.

(Circuit Court of Appeals, Fifth Circuit. November 27, 1894.)

No. 257.

1. CONFLICT OF LAWS—LOCUS OF CONTRACT OF SALE—RESCISSION.

A corporation domiciled in Louisiana placed an order for a machine with a manufacturing company located in Ohio; the correspondence showing the complete terms of the contract, both as to amount and time of payment. The builder sent an agent to superintend the erection of the machine, and wrote to the purchaser that it might hand the cash and notes to him. The machine being ready for operation, the purchaser telegraphed that it could not make the cash payment. The seller then wired their agent to accept the purchaser's draft at 60 days, with interest, in lieu of the cash payment. *Held*, that the original contract was made under the law of Ohio, and that there was nothing in the circumstances to show a subsequent rescission of that contract and the making of a new one in Louisiana.

2. SAME—VENDOR'S PRIVILEGE.

As the common law governs contracts of sale of personal property in Ohio, where this contract was made, the sellers could not claim the vendor's privilege given by the Civil Code of Louisiana.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This was a bill by the G. A. Gray Company against the Taylor Bros. Iron-Works Company, Limited, and others, for injunction, and for rescission of a sale, etc. Afterwards, an amended and supplemental bill was filed, making Michael Frank a party defendant, alleging that he had purchased from defendant the property which complainant was seeking to recover. A decree was entered dismissing the bill and supplemental bill, as against Michael Frank. Complainant appeals.

F. L. Richardson, for appellants.

By article 3227, Civ. Code, "he who has sold to another any movable property which is not paid for, has a preference on the price of his property over the creditors of the purchaser whether the sale was made on a credit or without, if the property still remains in the possession of the purchaser; so that, if the vendor may have taken a note or other acknowledgment from the buyer, he still enjoys the privilege." *Rivas v. Hunstock*, 2 Rob. (La.) 193. If it is urged that the seizure and sale of the property have destroyed the vendor's lien, it was held in *Lyons v. McRae*, 14 La. Ann. 438: "Where property has been seized and sold under execution, the money realized still belongs to the debtor, and must be surrendered to the syndic." Nor can it be claimed that it was necessary to preserve the privilege by registry. *Stevenson v. Brown*, 32 La. Ann. 461; *Allen v. Buisson*, 35 La. Ann. 108; *Bank v. Williams*, 43 La. Ann. 419, 9 South. 117. The contract made in Ohio should have been made and completed in that state, to be an Ohio contract,—for in *McIlvaine v. Lagare*, 36 La. Ann. 360, where the contract of sale was made in Ohio, but the acceptance was not to take place until after inspection in Louisiana, it was held that this was a Louisiana contract; and in *Overend v. Robinson*, 10 La. Ann. 728, "where the sale between the parties was made in New York, executory merely, with the intention that it should be consummated in New Orleans, and it was consummated there, the contract must be considered as completed in New Orleans, and the vendor's privilege may be exercised according to the laws of Louisiana." In the case at bar the planer was to be delivered and set up in New Orleans. That setting up was a thing to be done in this state satisfactorily before payment. It was to be erected and tested. According to the above decisions, that executory contract would have made this a Louisiana

contract. But that contract was annulled by the refusal of defendants to comply with its terms after its arrival, and defendants then made to Mr. Edman, the agent in this state, a new proposition, on new terms. The Gray Company released them from it, consented to the revocation, and might have sold to any third person. By Civ. Code, arts. 1805, 1806, the modification or change in a proposition is in all respects a new offer, and "he who makes the offer may withdraw it." See Benj. Sales, p. 287. Defendant Mr. Frank, who alone defends this suit, claims that this was only a modification of the Ohio contract, and that it is the same contract. We have seen that contract was executory here, but if it was not, and was complete there, under article 1805, Civ. Code, that contract ceased to exist by mutual agreement. By this article, "the acceptance to form a contract must be in all things conformable to the offer." It cannot be denied that that acceptance had been withdrawn after its arrival, and both parties set free. It cannot be denied that a new and materially altered offer to buy was made after the arrival of the thing here. There can be no question of novation of the contract, but it was annulled, and that long before the failure of defendants, and before any litigation was contemplated.

Another question was raised in argument in the lower court. Admitting that this machine was here in New Orleans, and the property of the Gray Company, of Ohio, but represented by an agent here, will a sale made by that agent to one domiciled here, upon an offer transmitted through the agent to the foreign principal, and accepted through same agency, be a Louisiana contract? The supreme court of this state holds that it is, in *Chaffe v. Heyner*, 31 La. Ann. 599: "As to rights and remedies of creditors, personal property has a situs or locality, and is to be governed by the laws of the country where it is located." When there arises a conflict between the law of the domicile of the owner and the creditor, the court holds this: "While recognizing the principle that all contracts in regard to personal property must be regulated by the *lex loci* of the domicile of the owner." But the situs of the thing sold cannot determine the question presented as much as the question, under what laws did the agreement take place? In the same case above quoted the court said, "This was not an executed contract, but an executory contract, and it was to have its execution in Louisiana." In *Beirne v. Patton*, 17 La. 530, this court correctly announces that "it is a well-settled rule that, where a contract is either expressly or tacitly to be performed in another place than that where it is made, its validity is to be governed by the law of the place of performance." Story, *Conf. Laws*, p. 233; 2 Kent, *Comm.* pp. 393, 459. So that this contract at bar, whether viewed as having its inception in Ohio and completion here, or as wholly begun and executed here, after its arrival, should be governed by the laws of this state, as to the rights and remedies.

It was further argued by defendant that this planer had become part of the realty by being placed in the foundry upon a brick foundation. The plan annexed shows the location, and the testimony shows that it is movable without injury to the walls of the building. In *Lapene v. McCan*, 28 La. Ann. 749, it was held that steam boilers which could be moved without damage to the sugar house did not form a part of the realty, and the vendor's privilege was maintained. Not being attached to the building, it was a movable. *Mackie v. Smith*, 5 La. Ann. 717. In *Daugherty v. Vance*, 30 La. Ann. 1247, mules attached to a plantation, and considered an immovable by destination, were seized and sequestered, and vendor's privilege recognized as against the entire immovable property.

Finally, we respectfully submit that it has been shown that the contract sued upon was a Louisiana contract; that, if considered as having had its origin in Ohio, it was executory in this state, and that contract was set aside, and a new one made here, after the machine arrived here; that this machine did not become a part of the foundry building,—an immovable; that complainants are entitled to the vendor's lien and privilege upon the property sold, or the proceeds thereof in the hands of defendant Mr. Frank, as prayed for.

Max Dinkelspiel, W. O. Hart, J. D. Rouse, and William Grant, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

McCORMICK, Circuit Judge. We affirm the judgment of the circuit court in this case. The case hinges on the question whether the contract of sale of certain movable goods mentioned in the record was made under the law of Ohio, or under the law of Louisiana. Taylor Bros. Iron-Works Company, domiciled in New Orleans, La., placed with the appellant (an Ohio corporation doing business in Cincinnati) an order for a planer. The correspondence between these parties shows their agreement as to the thing to be manufactured and sold by appellant to Taylor Bros. Iron-Works Company, the price, and the time of payment. The machine, as first ordered, was priced at \$4,445. This was changed so as to add \$90 to the cost, making the price \$4,535, one-fourth of which was to be paid cash on the day of the arrival of the machine in New Orleans, and the balance in six months from that date, with interest. On the 18th of April, 1892, the purchaser wrote the appellant to "push the work [of making the machine] to completion as soon as practicable, and forward by quickest route, making best rate you can for us." On July 14th, appellant wrote the purchaser:

"Your planer is done, and is being prepared for shipment. Ordered in the car yesterday, and are in hopes of getting car out to-morrow evening. * * * Our superintendent will start just as soon as you wire us the machine has come."

On July 26th, appellant wrote purchaser:

"Not hearing from you, we take it for granted that planer has arrived in New Orleans, and possibly our Mr. Erdman is with you. If so, you might hand Mr. Erdman the cash and notes in settlement for planer."

On July 29th the purchaser replied:

"We have received the planer, and are now unloading same. Mr. Erdman was over last night, but, as we will not have it on foundation before Saturday evening, he went back, to return Saturday evening and spend Sunday with us. It will be the middle of next week before we can run it, as the driving gear comes on the outside, and we have to put up three counter shafts to reach it."

The purchaser placed the machine in position in the iron works, adjusted it to the other machinery and the motive power therein, ready for use, and then, on the 10th day of August, wired appellant, at Cincinnati, "Not a matter of choice, but necessity; cannot make cash payment now." The appellant then wired Mr. Erdman to accept purchaser's 60-day draft, with interest, in lieu of cash payment. We are of opinion that this case does not come within the authority of *McIlvaine v. Legare*, 36 La. Ann. 359, or within any of the authorities cited for appellant. This contract of sale was made under the law of Ohio, the place of the domicile of the vendor. The sale was complete on the delivery of the finished machine to the carrier. The fact that appellant's superintendent came to New Orleans to be present at the starting of the machine to work did not effect or show a suspension of the contract of sale. There was nothing in the circumstances, the correspondence, or the conduct of any of the parties to show or effect a rescission of the sale made

in Ohio, and the making of a new sale in Louisiana. The thing, the subject of the sale, remained the same in substance and situation. The price was not changed. The purchaser could not make the cash payment, and the vendor accepted a 60-day draft, with interest, in lieu thereof. This does not express or imply a rescission of the sale already made under the law of Ohio, where the common law governs such contracts. The purchaser did not pay appellant for the machine. It has been seized and sold at the suit of other creditors of the Taylor Bros. Iron-Works Company. Appellant's contract being a common-law contract of sale of personal property, it cannot claim the vendor's privilege given by the Civil Code of Louisiana. The judgment of the circuit court is affirmed.

PROVISIONAL MUNICIPALITY OF PENSACOLA v. NORTHRUP.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1895.)

No. 341.

STREET-RAILWAY COMPANIES—OBLIGATION TO PAVE STREETS—RIGHTS OF BOND-HOLDERS.

A street-railroad company, operating under an ordinance requiring it to keep "in good condition" the street between its rails and one foot each side thereof, was required by a subsequent ordinance to pave the street to the same extent. The company accepted this ordinance, agreed to pay the town the cost of such paving, and consented that such cost should be a lien on its property. After the passage of the ordinance, but before the date of the agreement, the company issued and sold its mortgage bonds. *Held*, in a suit to foreclose the mortgage bonds, that the city had no lien for pavements laid under the ordinance and agreement. *Chicago v. Sheldon*, 9 Wall. 50, and *Railroad Co. v. Hamilton*, 10 Sup. Ct. 546, 134 U. S. 296, followed.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

This was a bill by W. H. Bosley, Douglas Gordon, and D. W. Thorne, citizens of Baltimore, Md., against the Pensacola Terminal Company, a corporation of the state of Florida, to foreclose a mortgage to secure an issue of bonds. The cause was heard in the circuit court upon a petition filed by the provisional municipality of Pensacola against W. H. Northrup, as receiver of the terminal company, praying that certain amounts should be decreed to the petitioner prior to any allowance upon the bonds. The court, by interlocutory order, denied the relief asked, with costs against the petitioner. From this order the petitioner appealed.

The facts, as stated in the appellant's brief, and assented to and adopted by the appellee, were as follows:

On May 1, 1892, the Pensacola Terminal Company was operating a line of street railway in the city of Pensacola, having been incorporated under the general incorporation laws of Florida, and using the streets of the city under the provisions of an ordinance of December 6, 1882, requiring that the portion of the street between the rails of the street railroad, and one foot on each side thereof, should be kept in good condition. On February 3, A. D. 1892, the provisional municipality of Pensacola enacted an ordinance to pave Palafox street, along which the road of the terminal company was laid, and over which it was operating its horse street cars. One of the provisions of this or-

dinance is (section 3) to "require the Pensacola Terminal Company to pave the street between its rails and one foot on each side thereof," in the manner which the municipality should contract for the paving of the entire width of the street. After that day (May 1, 1892) the terminal company issued bonds to complainants in the bill of complaint, secured by a mortgage on all of its property, franchises, privileges, and immunities then existing or thereafter to be acquired, and upon its rents, profits, and receipts. On March 6, 1893, after the execution of said mortgage, the terminal company and the municipality entered into an agreement by which the former accepted "the benefits, liabilities and terms of the contract for street paving" which the latter had made, and agreed "to pay to the said provisional municipality the amount of the cost of the paving required to be done by it" by the terms of the ordinance, and agreed "that the lien fixed by said ordinance" should "exist upon its property" for the amount apportioned for the paving between the rails and one foot on each side thereof. On May 26, A. D. 1893, the mortgage bondholders filed their bill to foreclose, and for a receiver. On the same day the court made an order appointing W. H. Northrup receiver. On June 15, A. D. 1894, the provisional municipality filed its petition in the court, reciting the aforementioned ordinances and agreements; that three installments of the amount for which the terminal company was liable were due and unpaid, and were a lien, under the laws of Florida, of prior dignity and paramount to all others on the right of way, rolling stock, and all other property of the terminal company in the hands of the receiver. The prayer of the petition is for the court to declare such lien, and to decree the payment by the receiver of said amounts, and general relief. The answer of the receiver denies that, under the original charter, it became the duty of the terminal company to bear the expense of paving said portion of the street, and denies that it has ever been the duty of the company, under its charter or the charter of the city of Pensacola, or any ordinance of the city, to pave any portion of the street. It admits that "it may be true" the provisional municipality of Pensacola and the terminal company entered into the said contract, but alleges that the contract was made after the execution and issuance of the first mortgage bonds held in trust by the Baltimore Trust Company, and was never consented to by it or the bondholders, and was not binding upon them, and was not a lien upon said property, in the absence of any law making it such, prior to the lien of the mortgage securing the bonds, and that there is no law of Florida, or valid ordinance of the city of Pensacola, making such paving a lien upon said property. The evidence submitted was the ordinance of December 6, A. D. 1882, the ordinance of February 3, 1892, and the contract of March 6, A. D. 1893. While it appears that the Pensacola Terminal Company has been incorporated, there is no claim that there is anything in its charter affecting the right of the city to regulate its use of the public streets under the provisions of the Revised Statutes of Florida.

The decree of the circuit court was in these terms:

It is ordered, adjudged, and decreed that the prayer of the said intervention be and is hereby denied, and that the said provisional municipality of Pensacola is not entitled to a lien upon the said property of the said Pensacola Terminal Company for the sums expended for paving the said portion of said street between and on each side of its track, and that the said provisional municipality do pay the costs of this proceeding, and that execution issue therefor.

John C. Avery and C. H. Laney, for appellant.

W. A. Blount and A. C. Blount, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. We are of opinion that this case is controlled by *Chicago v. Sheldon*, 9 Wall. 50, and by *Railroad Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, and the decree appealed from is affirmed.

STATE NAT. BANK OF ST. JOSEPH, MO., v. NEWTON NAT. BANK.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1895.)

No. 502.

AGREEMENT BY BANK TO PAY NOTE—POWER OF CASHIER.

The complaint in an action by one bank against another bank on notes payable to the M. Co., and executed by its stockholders, who constituted the board of directors, among whom was C., the cashier of defendant bank, alleged that plaintiff had discounted the notes at the request and for the benefit of defendant; that the proceeds had been received by defendant, and used by it in its business; that, though defendant did not indorse the notes when they were discounted, yet they were executed, and indorsed by the payee to plaintiff, solely for the accommodation of defendant, it agreeing by letter written by C. that at maturity the notes might be charged to defendant, if arrangements were not made for their renewal. The answer alleged that the notes were executed for the accommodation of the payee, under an arrangement with plaintiff to discount the notes for the sole benefit of the payee, and not for the benefit of defendant; that the letter written by C. was without the knowledge or ratification of defendant or its directors, and that the bank had received no consideration for the promise that the notes might be charged to its account at maturity; that plaintiff knew at the time that C. was not only one of the makers of the notes, but also a stockholder and officer of the payee and indorser, yet did not make inquiry as to his authority to bind defendant; that C., in sending the letter, was not acting altogether for defendant, as its cashier, but was also acting for himself and the M. Co., which plaintiff then knew; that C., in requesting plaintiff to place the proceeds to defendant's credit, did so as the representative of the M. Co., which plaintiff then knew, and that with such knowledge, and in compliance with such direction of C., plaintiff placed the proceeds to defendant's credit; that the M. Co. directed the proceeds of the notes to be thus placed to defendant's credit as a mere matter of convenience to the M. Co., and not as a matter of convenience to defendant; that defendant had no notice of such direction till after the credit was given; and that in giving such direction the M. Co., as plaintiff knew, did so merely to facilitate the transmission to it of the proceeds of the loan. *Held*, that plaintiff's motion for a judgment on the pleadings was properly overruled, as it admitted all the allegations of the answer, and it is not within the scope of the ordinary duties of a cashier to bind his bank by agreement to discharge obligations which he has himself contracted for the accommodation of a third party.

In Error to the Circuit Court of the United States for the District of Kansas.

Action by the State National Bank of St. Joseph, Mo., against the Newton National Bank, on notes. Judgment for defendant. Plaintiff brings error.

M. A. Reed and J. G. Slonecker filed brief for plaintiff in error.

C. S. Bowman and Charles Bucher filed brief for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The sole question presented by this record is whether an answer filed by the Newton National Bank, the defendant in error, to a suit brought against it by the State National Bank of St. Joseph, Mo., the plaintiff in error, stated a good defense

to the action. The question arises in the following manner: The State National Bank of St. Joseph, Mo., hereafter termed the "St. Joseph Bank," sued the Newton National Bank, hereafter termed the "Newton Bank," in the circuit court of the United States for the district of Kansas, to recover the amount due on two promissory notes, each for the sum of \$10,000, which were executed on July 21, 1890, and were afterwards sold to the plaintiff bank. Both notes were payable to the order of the McLain Live-Stock & Investment Company. One of them was executed by A. H. McLain, Horace McLain, C. R. McLain, and A. O. McLain. The other was executed by A. H. McLain, E. S. McLain, C. R. McLain, and A. O. McLain. The makers of these notes owned all the stock of the McLain Live-Stock & Investment Company, and constituted the board of directors of that company. C. R. McLain, one of the makers of said notes, was also cashier of the Newton Bank, while A. H. McLain and A. O. McLain were, respectively, vice president and assistant cashier of said bank. The St. Joseph Bank alleged in its complaint, in substance, that it had discounted these notes at the request of the Newton Bank, and for its benefit; that the proceeds of the discount had been received by the Newton Bank, and had been used by it in the ordinary course of its business; that, although the Newton Bank did not indorse the notes at the time they were discounted, yet that the notes were in fact executed by the makers thereof, and were indorsed to the St. Joseph Bank by the payee, solely for the accommodation of the Newton Bank,—the latter bank agreeing, by means of a letter written by C. R. McLain, its cashier, that at the maturity of said notes they might be charged to the Newton Bank, if arrangements were not made in the meantime for the renewal of the paper. The plaintiff bank also alleged that no arrangement for a renewal of the paper was in fact made before maturity, that the notes were overdue, and that the payment thereof had been demanded from the defendant bank, wherefore it prayed judgment against it for the amount due on said notes. The answer of the defendant bank to said complaint admitted the execution and sale of the notes to the St. Joseph Bank, but it alleged the fact to be that said notes were executed for the accommodation of the payee therein named, to wit, the McLain Live-Stock & Investment Company, in pursuance of an arrangement between said payee and the St. Joseph Bank whereby the latter was to discount, and did in fact discount, the notes for the sole benefit of the payee, and not for the benefit of the Newton Bank. The answer further averred, in substance, that the letter written by C. R. McLain, the cashier of the defendant bank, authorizing the notes to be charged to it at maturity, was written wholly without the knowledge or sanction of the Newton Bank, or of its board of directors; that neither said bank nor its board of directors had authorized the writing of such letter by its cashier, or had ratified his action in so doing; and that the bank had received no consideration for the promise therein contained, that the notes might be charged to its account at maturity. The answer also contained the following averments:

"That if plaintiff did discount said notes upon the strength of the said Charles R. McLain's direction to it to charge the same to defendant at their maturity, which this defendant denies, plaintiff well knew at the time that said Charles R. McLain was one of the makers of said notes, and was individually interested in the McLain Live-Stock & Investment Company, the indorser * * * thereof, as a stockholder, director, and officer therein, and that, being so interested, he, the said McLain, was in no position to fairly and honestly act for, represent, and bind defendant bank in and about the matters in which he was so individually interested, and it became and was the duty of plaintiff, before accepting the promises and acting on the directions of the said McLain, as cashier of defendant, in and about the matter aforesaid, to make inquiry as to his authority, as cashier or otherwise, to so bind the defendant, which inquiry plaintiff did not make, but with full notice of the said McLain's individual interest therein, as aforesaid, acted as it did in the premises; * * * that the said C. R. McLain, in writing and sending the letter, * * * was not acting altogether for defendant bank, as its cashier, but was also acting for and representing himself and the McLain Live-Stock & Investment Company, which plaintiff at the time well knew, and the said McLain, in requesting the plaintiff to place the proceeds of said notes to the credit of defendant bank, as set up in the petition, made such request and gave such directions as the agent and representative of the said McLain Live-Stock & Investment Company, and for it and on its behalf, all of which the plaintiff understood and well knew at the time; * * * that it was with such knowledge, and in compliance with such direction of said C. R. McLain, acting as the representative and agent of said McLain Live-Stock & Investment Company, that plaintiff placed such proceeds to the defendant's credit; * * * that the McLain Live-Stock & Investment Company directed plaintiff bank to place the proceeds of said notes to the credit of defendant, as aforesaid, as a mere matter of convenience to it, and not as a matter of any convenience or accommodation to defendant, and defendant had no notice or knowledge of such direction being given until after such credit was given as aforesaid; that, in giving such direction to plaintiff to credit this defendant with the proceeds of said notes, the said McLain Live-Stock & Investment Company, as plaintiff well knew, did so merely for the purpose of facilitating the transmission to it of the proceeds of said loan."

The plaintiff bank subsequently filed a reply to said answer, wherein it denied all of the allegations contained in the answer. It afterwards filed a motion for a judgment in its favor upon the pleadings, which motion the court overruled. Thereafter, the plaintiff bank announced that it would rest the case on its motion for a judgment upon the pleadings. The circuit court thereupon entered a judgment in favor of the defendant. To reverse that judgment the plaintiff bank has removed the record to this court by writ of error.

It is manifest that the aforesaid motion filed by the plaintiff proceeded upon the theory that the admissions contained in the answer were sufficient to warrant a judgment in favor of the plaintiff, irrespective of all other allegations in said answer contained. The motion admitted all of the affirmative allegations contained in the answer which were at first put in issue by the reply. By filing said motion the plaintiff, in effect, asserted, and rested its case on that assertion, that, notwithstanding all of the facts stated in the answer, it was nevertheless entitled to a judgment. We think that this position was untenable. In view of the motion for a judgment on the pleadings, it stood admitted of record that the notes in suit were discounted for the sole benefit of the McLain Live-Stock & Investment Company, in pursuance of a previous agreement between

it and the plaintiff bank; that the proceeds were received and used by the investment company, and not by the Newton Bank; that they were placed to the credit of the Newton Bank, on the books of the plaintiff bank, merely as a convenient mode of transmitting the same to the investment company; and that the plaintiff was well advised of that fact when it made the discount. It also stood admitted that the letter signed by C. R. McLain, as cashier of the Newton Bank, authorizing said notes to be charged at maturity to that bank, had been written by said McLain of his own motion, without the knowledge or sanction of said bank or its board of directors, and that the plaintiff bank had caused no inquiries to be made as to the extent of McLain's authority, although it well knew that by writing said letter he had assumed to bind the bank, of which he was cashier, to pay his individual notes to the amount of \$20,000. The contention that the letter written by the cashier of the Newton Bank had the effect of binding that bank to pay the notes in suit, notwithstanding the admitted facts that it was written without any actual authority, and that the bank had not received the proceeds of the discount, must rest upon the assumption that it is within the scope of the ordinary duties of a bank cashier to bind his bank by an agreement to discharge obligations which he has himself contracted for the accommodation of a third party. It is hardly necessary to observe that the making of an agreement of that nature is wholly outside of the ordinary functions of a cashier, and that persons dealing with such officers have no right to presume that they have been vested with authority to make agreements of that character. Upon the state of facts disclosed by the answer and admitted by the motion, the case presented for decision was not one in which a bank cashier had assumed to borrow money for the use and benefit of his bank, but it was one in which he had attempted to pledge the credit of the bank to secure a discount of his own notes for the benefit of a third party. It is clear, we think, that McLain, as cashier, had no implied power to bind the defendant by a transaction of that kind; for, even if the board of directors of the bank could make such use of the bank's credit,—a proposition which we need not discuss,—it would not be within the scope of the ordinary duties of a cashier to thus pledge its credit and funds. *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572.

We conclude, therefore, that the answer of the defendant bank stated a good defense to the action, and that the motion for a judgment on the pleadings was properly overruled. The judgment of the circuit court is accordingly affirmed.

INTERSTATE NAT. BANK OF NEW YORK v. NEWTON NAT. BANK.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1895.)

No. 503.

In Error to the Circuit Court of the United States for the District of Kansas.

M. A. Reed and J. G. Slonecker, for plaintiff in error.

C. S. Bowman and Charles Bucher, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case was submitted under an agreement of counsel that it should abide the decision in the case of State Nat. Bank of St. Joseph, Mo., v. Newton Nat. Bank, 66 Fed. 691; the facts, pleadings, and record in both cases being practically the same. In accordance with said stipulation, the judgment of the circuit court is affirmed.

COLMAN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. March 20, 1895.)

No. 218.

DISTRICT ATTORNEYS—COMPENSATION FOR EXTRA SERVICES.

A district attorney, who, by special direction of the department of justice, rendered services in proceedings brought against the United States under authority of the act of congress of March 3, 1875, to recover damages caused to lands by the improvement of the Fox and Wisconsin rivers, is precluded by Rev. St. §§ 1764, 1765, from recovering extra compensation therefor. These proceedings, though of a special statutory character under the Wisconsin laws, were yet, after transference to the federal court, to be regarded as "civil actions," which it is a part of the attorney's regular duties to prosecute, under Rev. St. § 771. *Gibson v. Peters*, 14 Sup. Ct. 134, 150 U. S. 342, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This was a petition by Elihu Colman against the United States to recover compensation for special services rendered under the direction of the department of justice during his term of office, and while serving as United States district attorney for the Eastern district of Wisconsin. The circuit court dismissed the petition without prejudice to a claim for an allowance of taxable fees, and the petitioner appealed.

The claims in controversy are predicated upon four different matters of special employment, are not made in conformity with the fee bill or supported by any express appropriation, and are as follows:

(1) For an action in equity (*United States v. Winnebago Paper Co.* and thirty-six other defendants) in which the bill was filed in 1886, in the name of the United States, by a special attorney appointed by the department of justice, to restrain the drawing of water below certain points at the dams at Neenah and Menasha, for the preservation of navigation on the Fox river improvements, wherein the petitioner alleges that he rendered services for the complainant, by direction of the attorney general, of the value of \$375, and incurred a personal expense of \$7.30. The bill is certified by Judge Jenkins, of this court, as reasonable in amount, without passing upon the validity of the claim. The attorney general approved, after deducting \$75 from the account of services.

(2) For services rendered by the direction of the department of justice, through request of the war department, for an alleged trespass in cutting through the embankment of a lock at Appleton, which was the alleged property of the United States, in charge of the war department, and wherein an ejectment suit was instituted in this court in behalf of the United States against the Manufacturers' Investment Company. The claim is for \$150 for four days' work, and assisting the special assistant United States attorney in an argument of demurrer to answer, and personal expenses, \$3; certified by Judge Jenkins as reasonable in amount, without passing upon its validity. The attorney general deducted \$25, and approved the balance.

(3) For services pursuant to the direction of the department of justice, under date of September 4, 1891, assisting the special attorney of that department in the preparation and trial of *Paine Lumber Co. v. U. S.*, 53 Fed. 854, being an appeal from an award by commissioners in a state court for damage by flowage occasioned by dams maintained by the United States (under an act of congress for that object), and removed into this court. This is alleged to have been adopted as a test case, and occupied 23 days in preparation (well shown) and 18 days in trial and argument, and accomplished a large reduction in the award, and favorable settlement of other claims upon its basis. The bill for services, predicated on the customary professional charges, is placed at \$3,000, and hotel expenses are added, \$43.50; making the total, \$3,043.50. It bears a certificate by Judge Jenkins that "\$2,500 would be a reasonable charge for services rendered and the result obtained." The department of justice deducted \$1,000, and approved the balance. Competent witnesses testify that the reasonable value of the services would be \$5,000, in view of the result accomplished, and under assumptions of fact all of which are undisputed.

(4) Services rendered, in conjunction with the special attorney, in settlement of a large number of similar cases (enumerated, and indicating large saving from previous awards), for which the charge is \$500. There is no approval by the court, and the department of justice deducted \$250, and approved the balance.

These claims were all disallowed by the first comptroller, for the reasons stated, and with remarks as follows: "That such charges do not come within any provision of law. In each of the several cases enumerated in account the United States is a party of record, and the fees therein are taxable only in accordance with sections 823 and 824, Rev. St. Even if the United States was merely an interested party in these cases, and not a party of record, under section 299, Rev. St., fees for services therein should be assimilated to those provided by law for similar services in cases in which the United States is a party."

In the circuit court the following opinion was rendered by SEAMAN, District Judge:

"If these several claims could be adjudged upon the showing of meritorious and beneficial services rendered by the petitioner by direction of the department of justice, there could be no reasonable question of their allowance to the amount claimed in the petition. But the services were all rendered in matters in which the United States was a party, and immediately interested, during the petitioner's term of office as district attorney; and it is clear that there can be no recovery for such services beyond the allowances provided by statute. Section 1764, Rev. St. U. S., provides that 'no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform unless expressly authorized by law.' Section 1765 prohibits any officer whose salary, pay, or emoluments are fixed by law or regulations from receiving 'any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.' Section 770 fixes the salary of the district attorney. Sections 823 to 827 prescribe the fees which may be allowed, and there is no contention that warrant can be found in either of these sections for the claims here presented. The only statutory authority which is suggested is chapter 166 (18 Stat. 506). That is the provision for possession and improvement of the Fox and Wisconsin rivers, and for pay-

ment of overflow damages, and authorizes the department of justice to 'represent the interests of the United States in legal proceedings under this act.' It is understood that the appointment of the special attorney (who was here assisted by the district attorney) was made and his compensation allowed under this statute, but there is no suggestion in it of special compensation for the district attorney, and it furnishes no aid for the claim.

"It is further suggested by the petitioner that his services in the flowage cases are not covered by the fee bill, because section 824 only provides for fees in a 'civil cause' or 'case at law,' and these proceedings, which are made by the act conformable to the state statute for condemnations, and governed by the rule of the state of Wisconsin, are expressly declared to be 'special proceedings,' and are not actions at law. *Cornish v. Railroad Co.*, 60 Wis. 476, 19 N. W. 443. Decision of this point is not necessary, for the reason that an adoption of this view, holding section 824 inapplicable, would not furnish ground for the claim, as no provision would remain for any compensation beyond that contained in section 770, which prescribed the salary of the district attorney. However inadequate this may be for such services, it is well settled that public officers take their offices cum onere. As stated by Dixon, C. J., in *Crocker v. Supervisors*, 35 Wis. 234: 'Any services required of them by law, for which they are not specifically paid, must be considered compensated by the fees allowed for other services.' If it was the duty of the petitioner, as district attorney, to perform the services, either upon direction of the attorney general, or because the matters were 'civil actions in which the United States are concerned' (section 771, Rev. St.), the general rule must apply, and limit the compensation to that which is prescribed by the statute. If the services were not such as are per se imposed upon the office of district attorney, they were in fact so rendered, and sections 1764 and 1765 preclude any compensation 'unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.' There is no pretense of any statutory allowance for the claims here made, and they are clearly barred by the interpretation placed upon the several sections above cited in *Gibson v. Peters*, 150 U. S. 342, 14 Sup. Ct. 134. It is there held: 'Congress evidently intended to require the performance by a district attorney of all the duties imposed upon him by law, without any other remuneration than that coming from his salary, from the compensation or fees authorized to be taxed and allowed, and from such other compensation as expressly allowed by law specifically on account of services named.' And the purpose is further stated that the United States was not to be subjected to any rule for reasonable compensation which applied to private suitors, or 'any system for compensating district attorneys except that expressly established by congress, and therefore to withhold from them any compensation for extra or special services, rendered in their official capacity, which is not expressly authorized by statute.' I am well convinced of the entire merit of these claims, aside from the want of statutory authority for their allowance, but am constrained to hold that this objection is fatal. The petition does not contain specifications which would enable an allowance of taxable fees, if that were desired. It must, therefore, be dismissed, but without prejudice to a claim for such allowance. Findings are filed herewith in accordance with this opinion."

Elihu Colman, pro se. (Thomas Milchrist, of counsel).

J. H. M. Wigman, for the United States.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. The appellant, Elihu Colman, was district attorney of the United States for the Eastern district of Wisconsin from February 6, 1890, to April 24, 1893. In September, 1891, he was instructed by the department of justice to co-operate with Albert E. Thompson, who had theretofore been appointed a special assistant attorney general, in the management of the flow-

age damage cases against the government pending in the United States circuit court for the Eastern district of Wisconsin. The cases referred to had arisen under the act of congress of March 3, 1875, whereby the owners of land or property adjacent to the Fox and Wisconsin rivers were allowed to bring actions against the United States for damages caused by the improvement of those rivers by the government. Of the cases brought and pending in the court of the Eastern district of Wisconsin when the appellant was directed to aid in their management there were about 150. The sums claimed amounted to \$231,818, and in most of the cases awards had been entered, which aggregated \$127,468. The appellant, in obedience to instruction, assisted in the preparation for the trial and in the trial of a test case, and in the settlement and disposal of the other cases except three, which remained pending when he quit office, involving not more than \$500. The judgments obtained against the government in the cases disposed of had been reduced below the awards to the sum of \$36,171.34, which result, it is alleged, was largely due to the skill and labor given to the management of the cases by Thompson and the appellant. The test case was the case of the Paine Lumber Company, Limited, against the United States (55 Fed. 854), in which the demand was \$100,000, the award \$65,621, and the trial, which lasted more than a month, resulted in a verdict for \$5,588.34. Besides the damage flowage cases, but, it is alleged, directly connected with them, were two other cases under the charge of Thompson, in the preparation and trial of which the appellant assisted, namely, the case in equity of the United States against the Winnebago Paper Company and 36 other defendants, involving the rights of the parties in the flowing water of Fox river, and the case in ejectment of the United States against the Manufacturers' Investment Company. Accompanying the complaint or petition of the appellant are bills of particulars of the services rendered and expenses incurred in each of these cases, the total charge for services being \$4,000, and for expenses \$78.80. It is alleged that the attorney general had allowed the claims to the amount of \$2,708.50, but that the comptroller of the treasury had refused to allow any part of them. The court found specially (1) that the services were duly rendered as alleged in the petition, but were in pursuance of his office, and during the term of office of the petitioner as district attorney; (2) that the services in the flowage cases were rendered under the direction of a communication from the department of justice, accompanied by a letter of request therefor by A. E. Thompson, copies of which are set out in the finding; and (3) that the services stated in the petition were reasonably worth the amount claimed in the petition in each of the matters therein set forth, upon the basis of the customary professional charges for such services. As matter of law the court found in substance that the United States was not liable to the appellant for the value of his services, but only in the amounts provided by statute for such services. We concur in that conclusion. Statutory provisions pertinent to the subject are collected and considered in the case of *Gibson v. Peters*, 150 U. S.

342, 14 Sup. Ct. 134. Section 770 of the Revised Statutes fixes the salary of a district attorney, and section 771 makes it his duty "to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned." Sections 823 to 827, inclusive, prescribe the fees which shall be allowed to district attorneys "in civil or criminal cases," "in cases of admiralty," "in cases at law," and for other specified services, and that "no other compensation shall be allowed them." When these provisions are construed, as in *Gibson v. Peters* it is declared they must be construed, in connection with sections 1764 and 1765, which forbid compensation for "extra services" and "extra allowance or compensation, in any form whatever," "unless the same is authorized by law," there can be no doubt of the right conclusion. The contention of the appellant is that the services in question were rendered by virtue of a special statute, which provided that the department of justice should represent the interests of the United States in legal proceedings under the act, including flowage damage cases (18 Stat. 506, c. 166); that this act, unlike section 380 of the Revised Statutes, under which the case of *Gibson v. Peters* arose, did not require that the district attorney should have charge of the cases arising under it, and that the cases were not "civil causes," or "cases at law," for which docket fees are allowed by section 824, but special proceedings under the Wisconsin statute for the assessment of damages. It may be conceded that in the state court the proceeding for the assessment of damages was a special proceeding, as distinguished from a civil cause or case at law, but on appeal, which either party was entitled to take, and certainly in the federal court after transfer, "the proceeding," to use the words of the supreme court in *U. S. v. Jones*, 109 U. S. 513, 517, 3 Sup. Ct. 346, "so far as the ascertainment of compensation is concerned, takes the form of a regular action at law, in which the petitioner becomes the plaintiff and the contestants the defendants." The damage cases, therefore, from the time the appellant was directed to cooperate in them, like the case in equity and the action in ejectment, were "civil causes" or "civil actions" in which the United States was concerned, and which it was a part of the appellant's official duty to prosecute or defend. It has been suggested that, in any event, the appellant ought to recover his expenses, but, as the court made no finding in respect to the items of expense, the question is not in the record. The judgment of the circuit court is affirmed.

P. J. WILLIS & BRO. v. COLE et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1895.)

No. 345.

HOMESTEAD—EVIDENCE TO SHOW ESTABLISHMENT—CREATION OF LIENS.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This was a suit, originally brought by P. J. Willis & Bro., Incorporated, against James P. Cole, Lewis Cole, and T. W. Huddleston, to enforce the lien of a trust deed upon certain lands situated in Bosque county, Tex. Afterwards, by stipulation of the parties, Thomas R. Lawson, trustee in said deed of trust, was made a party plaintiff, and Mary Cole, wife of Lewis Cole, was made a party defendant. The circuit court found upon the evidence that part of one tract covered by the deed of trust was, at the time of the execution thereof, the homestead of Lewis Cole and wife, Mary L. Cole, for which reason it held that no lien could or did attach thereto by virtue of such deed. The court, however, decreed the enforcement of the lien against the remainder of the land embraced within the terms of the deed of trust. From this decree the complainant appealed.

As shown by the assignments of error set out below, the controverted question was mainly one of fact. No opinion was written by the circuit court.

First assignment of error: The court erred in holding that the 200-acre tract claimed by Lewis R. Cole and Mary L. Cole as their homestead was such, because it appears that the burden of proof was upon them to show the fact to be such, and the trust deed of date December 14, 1891, signed by Lewis R. Cole and Thomas F. Lawson, recites that the southeast quarter of block 27, in the town of Morgan, was at that very particular time his homestead, and that he was then using, occupying, and enjoying the same as such, and that the 200 acres in controversy in this suit was not his homestead; and in this statement he was supported upon the trial by two witnesses, T. W. Huddleston and F. M. Hornbuckle, whereby the complainant established beyond controversy the fact that the homestead of Lewis R. Cole, and consequently that of his wife, was the southeast quarter of block 27 in Morgan, and not the 200 acres in controversy.

Second assignment of error: The court erred in holding that the 200 acres in controversy was the homestead of Lewis R. Cole and Mary L. Cole, in this: that it was clearly established that, although Lewis R. Cole and wife once occupied this 200 acres as a homestead, the same was abandoned for this purpose in June, 1891, and that thereafter, until within a few days of the date of the deed of trust in question, December 14, 1891, Lewis R. Cole and wife occupied the southeast quarter of block 27 in the town of Morgan as their homestead; and there is no evidence in the record to show any removal from that homestead at Morgan (if any is shown) was not an incidental removal; nor was there any evidence to show that prior to the 14th day of December, 1891, any declaration was made by Cole and his wife dedicating the 200 acres in the country as their homestead, or indicating an abandonment of the southeast quarter of block 27 in Morgan as their homestead. So that, so far as the evidence goes, the removal (if any) from the homestead in Morgan was incidental, not with the intention of abandonment, but, on the contrary, with the intention of retaining the same as a homestead, as shown by the recital to that effect by Lewis R. Cole in his solemn deed of trust to Thomas F. Lawson, for the use of complainant, on the 14th day of December, 1891.

Eugene Williams, for appellant.

Maco Stewart, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. The record showing no reversible error, the decree appealed from is affirmed.

NEWBEGIN v. NEWTON NAT. BANK OF NEWTON et al.

(Circuit Court of Appeals, Eighth Circuit. January 16, 1895.)

No. 461.

1. DECEIT—SUBSCRIPTION FOR INCREASE OF BANK STOCK.

One induced to subscribe for certificates alleged to represent an increase of the capital stock of a national bank, at a time when no increase had been authorized, upon false representations of the cashier as to the bank's condition and ability to pay dividends, it being in fact insolvent at the time, is entitled to a judgment against the bank and its receiver for the purchase money paid.

2. LACHES—WHAT CONSTITUTES.

In an action against a national bank and its receiver to recover money paid under false representations, as a subscription for an increase of capital stock, a jury being waived, the court found facts clearly entitling plaintiff to recover. It then further found that the certificates of stock were issued on July 22, 1890; that the bank had no authority to issue such certificates; that the increase of stock was not authorized until the 24th day of September, 1890; that plaintiff was guilty of laches in not returning said certificates and demanding his money until after the bank had passed into the hands of a receiver, and in not bringing his action to recover said money sooner. The court thereupon rendered judgment for defendants. *Held*, that there was nothing in the finding sufficient to support the conclusion as to laches, and that the judgment must be reversed.

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action by Henry Newbegin against the Newton National Bank of Newton and John Watts, receiver thereof, to recover money alleged to have been paid by reason of false representations. In the circuit court a jury was waived in writing, and the court, having found the facts, rendered judgment for defendants. Plaintiff brings error.

The facts, as found by the court, were "that plaintiff, on or about the 1st day of June, 1890, paid to the defendant the Newton National Bank the sum of \$6,683.60 in payment for the 62 shares of the increase capital stock of the said bank; that said bank had made application for permission to increase the capital stock of said bank from \$100,000 to \$200,000; that plaintiff had been induced to subscribe for said shares by the representations of C. R. McLain, the cashier of defendant bank; that said C. R. McLain represented said bank to be in good condition, having no bad debts, and that said increase of capital stock would pay dividends; that said representations induced said plaintiff to subscribe for said stock; that said representations were false; that said bank was, at the time said representations were made, insolvent, and that the certificates of stock were issued on July 22, 1890; that the bank had no authority to issue such certificates; that the increase of said stock from \$100,000 to \$200,000 was not authorized until the 24th day of September, 1890; that plaintiff was guilty of laches in not returning said certificates and demanding his money until after the bank had passed into the hands of a receiver, and in not bringing his action to recover said money sooner." Upon the facts thus stated, it was announced that "the court doth find, as a conclusion of law, that defendant is, by reason of the laches of plaintiff, entitled to recover, and thereupon renders judgment for defendant as follows," etc.

Henry Newbegin and Samuel R. Peters, for plaintiff in error.

C. S. Bowman and C. Bucher, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. This case appears to have been tried by the circuit court under a written stipulation of the parties waiving a jury, pursuant to sections 649 and 700 of the Revised Statutes. The circuit court made and filed a special finding of the facts, and ordered a judgment to be entered against the plaintiff in error, who was also the plaintiff in the trial court. An inspection of the special finding of facts, as contained in the record, discloses to this court that the facts found are insufficient to sustain the judgment. The circuit court first found the existence of certain facts which clearly entitled the plaintiff to a judgment, and thereafter found that the plaintiff's right of action was barred on the ground of laches. But no facts were found by the circuit court which are sufficient to support the conclusion that the plaintiff's right of action was barred by laches. For these reasons the judgment of the circuit court is reversed, and the cause is remanded, with directions to award a new trial.

GOUGAR v. MORSE.

(Circuit Court, D. Massachusetts. March 21, 1895.)

No. 250.

1. NEW TRIAL—AMBIGUOUS CHARGE TO JURY.

In an action for libel, for words alleged to have been spoken of the plaintiff as a public speaker, the evidence upon all the issues which plaintiff, on the motion for new trial, claimed to have been essential to the case, was such as to require a verdict for the plaintiff. The declaration contained an allegation which, plaintiff maintains, bore only on the question of damages, but which, defendant claims, raised an essential issue in the case itself. Evidence both in support and denial of such allegation was introduced. In its charge the court used language which might be construed as an instruction to the jury that the plaintiff must prove this allegation as a part of her case, but which was so far ambiguous as to mislead the plaintiff (under the impression that the court did not intend to give such instruction) into omitting to except to the charge. The jury gave a verdict for the defendant. *Held*, that the verdict should be set aside, and a new trial granted.

2. SAME—DISCRETION IN IMPOSING TERMS.

It is the ordinary common-law right of a suitor who has suffered from a mistrial to enjoy a new trial (including the assessment of damages by a jury), without conditions; and though there are cases where that which is erroneous may be severed, and the new trial limited or conditioned accordingly, or where terms affixed to the granting of a new trial are clearly within the line of the legal rights of the parties, judicial discretion should rarely go beyond these limits in imposing terms upon the granting of a new trial.

This was an action by Helen M. Gougar against Elijah A. Morse. Defendant obtained a verdict, and plaintiff now moves for a new trial.

Harvey N. Shepard, for plaintiff.

George D. Robinson and Henry F. Buswell, for defendant.

PUTNAM, Circuit Judge. This is a suit for libel. There was a verdict for the defendant, and the plaintiff, within the time fixed therefor by the rules, filed a motion for a new trial, for the alleged

reasons that the verdict was against the evidence and the weight of the evidence, and against the law and the instructions of the court. For reasons which will appear in the course of this opinion, the court has given this motion very careful examination, and reaches its conclusions with doubt. It is, however, satisfied that by its conclusions it is less likely to do substantial injustice than by a different result.

The only portion of the pleadings which it is essential to set out is the following extract from one count in the declaration, the other counts being for present purposes substantially the same:

"And the plaintiff says that on or about the 10th day of October, A. D. 1892, she was president of the Woman Suffrage Association, of and for the state of Indiana, and interested actively therein, and also connected with the Women's Christian Temperance Union, of and for the United States of America, and interested actively therein, and especially in the consideration and exposition of the effect upon working people of the use of alcohol and intoxicating drinks; and, also, she then was a member of the national executive committee of the Prohibition party of and for the said United States of America, and that she was known and reputed generally to be interested in the said woman suffrage and temperance causes, and was known publicly as a speaker therein; and, on or about the said 10th day of October, she also was and had been engaged and employed in the said district of Massachusetts in the making of public addresses relative to and in advocacy of the platforms and principles adopted by the Prohibition party of the United States and of the commonwealth of Massachusetts, and the election of the national and state candidates nominated thereby; and the defendant, on or about the said 10th day of October, intending to accuse, and accusing, the plaintiff of falsehood and misrepresentation in her public addresses as aforesaid, and of insincerity therein, and intending and seeking to defame the plaintiff, to blacken her reputation, to hurt her as an officer aforesaid and as a public speaker and as a woman, and to render her infamous, odious, and ridiculous, and to expose her to hatred, contempt, and ridicule, wrote and sent to Arthur B. Pierce, of Attleboro, in said district, a letter, a copy whereof, marked 'A,' is annexed hereto, and made a part of this declaration, which letter contains the following words: [Here follows the alleged libel.]"

The plaintiff, while introducing her evidence in chief, and without waiting to rebut the defendant's case, asked a witness whether he knew the reputation of the plaintiff as a public advocate of prohibition. This was admitted as merely preliminary. Next, she asked him what in October, 1892, was her reputation as a public advocate of prohibition in Massachusetts. This was objected to by the defendant, on the ground that there was no allegation touching the character of her reputation in that particular; that the allegation was merely that she was known publicly, without anything to the effect that she was known favorably or otherwise. Thereupon, after some consideration, plaintiff was allowed to amend her declaration by inserting, after the words "and was known publicly as a speaker therein," the words "and was of good and favorable reputation as such public speaker." Thereupon, after the amendment, plaintiff's counsel put the following question to the same witness: "In the month of October, 1892, just previous to the 10th, in this community, was the reputation of Mrs. Gougar as a public speaker in the prohibition and woman suffrage causes good or bad?" The defendant continued his objection, but the court admitted the question, and it was answered as follows: "I should

say very good." As the result of the opening of this topic by the plaintiff, further evidence of a like character was put into the case by her, and the defendant met it, or endeavored to meet it, by evidence showing his view of the plaintiff's reputation, which evidence on his part the following, from his own testimony, fairly characterizes:

"Her reputation as a speaker is that she is a speaker of ability and remarkable command of language, and a very sharp, personal, bitter, and vindictive public speaker."

A careful examination of the record fails to show that the court considered definitely whether this amendment and the evidence referred to related to the cause of action, and were essential to it, or concerned only the question of damages. This latter question the plaintiff was, of course, entitled to open in this way at the outset of her case, if she saw fit so to do and the court saw no reason to the contrary, without waiting to reply to the defendant's case. Neither does it appear satisfactorily to which of these topics the plaintiff regarded the amendment and the evidence to relate. Indeed, she was not requested to elect, and, perhaps, could not have been required to elect, in reference thereto, at that stage of the case; but she was permitted to put in the amendment and proofs, and draw such advantage from them as she might draw in any direction according to subsequent developments.

The only alleged libelous expression which the court allowed to go to the jury was the following: "She [that is, the plaintiff] is a soldier of fortune, who works for the side that pays the best." Touching that, the court in substance said, with the explanations we will give further on, that it involved a charge of insincerity, and that, for a person who undertakes to instruct and persuade the public, sincerity of character and a reputation for such sincerity are ordinarily of very great value. The court further said every charge of insincerity is not libelous, and that, if libelous in this case, it was because it was made against a person occupying the position and doing the work which the plaintiff claims she was doing. As illustrating this, the court referred to *Com. v. Wright*, 1 Cush. 46, where it was held that it is libelous to publish of one in his capacity of a juror that he in such capacity agreed with another juror to stake the decision of the amount of damages to be given in a cause then under their consideration, upon a game of checkers. The court observed that, in the case cited, this was libelous, because it was spoken of a juror in his capacity as such; and that, on like principles, in the case on trial the expression stated was libelous, if at all, because it referred to the plaintiff as a public speaker. To make plain, an examination of the record shows the basis on which the court proceeded was that these words would not have been libelous if they had referred to the plaintiff merely as a private individual. Therefore, according to the views of the court by which the trial was governed, it was necessary to the plaintiff's case to prove, as a matter of fact, that she was a public speaker, as alleged, and that these words referred to her in her capacity as such.

On this motion for a new trial, a question has arisen between counsel whether it was also ruled that it was necessary to prove as a part of the plaintiff's principal case, and not merely with reference to an enhancement of damages, that her reputation as such public speaker was such as was alleged in the amendment which the plaintiff made. It is clear, as already stated, that, at the time the amendment was offered, this precise question was not brought to the attention of the court, and was not specifically ruled on; and it is also clear that the amendment was pertinent with reference to the matter of the enhancement of damages, if not necessary with reference to the plaintiff's principal case. The court regrets, however, to find, on a re-examination of the charge, that the earlier parts of it gave some ground for misunderstanding among counsel touching the instructions which the court gave the jury on this particular topic; and, further, that, if the court can fairly be understood to have instructed the jury as the defendant claims it did, the plaintiff was misled, and therefore failed to take the exception which she otherwise might have taken.

It cannot be doubted that the expression which the court allowed to go to the jury as actionable was so plain and unambiguous to the common understanding that, the conditions referred to being satisfied, the question whether it was libelous or not was for the court. It is not necessary to cite authorities to any extent on this proposition, and the court only refers, therefore, to *Morgan v. Halberstadt* (decided by the circuit court of appeals for the Second circuit) 9 C. C. A. 147, 60 Fed. 592, and to the exceedingly careful opinion of Judge Taft, in behalf of the circuit court of appeals for the Sixth circuit, in *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 59 Fed. 530. The last case meets the claims which were raised at the trial, touching the lack of actual malice on the part of the defendant, of good faith on his part, and that the matter was of public interest, and therefore privileged; and it also supports the proposition that the law looks, not at what was intended to be charged, but at what was in fact written. It is also not necessary to cite authorities on the proposition that, if the conditions referred to were satisfied, the expression is libelous. But *Post Pub. Co. v. Hallam*, *ubi supra*, is singularly in point. There the defendant below charged the plaintiff below with selling his influence in a political convention. This was held to be libelous *per se*, and, on the question of privilege, the court cited and approved the expressions of Lord Herschell in *Davis v. Shepstone*, 11 App. Cas. 187, as follows:

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

The defendant, moreover, failed to justify—that is, to prove—that the plaintiff was in fact insincere, or, if it was necessary for him to do so, to prove that her reputation as a public speaker was that

of insincerity, although he did offer evidence tending to show that her reputation as such was of the character described by him in the extract we have made from his evidence. There was matter which came into the case in one way and another, tending not only to support this evidence, but also to show that the plaintiff's methods as a public speaker were in fact sharp, personal, and bitter.

At the close of the charge, in reply to a question by a jurymen, the court said as follows:

"You understand from my charge that if you find that the plaintiff was engaged as a public speaker, as she says in her writ she was, and if the words, which I will read to you again, related to her as a public speaker, then they are libelous; that is, 'she is a soldier of fortune, who works for the side that pays the best.' If you find she was engaged as a public speaker, as she says, and those words related to her as a public speaker, then I instruct you they are libelous."

It will be observed that this left out an element or condition requiring that the jury should find as essential to the plaintiff's cause of action the matter covered by the plaintiff's amendment. It will also be noticed that this was the last expression to the jury on this topic. With reference to damages, the court instructed the jury that there was no evidence of special damages, as that the plaintiff had lost or suffered in her occupation; that the question of damages was one of injury to her sensibilities and reputation; that she was entitled to such special consideration of the injury to the former as came from the fact that she valued and cherished her reputation as a public speaker; but that, in taking into account her sensibilities and reputation, the jury should take them just as they were presented to them at the trial. Beyond this, the attention of the jury was not called by the court to the favorable or unfavorable character of her reputation, or to the points with reference thereto raised by the amendment and evidence which we have explained; and no request for a more specific ruling in those particulars was made by either party. The jury were not told in terms that if they found that the plaintiff was engaged as a public speaker as alleged, and that the words cited related to her as such public speaker, they should return a verdict for the plaintiff; but, as the case stood, the verdict for the defendant was clearly erroneous, and should be set aside, unless the third condition fairly came into the case, as is claimed by the defendant on this motion for a new trial. There was no doubt, on the evidence, that she was a public speaker, as alleged in her declaration, and was publicly known as such. There was also no doubt that the words submitted to the jury referred to her as such public speaker. Therefore, if only these two conditions had been involved, the language cited was libelous, not privileged, nor justified; and it was undoubtedly the duty of the jury to return a verdict for the plaintiff, even though for nominal damages, and the court might well have expressly instructed them so to do.

But, as already said, the defendant claims that the court, in its charge, made a third condition essential to the plaintiff's principal case; namely, that the allegation of the plaintiff's amendment to

the effect that she was of good and favorable reputation as a public speaker should also be established. If the court had clearly so ruled, and thus clearly furnished the plaintiff ground for an exception to such ruling, the court has no doubt that it would be beyond its power to disturb this verdict; as the evidence on this proposition was of such character, pro and con, as undoubtedly to leave the case in this particular to the judgment of the jury as the ultimate arbiter. But while there are some things in the early part of the charge which apparently justify this proposition, and, as already said, lead to misapprehension, yet the court is not satisfied that the charge as a whole fairly bears that construction. The court need not, however, follow this further, because, if it does bear that construction, the plaintiff was, nevertheless, fairly led to assume otherwise, and especially to assume that the early parts of the charge were superseded by the closing remarks to the jury, already cited. For the court to hold now that any rule other than that given in its closing remarks was intended by it or given by it would operate unjustly, in connection with an excusable misunderstanding on the part of the plaintiff, to deprive her of exceptions which she might have taken, if she had conceived the rulings of the court to have been as now claimed by the defendant. One of two propositions seems clear. Either the court must be held to its closing remarks, in which case the verdict of the jury was clearly against the instructions, or there is an inconsistency between the various parts of the charge which obviously tended to mislead the plaintiff. In either event the plaintiff has been injured. Therefore, the court is constrained to stand by its closing instructions, and to hold that, in accordance with them, the jury should have returned a verdict for the plaintiff, and that its verdict for the defendant was a mistaken and erroneous one; not only against the evidence, but against the law as given at the trial, and as required to be applied to the undoubted facts of the case. In coming to this conclusion, the court feels that the error arose more from its own failure to give positive instructions with reference to the results of the complicated rules of law touching actions of libel, applicable to the case at bar, than from any purposed inattention of the jury. The court has not found it necessary to determine what is the true principle of law in the particular in dispute, because, on reflection, the court perceives that it must, for the purposes of this motion, stand on what was in fact ruled at the trial, or that it will deprive plaintiff of exceptions to which she would otherwise have been justly entitled.

It was suggested at the hearing of this motion, and is now claimed by the defendant, that as the damages must in any event be nominal, or at least very small, the court would be justified in imposing on plaintiff the terms of an option on the part of defendant to consent to a judgment for a nominal or small amount, to be fixed by the court. There are many reasons, in view of the state of the evidence, and also in view of the public and private expenditures involved in a new trial, which appeal to the court to take this view; but the court is satisfied that it cannot lawfully do so. Within two or three days after the date of the alleged libel, the defendant

gave a very wide publication to what was claimed in defense to have been a retraction. In view of the fact that the law is that there could be but one assessment of damages, to cover both the past and the future, and that the jury may find that the injury arising from a specific libel is continuing, it seemed to the court proper to allow the retraction to go to the jury, for it to determine whether or not it operated to diminish the continuing injury, to stay it entirely, or perhaps to enhance it. While the alleged retraction did not in terms directly traverse the alleged libel, as it might have done if drawn under legal advice, yet there was much in the method of its publication on which to base arguments in behalf of the defense that it might well have been accepted by the plaintiff; and there was some evidence to support the claim that it had in fact been so accepted. For this and other reasons shown in the case, it is apparent that, if the verdict had been for a nominal or small amount, it would have been beyond the just power of the court to interfere with it; and this fact is now pressed on us as a ground for refusing a new trial, except subject to the terms named. But, in cases of this character, damages—within, of course, certain extreme limits—are so far outside any rules of admeasurement which the court possesses that the right to have them determined by a jury is a fundamental one at common law. There are, of course, cases where, on granting a new trial, that which is erroneous may be severed, and the new trial limited or conditioned accordingly; and there are also cases where terms affixed to the granting of a new trial are clearly within the line of the legal rights of the parties. But beyond this judicial discretion in this direction should rarely go. It is the ordinary common-law right of a suitor who has suffered from a mistrial to enjoy a new trial without conditions; and for the court to impose terms, unless in exceptional cases, is less like administering the law than it is like involving the injured party in a legal trap, and refusing him permission to escape except under a penalty. Among the great number of cases in which new trials have been granted, precedents can, perhaps, be found for sustaining the exercise of judicial discretion to the extent of giving the defendant an option in the case at bar; but the court, in the absence of a precedent which directly controls it, considers it its duty to maintain the legal rights of parties according to the common law, with only such exceptions in the application of judicial discretion as are sustained by well-settled practice. The plaintiff's right to a legal verdict involved an assessment of damages by the jury; and as, by reason of an erroneous trial, her constitutional privilege to have such an assessment has not been realized, the court feels compelled to secure it to her.

The verdict is set aside, and a new trial granted.

ATCHISON, T. & S. F. R. CO. v. CAMERON.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1895.)

No. 404.

1. CARRIERS—DUTY TO STOP AT STATION—STATEMENTS OF TICKET AGENT.

Statements of a ticket agent that a certain train stopped at a certain station will bind the railroad company only when made contemporaneously with the sale of a ticket, and not when made several weeks before, and not referred to at the time the ticket was sold.

2. SAME—IMPLIED OBLIGATIONS.

Sale by a carrier of a ticket to a station on a connecting line creates no implied obligation that the train for which it is sold shall stop at that station, or that it will be reached without change of cars, or waiting at stations for other trains.

In Error to the United States Court in the Indian Territory.

Action by Nannie Cameron against the Atchison, Topeka & Santa Fe Railroad Company. Judgment for plaintiff. Defendant brings error.

Henry E. Asp (John W. Shartel, on the brief), for plaintiff in error.

W. O. Davis, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. Nannie Cameron, the defendant in error, brought an action against the Atchison, Topeka & Santa Fe Railroad Company, the plaintiff in error, in the United States court in the Indian Territory, to recover damages for its failure to stop one of its trains, on which she was a passenger, at Moore, a small station on its road in the territory of Oklahoma. She recovered a verdict, and the case comes to this court on a writ of error sued out by the defendant railroad company. In her complaint the plaintiff below averred that on June 4, 1891, she purchased from the agent of the Gulf, Colorado & Santa Fe Railway Company at Gainesville, Tex., a ticket entitling her to transportation from that point on the line of the Gulf, Colorado & Santa Fe Railway Company to Moore, a station on the line of the Atchison, Topeka & Santa Fe Railroad Company in Oklahoma territory; "that before purchasing said ticket * * * plaintiff caused inquiry to be made of defendant's agent at said Gainesville concerning the said train, and was assured and informed by said ticket agent that said train was a through train from Gainesville to Moore, and that the same would stop at Moore, and that she would have a continuous passage thereon from Gainesville to Moore without change of cars, and plaintiff, not knowing of any rule or regulation of the defendant to the contrary, believed said statements, and took passage on said train;" that she was subsequently compelled to leave said train at Norman, a point nine miles south of Moore, because the train did not stop at Moore, and that her health was impaired by leaving the train in a rain storm, and that she was also subjected to considerable expense, inconvenience, and delay. The facts disclosed by

the record are as follows: In May, 1891, the plaintiff resided at Belcherville, Tex., which is a town about 47 miles distant from Gainesville. Being in poor health, she was desirous of visiting her sister, who resided a few miles from Moore, in the territory of Oklahoma. About three weeks prior to June 4, 1891, the plaintiff's brother, while passing through Gainesville, called at the station of the Gulf, Colorado & Santa Fe Railway Company for the purpose of making inquiries with respect to trains running between that point and Moore. What occurred at that interview between the plaintiff's brother and the station agent will be best shown by the testimony of the former, which is all the evidence that we find in the record tending to show that an agent of the defendant company assured the plaintiff that the train on which she eventually took passage would stop at Moore. The testimony is as follows:

"Q. Who did you see when you got to Gainesville? A. I seen a good many people. I seen the ticket agent at the depot. Q. What agent? A. The ticket agent of the Gulf, Colorado and Santa Fe Railway Company. Q. What did you say to him with reference to your sister wanting to go to Moore? Did you state whether or not you asked that question in contemplation of buying a ticket for your sister? A. I did. Q. State the conversation between you and the agent? A. Well, I told him my reasons for coming to see him. I asked what train would be best for my sister to go on, as she was an invalid, and told him that if she could get a through train she could go to Moore without any of us going with her, and if she could not some of us would have to go with her. This was about three weeks before she went. He told me she could if she went on the ten o'clock train at night. That was why I sent her on that train. Q. Did you say to him that your sister was an invalid? A. Yes, sir; I told him that she was an invalid. Q. What did he say with reference to that train stopping at Moore? A. He said that if she took the day train she would have to lay over at Purcell. That was why we put her on the night train,—to save going with her. Q. When the ticket agent told you that the 10:30 train was a through train to Moore, and stopped at Moore, what did you then say to him with reference to your sister going to Moore? A. I don't remember what I really did say to him. I inquired about that train, and he told me that she could go through on that train. Q. Well, when you came back to Belcherville, did you report to your sister what the agent had said to you with reference to the train? A. Yes, sir."

Three weeks after the alleged interview, which is given above in the language of the witness, a brother-in-law of the plaintiff brought her to Gainesville, and purchased for her, from the station agent of the Gulf, Colorado & Santa Fe Railway Company at that place, a ticket from Gainesville to Moore. At that time there were only two trains per day by means of which persons could make the journey by rail from Gainesville to Moore over the lines of the Gulf, Colorado & Santa Fe Railway Company and the Atchison, Topeka & Santa Fe Railroad Company. One of these trains left Gainesville at 2:25 p. m., and arrived at Purcell, in the Indian Territory, the same evening at 6:40 p. m., where passengers were compelled to lay over until the following day before proceeding north. Another train, known as the fast through express from Galveston to Kansas City, passed through Gainesville at 10:30 p. m. daily, and arrived at Purcell, the terminus of the Gulf, Colorado & Santa Fe Railway, at about 3:15 a. m. the next morning. At that point the passenger and express cars of the train were taken up by a train of the Atchison, Topeka & Santa Fe Railroad Company, which left

Purcell for the north immediately on the arrival of the through train from the south. This train was not scheduled or advertised to stop at Moore, which was some 25 miles north of Purcell, and it did not stop at the former station except when it was necessary to do so to pass other trains. Passengers destined for Moore who came from points as far south as Gainesville could make the trip most expeditiously and conveniently by taking the through train leaving Gainesville at 10:30 p. m. This train arrived at Norman about 4 a. m. the next morning. At 7 a. m. a local train from the south stopped both at Norman and Moore, which enabled passengers who had left the through train at Norman to reach Moore about 8 a. m. There was a comfortable hotel at Norman, about 125 feet from the station. The station was also provided with an ordinary waiting-room. According to the testimony of the defendant's witnesses, passengers who desired to stop at Moore, who came from points a considerable distance south of Purcell, usually took the through evening train, and made the trip in the manner above indicated, unless it was found necessary for the through train to stop at Moore.

We have been favored by counsel for the plaintiff in error with an elaborate argument, which is intended to establish the proposition that the evidence as to what occurred between the station agent at Gainesville, Tex., and the plaintiff's brother, was inadmissible. It is contended, in substance, that the two corporations above mentioned were distinct legal entities, each under a different management, which bore to each other, at the date of the transaction in question, the same relations that are ordinarily borne by connecting railroads; also that a ticket agent who is merely authorized to sell coupon tickets over the line of a connecting road has no implied authority to make representations for the connecting carrier as to the movement of trains on its road. The view that we have felt ourselves compelled to take of the present case does not require us to determine what were the actual relations that existed on June 4, 1891, between the two carriers; and with reference to the powers of a ticket agent to bind his own company or a connecting carrier we are willing to accept the doctrine announced in *New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. 356, that what is said between a passenger on a railroad and the ticket seller of the company, at the time of the purchase by the passenger of his ticket, is admissible as going to make up the contract of carriage and forming a part of it. The case at bar proceeded upon the evident assumption that the agreement implied by law from the mere purchase of the ticket from Gainesville to Moore was qualified and enlarged by a special assurance given to the purchaser, by the station agent at Gainesville, that the train on which the plaintiff took passage on the evening of June 4, 1891, would stop at Moore. We think that the evidence was insufficient to show a modification of the implied obligation such as is above indicated. The conversation between the plaintiff's brother and the station agent, which is relied upon for that purpose, occurred, as before stated, three weeks before the ticket was purchased. It

was not called to the attention of the station agent by the plaintiff's brother-in-law, who purchased the ticket for her, and no inquiry was made at that time whether the train stopped at Moore. So far as we can discover, the station agent had no reason to suppose, when he sold the ticket, that it was bought by the plaintiff on the faith of representations that had been made to her or her brother three weeks previously; nor was there any evidence that the agent who sold the ticket and the agent who made the alleged representation were the same person. As no inquiry was made when the ticket was bought as to whether the train stopped at Moore, and as the alleged conversation with the plaintiff's brother was not called to the agent's attention, it must be held that it was too remote in point of time to alter the legal obligation of the parties incident to the purchase of the ticket. When, by means of oral statements made by a ticket agent, persons seek to enlarge the obligation which a railroad company assumes by selling a ticket, the proof should be confined to statements made by the agent contemporaneously with the purchase of the ticket. *Hostetter v. Railroad Co.* (Pa. Sup.) 11 Atl. 609. Ticket agents are not charged with the duty of determining at what stations trains shall stop for the discharge of passengers. They are not vested with an actual authority to control the movement of trains, either on their own road or connecting lines, and this fact is generally well known to the traveling public. Besides, railroad companies are in the habit of giving full information to the public as to the movement of trains on their respective roads by means of time cards and folders. We think, therefore, that if a connecting road is to be held liable in damages for representations made by a foreign ticket agent as to the movement and stopping points of trains on its road, which are incorrect, and differ from information given by its published time cards and folders, the liability should be limited to representations that are practically coincident with the purchase of the ticket. So far as we are advised, statements made by such agents that have heretofore been held admissible to impose a liability upon a connecting carrier, growing out of the sale of a ticket, are statements made to passengers in connection with the purchase of a ticket. *New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 69, 12 Sup. Ct. 356. It is also worthy of notice in this connection that the station agent at Gainesville evidently gave the plaintiff's brother correct information as to the train that it would be best for the plaintiff to take to reach her destination with the least inconvenience and delay. It is not shown by the testimony that the agent stated that the night train stopped at Moore. He represented it to be a through train, as it was ordinarily called; but, even if it be conceded that he was probably understood to mean that it stopped at Moore because he termed it a through train, still we think that, if the plaintiff had been fully advised of the situation before she left Gainesville, she would most likely have taken the night train, and that the false information complained of did not, in fact, cause her to take a different train than she would otherwise have taken.

It only remains for us to consider whether, without reference to the verbal representations said to have been made, the defendant company was nevertheless under an implied obligation to stop the through express train at Moore, because its agent for the sale of tickets sold the plaintiff a ticket entitling her to be carried from Gainesville to Moore. The law seems to be well settled that when a railroad company sells a ticket from one point to another on its own line, it simply engages to carry the passenger to his destination in the customary way, according to such reasonable rules and regulations as it has adopted for the running of its trains. In the absence of a special contract to that effect, a passenger has no right to require a train to stop at a particular station where, according to the regulations of the company, it is not scheduled to stop, and does not ordinarily stop. Railroad companies are bound, of course, to make reasonable running arrangements for the accommodation of the traveling public, but that does not mean that all passenger trains must stop at all stations, or that trains must be so scheduled and run as to enable each passenger to make a continuous trip. So long as a railroad company furnishes reasonable facilities for reaching all stations on its line, passengers who desire to stop at a particular station should take trains that usually carry passengers to that place. *Railroad Co. v. Randolph*, 53 Ill. 510; *Plott v. Railway Co.*, 63 Wis. 511, 516, 23 N. W. 412; *Railroad Co. v. Bills*, 104 Ind. 13, 17, 3 N. E. 611; *Duling v. Railroad Co.*, 66 Md. 120, 6 Atl. 592; *Matthews v. Railway Co.* (S. C.) 17 S. E. 225. We think, therefore, that the sale of the ticket from Gainesville to Moore did not in itself obligate the defendant company to stop the through express at the latter station, and that the sale of the ticket was not in itself an assurance that the plaintiff would be carried through to her destination on that train without change of cars. It results from the foregoing views that there was not sufficient evidence to warrant a verdict in favor of the plaintiff, and the court below should have so instructed the jury. For its failure to give such instruction, as it was requested to do by the defendant company, the judgment of the lower court is reversed, and the cause is remanded, with directions to award a new trial.

UNITED STATES v. ORTEGA.

(District Court, S. D. California. February 20, 1895.)

1. VIOLATIONS OF CUSTOMS LAWS—CRIMINAL PUNISHMENT—SMUGGLING CIGARS IN SMALL QUANTITIES.

The provision of Rev. St. § 3082, punishing unlawful importations by fine and imprisonment, in addition to forfeiture of the goods, applies to cases of smuggling cigars in quantities less than 3,000, notwithstanding the provisions of section 3081, that goods seized, of an appraised value not exceeding \$1,000, may be released on payment of such value, and of sections 2804 and 2652, that no cigars shall be imported unless packed in boxes of not more than 500 cigars in each, and that no entry of cigars shall be allowed of less than 3,000 in each package, and that regulations

shall be made for carrying into effect these provisions; as these sections apply to the revenue features of the law, and do not affect its criminal feature.

2. SAME—CONSTRUCTION OF STATUTES—REPEAL BY IMPLICATION.

Neither was the criminal feature of Rev. St. § 3082, repealed by implication by the amendment of section 2865, so as to provide for the punishment of smuggling, made by Act Feb. 27, 1877, "to perfect the revision of the statutes," which, although it struck out, amended, or otherwise changed many sections and provisions, left section 3082 unchanged; there being no such clear and positive repugnancy as to leave no doubt as to the intent of congress.

3. SAME—CUSTOMS REGULATIONS—CRIMINAL PUNISHMENTS.

The provision in article 354 of the customs regulations of 1892 that any cigars in excess of 50, and not over 1,000, in the possession of a passenger, and evidently for his bona fide personal consumption, may be delivered to him on payment of the duty, and that 50 cigars or less may be delivered to him free, has no application to the criminal features of Rev. St. § 3082, which provides a punishment for fraudulently or knowingly bringing in goods contrary to law.

4. SAME—CRIMINAL TRIALS—INSTRUCTIONS—REPEAL OF STATUTE.

Section 16 of the act of June 22, 1874 (1 Supp. Rev. St. p. 76), requiring the court to submit to the jury, as a separate and distinct proposition, the question whether the alleged acts were done with an actual intent to defraud the United States, was expressly repealed by the act of June 10, 1890 (1 Supp. Rev. St. [2d Ed.] 34, 755); and, even when in force, it was limited to proceedings "to enforce or declare the forfeiture of any goods," etc., and had no application to criminal trials.

This was an indictment against Gregorio Ortega for violation of the customs laws. Defendant, having been convicted, moves in arrest of judgment, and for a new trial.

George J. Denis, U. S. Atty.

Zach. Montgomery, for defendant.

ROSS, District Judge. The defendant in this case having, after trial upon an indictment based upon section 3082 of the Revised Statutes, been convicted, motions on his behalf are made in arrest of judgment and for a new trial.

The fourth section of the act of congress of July 18, 1866, entitled "An act further to prevent smuggling, and for other purposes" (14 Stat. 179), provided:

"That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares, or merchandise contrary to law, or shall receive, conceal, buy, sell, or knowingly facilitate the transportation or sale of such goods, wares, or merchandise after their importation, knowing the same to have been imported contrary to law, such goods, wares, and merchandise shall be forfeited, and he or she shall, on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding \$5,000 nor less than \$50, or be imprisoned for any time not exceeding two years, or both, at the discretion of such court."

That provision of the law, with some verbal changes, was embodied in the Revised Statutes as section 3082.

In speaking of the fourth section of the act of 1866, the supreme court said in the case of *U. S. v. Claffin*, 97 U. S. 553, that congress "had in view, not only punishment of the offense described, but indemnity to the government for loss sustained in consequence of the criminal conduct of those guilty of the offense." That is

plain, from the language employed. See, also, *Cotzhausen v. Nazro*, 107 U. S. 219, 2 Sup. Ct. 503; *Friedenstein v. U. S.*, 125 U. S. 224, 8 Sup. Ct. 838; and *U. S. v. A Lot of Jewelry*, 59 Fed. 684, in which latter case it was adjudged that so much of section 3082 of the Revised Statutes as declares a forfeiture of goods imported contrary to law is a subsisting statute. It is with its criminal aspect that we have to deal in the present instance. The language of the statute is very general. So far as applicable here, it reads:

"If any person shall fraudulently or knowingly import or bring into the United States * * * any merchandise contrary to law, * * * such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

It is said by counsel for the defendant that section 3082 of the Revised Statutes has no application to the smuggling into the United States of cigars in less quantities than 3,000; that it was never intended for such petty violations of the revenue laws; that those are governed by other provisions of the statutes, and by the rules and regulations prescribed by the secretary of the treasury; that this is shown in part by the preceding section (3081) of the Revised Statutes, which reads as follows:

"The collectors of the several districts of the United States, in all cases of seizure of any merchandise for violation of the revenue laws, the appraised value of which, in the district wherein such seizure shall be made, does not exceed one thousand dollars, are hereby authorized, subject to the approval of the secretary of the treasury, to release such merchandise on payment of the appraised value thereof."

Such release, in cases falling within the provisions of section 3081, would undoubtedly dispose of the forfeiture feature of section 3082. But, as has already been said, section 3082 has a double aspect; that is to say, it provides not only for the forfeiture of the smuggled merchandise, in order to secure indemnity to the government for the wrong done to it, but superadds fine or imprisonment, or both, as a vindication of public justice. *U. S. v. Claffin*, *supra*. The criminal feature of section 3082 is unaffected by the provisions of section 3081. Nor, in my opinion, is it affected by the provisions of sections 2804 or 2652 of the Revised Statutes, which provide, among other things, that no cigars shall be imported unless the same are packed in boxes of not more than 500 in each box, and that no entry of any imported cigars shall be allowed of less quantity than 3,000 in a single package, and authorizing the secretary of the treasury to make all necessary regulations for carrying those provisions of the law into effect, and making it the duty of all officers of the customs to execute and carry into effect all instructions of the secretary of the treasury relative to the execution of the revenue laws, and making his decision in respect to the true construction and meaning of any part of the revenue laws conclusive and binding upon all officers of the customs. These provisions deal

with the laws intended to secure revenue to the government, and I discover nothing in them to indicate that they were intended to limit those provisions of the statute making it a crime punishable by fine or imprisonment, or both, to knowingly import merchandise contrary to the revenue laws. The amount of costs that attend such prosecutions is not a valid argument for excluding cases from the operation of the statute which manifestly fall within it.

There is room for argument in favor of the proposition that the criminal feature of section 3082 of the Revised Statutes was repealed by the act of February 27, 1877 (19 Stat. 240), by which act section 2865 of the Revised Statutes was amended by substituting therefor the following:

"If any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States, any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom house any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

But it cannot, I think, be properly so held when it is considered that the act of February 27, 1877, was an act, as its title declared, "to perfect the revision of the statutes of the United States and of the statutes relating to the District of Columbia," by which a large number of the sections and provisions of the Revised Statutes were stricken out, amended, and otherwise changed, while section 3082 was left wholly unchanged, and bearing in mind the rule declared by the supreme court in *U. S. v. Sixty-Seven Packages of Dry Goods*, 17 How. 93, that:

"In the interpretation of our system of revenue laws, which is very complicated and contains numerous provisions to guard against frauds by the importers, this court has not been disposed to apply with strictness the rule which repeals a prior statute by implication, where a subsequent one has made provisions upon the same subject, and differing in some respect from the former, but have been inclined to uphold both, unless the repugnancy is clear and positive, so as to leave no doubt as to the intent of congress; especially in cases where the new law may have been auxiliary to and in aid of the old, for the purpose of more effectually guarding against the fraud."

Respecting the animadversions of counsel upon the testimony of the deputy collector in regard to the practice of the customs officers in the San Diego district permitting persons coming from Mexico into the United States to bring with them any number of cigars less than 50 free of duty, it is but fair to say that they were, doubtless, acting pursuant to article 354, p. 146, of the customs regulations of 1892, which provides, among other things, that:

"Any cigars in excess of fifty, and not over one thousand, in the possession of a passenger, and evidently for his bona fide personal consumption, may be delivered to him on payment of a fine equal to the duty. Fifty cigars or less may be delivered free of duty."

These regulations, prescribed by the secretary of the treasury, like those already referred to, have, I think, no application to that feature of the statute which makes it a crime, punishable by

fine or imprisonment, or both, to fraudulently or knowingly import or bring into the United States any merchandise contrary to law. Two hundred and seventeen cigars are as much merchandise as are as many thousand, and they are not importable into this country from a foreign country except upon the payment of the prescribed duty, and then only in quantities and in the form prescribed by the laws of the United States. To otherwise bring them into the country fraudulently or knowingly is declared by section 3082 of the Revised Statutes to be a criminal offense, and punishable accordingly. The indictment is based on that section, and is, in my opinion, sufficient under its provisions.

The motion for new trial is based upon the proposition that in this case the court did not submit to the jury, "as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States"; the contention of counsel for defendant now being, although no such request was preferred at the trial, that such a course was required by the provisions of section 16 of the act of congress of June 22, 1874, entitled "An act to amend the customs revenue laws, and to repeal moieties" (1 Supp. Rev. St. p. 76), which reads as follows:

"That in all actions, suits, and proceedings in any court of the United States now pending or hereafter commenced or prosecuted to enforce or declare the forfeiture of any goods, wares, or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited by reason of any violation of the provisions of the customs-revenue laws, or any of such provisions, in which action, suit, or proceeding an issue or issues of fact shall have been joined, it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by such jury; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed."

There are two valid answers to this proposition: The first is that section 16 of the act of June 22, 1874, was expressly repealed by the act of June 10, 1890 (1 Supp. Rev. St. [2d Ed.] pp. 34, 755). But, apart from that consideration, it is quite evident, I think, that, while section 16 of the act of 1874 was a subsisting law, it had no application to a criminal case, but in terms applied to all actions, suits, and proceedings in any court of the United States then pending or thereafter commenced or prosecuted to enforce or declare the forfeiture of any goods, wares, or merchandise, etc., by reason of any violation of the provisions of the customs revenue laws. The counsel for the defendant, in considering the word "all," immediately preceding "actions, suits," etc., fails to give proper effect to the qualifying words "to enforce or declare the forfeiture of any goods, wares, or merchandise," etc. Manifestly, a prosecution for the violation of a criminal statute is in no sense an action, suit, or proceeding to enforce or declare the forfeiture of property.

Motions denied.

BOUSSOD VALADON CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 30, 1895.)

No. 494.

1. CUSTOMS DUTIES—REVIEW OF THE DECISION OF THE BOARD OF APPRAISERS—EVIDENCE.

A finding of the board of general appraisers, not sustained by sufficient proof, will be disregarded by the court.

2. SAME—PAINTING IMPORTED FOR EXHIBITION — ASSOCIATION FOR PROMOTION OF ART.

A painting imported for exhibition by an association for the promotion of art, within Act Oct. 1, 1890, par. 758, providing for admission of works of art so imported, does not fall within the proviso of paragraph 759, that the privileges of paragraph 758 "shall not be allowed to associations engaged in or connected with business of a commercial character," merely because it is exhibited in the art rooms occupied by a copartnership engaged in selling works of art, some of whose members are connected with the association.

3. SAME—PROTEST—REFERENCE TO STATUTE NOT IN EXISTENCE.

A protest which clearly points out the facts and reasons why certain goods should be admitted free of duty is not bad because it refers to a statute not in existence at the time, and such reference does not relieve the collector from proceeding under existing laws.

This was an application by the Boussod Valadon Company, the importer of a certain painting for exhibition, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York assessing duty on said painting.

Eugene H. Lewis, for importers.

Jason Hinman, Asst. U. S. Atty.

COXE, District Judge (orally). I think that the painting in this case is directly within paragraph 758 of the tariff act of 1890. It is not within the proviso of paragraph 759 of the same act, first, because the proof is insufficient to sustain the finding of the board; and second, even if the finding were correct, it would not bring the case within the proviso, because the proviso clearly refers to importations by those engaged in business or connected with business of a private or a commercial character. It is safe to say that the lawmakers did not intend that provision to cover the case of a painting exhibited by a corporation in the art rooms occupied by a copartnership engaged in selling works of art, even though some members of the copartnership may be connected with the corporation.

The question of protest is more serious. It is, however, purely technical; no one has been misled, and I shall hold the protest good. The reference to a statute not in existence at the time was surplusage and did not relieve the collector from proceeding under existing laws. The protest was clear and explicit in pointing out the facts and the reason why the importer insisted that the painting should enter free of duty. The decision of the board of appraisers is reversed.

UNITED STATES v. MAYER et al.

(Circuit Court, S. D. New York. February 6, 1895.)

No. 1,878.

CUSTOMS DUTIES—CLASSIFICATION—GRAPES IN BARRELS—CORK DUST AND SAW DUST.

Certain grapes were imported from Spain in barrels of about two cubic feet capacity each. Duty was assessed upon them by the collector of customs at the port of New York at "60 cents per barrel of three cubic feet capacity, or fractional part thereof," under paragraph 299 of the tariff act of October 1, 1890, without any allowance for the cork dust and saw dust, which constituted nearly one-half of the cubical contents of the barrels. The importers protested that they should be allowed for the cork dust, saw dust, and other tare, under said paragraph 299, or that the grapes were duty free, under the provision for "Fruits, green, ripe or dried, n. o. p. f.," in paragraph 580 of the free list of the same tariff act. The board of general appraisers took evidence showing the quantity of cork and other dust contained in the barrels; also, that these latter were the ordinary, average barrels of grapes, and that such grapes are always sold in this market by the barrel, in the condition as imported, and that the weights on the trade catalogues include barrel, cork dust, and grapes. The board of general appraisers decided that the "barrel" applies to the standard of measurement, and not to the form of the package, and that, if the grapes are dutiable by cubic measure, then tare must be allowed for packing material beyond that which occupies the interstices between the grapes or bunches. By measuring the grapes, a correct estimate of their cubic measurement may be obtained. The board cited and relied upon the case *Lead Co. v. Seeberger*, 44 Fed. 258, and sustained the importers' protest that an allowance for the cork and saw dust should be made. *Held*, that the conclusion reached by the board of general appraisers was correct, and that the collector was not authorized to take duty upon the cork dust and saw dust.

At Law. Appeal by United States from decision of board of general appraisers reversing the action of the collector in assessing duty on certain Malaga grapes. Affirmed.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

W. Wickham Smith (of Currie, Smith & Mackie), for appellees.

COXE, District Judge (orally). The respondents in this cause are dealers in fruit. They imported into this country Malaga grapes, which were assessed for duty by the collector under paragraph 299 of the tariff act of October 1, 1890, taking duty not only upon the grapes but also upon the saw dust and cork dust in which they were packed. The importers protested, insisting that they were entitled to a deduction for tare by reason of the cork dust and saw dust. The practical question presented to the court is whether under the guise of assessing grapes, the collector is authorized to take duty upon saw dust. I do not think he is. It is true that the courts should not legislate, but if a construction consistent with common sense can be arrived at it is the duty of the court so to construe the act in question. I agree with the con-

clusion reached by the board of general appraisers, and, mainly, in the reasoning with which they sustain their conclusion. The decision of the board of general appraisers is affirmed.

UNITED STATES v. CURLEY et al.

(Circuit Court, S. D. New York. February 7, 1895.)

No. 1,876.

1. CUSTOMS DUTIES—ACT OF OCTOBER 1, 1890—COOKS' KNIVES.

Certain knives, used in the kitchen by cooks, *held* to be dutiable under paragraph 167, and not as a manufacture of metal, under paragraph 215, of the act of October 1, 1890.

2. SAME—IMPORTER'S PROTEST.

The importer is bound by his protest and cannot go outside of it.

Appeal by the United States from a decision of the board of general appraisers reversing the action of the collector in assessing duty upon certain knives under paragraph 167 of the tariff act of 1890.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, for the United States.

Edward Hartley, for importers.

COXE, District Judge (orally). The question in this cause is whether or not the importation, which was assessed by the collector as a cook's knife, should have been classified as a manufacture of metal under paragraph 215 of the tariff act of 1890. The uncontradicted evidence shows that the importation in question is either a cook's knife, a kitchen knife, or a butcher's knife. These knives are all provided for in paragraph 167 and each is a more specific designation than a "manufacture of metal." As the importers only protest upon the ground that the importation is a manufacture of metal, it is manifest that the decision of the board of general appraisers should be reversed.

In re FELLHEIMER et al.

(Circuit Court, S. D. New York. April 27, 1894.)

No. 747.

CUSTOMS DUTIES—CLASSIFICATION — WEARING APPAREL MADE ON LOOM WITH JACQUARD ATTACHMENT.

A fabric made on a loom with a Jacquard attachment, and which is not known in the trade as "embroidery," or an "article of wearing apparel embroidered by hand or machine," cannot be classified under Act Oct. 1, 1890, par. 373, referring to embroidered articles.

This was an application by Fellheimer & Lindauer, importers of certain articles of wearing apparel for women, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

The importations consisted of articles of wearing apparel for women, appropriately trimmed. The collector assessed them under paragraph 373 of the act of 1890. The importers protested, under paragraph 349 of same act.

David Ives Mackie, for importers.

James T. Van Rensselaer, for collector.

COXE, District Judge (orally). It seems to me that the proposition that a fabric made on a loom with a Jacquard attachment is not embroidery, has been determined by the circuit court of appeals. *U. S. v. Albert*, 9 C. C. A. 332, 60 Fed. 1012. How can a machine that is incapable of embroidering dots, sprays, etc., embroider the figures appearing on the article in suit? I do not see how I can say that the same machine which the court has held cannot embroider, can embroider. The two cases cannot be distinguished. It is clear, in view of this decision, that the court cannot say that a fabric made in this way is embroidered. It would create an unfortunate conflict of authority to hold in one case that a machine can embroider when in another case it is held that the same machine cannot embroider. The circuit court of appeals having decided that a loom with a Jacquard attachment cannot do embroidery work the only remaining question is whether or not a trade-name has been established by the respondent. Upon that proposition it is conceded, as I understand it, that the question is in doubt, with a larger number of witnesses testifying against the contention of the collector than supporting it. The fact that a trade-name has not been established by either side compels the court to determine what in fact the article is, whether it is in fact embroidered. As to that proposition I have no doubt. There is no evidence that the loom described can do embroidery work, and as I recall the testimony it is well-nigh unanimous that the machine cannot do embroidery work. In fact I could go further and say, if I were called upon to decide, on this evidence, what the trade-name was in this market on October 1, 1890, that this importation was not known in trade and commerce as "embroidery" or as an "article of wearing apparel embroidered by hand or machine," under paragraph 373 of the tariff act of 1890. I think the decision of the board of general appraisers, so far as it relates to the question discussed, should be reversed.

HERMANN et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 31, 1895.)

No. 1,743.

CUSTOMS DUTIES — ORDER FOR RETURN OF GOODS TO PUBLIC STORES—COMPUTATION OF TIME.

In computing the 10 days within which the order of the collector for return of goods to the public stores, under Rev. St. § 2899, must be served upon the importer, if the tenth day falls on Sunday, that day cannot be excluded, and service of such notice on the Monday following is not sufficient. *Shefer v. Magone*, 47 Fed. 872, followed.

This was an application by Hermann, Sternbach & Co., importers of certain merchandise, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

The imported goods are manufactures of cotton. The collector assessed them erroneously under paragraph 394 of the tariff act of 1890. He refused to classify them under paragraph 348 of the same act, for the reason that they had not been returned to the public stores, pursuant to the order of the collector under section 2899 of the Revised Statutes. The board of general appraisers sustained the action of the collector.

Stephen G. Clarke, for importers.

James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge (orally). It is not disputed by the collector that the sample of the imported goods produced by the importers is a manufacture of cotton. If the case of goods in question was composed, as the importers testified it was, of like goods, the duty imposed by the collector was improperly imposed, unless the importers by reason of their subsequent conduct are estopped from showing what their importation actually was. The only question for the court to determine is whether or not the order which the law required the collector to give to the importers to return the case of goods in question to the public stores was given within the 10 days required by law after the packages designated by the collector and sent to the public stores to be opened and examined had been appraised and reported to him. This date, it is conceded, was January 26, 1893. The 10 days, if the above date is included in the computation, would expire on the 4th day of February, and if excluded it would expire on the 5th day of February. The 5th day of February, 1893, was Sunday. There is absolutely no proof of which the court can predicate a finding of fact that the notice mailed by the collector to the importers for a return of the goods in question was served upon the 4th day of February. If the court is permitted to indulge in speculation and guesswork, it is probable that the notice was mailed on that day, but the only evidence of its receipt comes from the importers, and is to the effect that it was received Monday morning, February 6th. There is no analogy between the giving of the actual order which was here necessary and the service of notices by mail in actions at law governed by special statutes. The law required the goods to be returned upon the order of the collector, and it is manifest that until the order was received by the importers they were not required to act and could not act. Was the order given to the importers on February 6th in time, or, in other words, was it within 10 days from January 26, 1893? The answer depends upon whether or not the court can consider Sunday a dies non and include Monday within the 10 days. The analogy to the practice of the law courts cannot be considered in determining this question. As matter of fact Monday was not within the 10 days. The precise point was determined with reference to a protest in *Shefer v. Magone*, 47 Fed. 872. I shall

hold therefore that the order of the collector to be available should have been made at some time prior to Monday, February 6th. I am entirely clear upon the proof that no order was received by the importers prior to that time, and I shall hold that the decision of the board of general appraisers should be reversed, and that the merchandise in question, contained in parcel 18,230, should be classified and assessed for duty as cotton cloth under paragraph 348 of the act of 1890.

In re LINDNER.

(Circuit Court, S. D. New York. April 25, 1894.)

No. 1,255.

CUSTOMS DUTIES—TOOLS OF TRADE — SEVERAL MACHINES OF THE SAME KIND.

A glove manufacturer imported four machines used in the manufacture of gloves, which he himself, his father, and his two brothers had worked in Germany, intending to transplant his business to the United States, and to manufacture gloves in the same way. *Held*, that all the machines were entitled to entry free of duty as "tools of trade," under Act Oct. 1, 1890, par. 686.

This was an application by Emil Linder, importer of certain machines, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such machines.

Stephen G. Clarke, for importer.

O. H. Wefing, Asst. U. S. Atty., for collector.

COXE, District Judge (orally). The importation which is the subject of this suit consisted of four machines used in the manufacture of gloves, which were assessed for duty by the collector at 45 per centum ad valorem under paragraph 215 of the tariff act of October 1, 1890. The importer claims that they were free of duty as "tools of trade" under paragraph 686 of the same act. Without doubt the importer might have brought one of these machines to this country free of duty. The question is whether bringing four machines changes the situation; whether one man can bring in four machines as tools of his trade when he can work but one. There is no evidence that he intended to work these machines other than by manual power, and I assume that one man cannot work four. If there were only one machine I would not have a particle of doubt, but the fact that there are four machines raises a question of importance. The evidence shows that these machines were to be used by the importer, his father, and two brothers, in the same way they had used them in Germany. I can hardly think that congress intended to exact duty from a man who comes to this country under such circumstances, bringing with him certain implements with which he made a living in his European home. It is very much like the case of a tailor who has a small shop, in which his wife, daughter and son help him work the sewing machines. He comes here intending to transplant his business.

He does not intend to start a manufacturing establishment here as we understand that term. He intends to work just as he did at home and make articles of clothing by the help of his own family. It may be that the importer by some admissions in his affidavit has made it difficult to determine this question in his favor, but I think it is the duty of the court to brush aside these technicalities, try to look at the question from a common-sense point of view and get at the spirit of the law. I cannot believe that it was the intention of the law to exact duty in a case like this and under the circumstances the doubt, if there be one, should be resolved in favor of the importer. The decision of the board of general appraisers is, therefore, reversed.

In re MERCK et al.

(Circuit Court, S. D. New York. April 26, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—CHLORAL HYDRATE.

U. S. v. Battle & Co. Chemists' Corp., 4 C. C. A. 249, 54 Fed. 141, followed.

This was an application by Merck & Co., importers of chloral hydrate, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on said merchandise.

Everit Brown, for importers.

James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge. The questions involved in this appeal have all been determined in the Case of Battle & Co., 50 Fed. 402, affirmed 4 C. C. A. 249, 54 Fed. 141. There is some testimony here which was not present in the Battle Case, but the new evidence is cumulative in character and does not change in any degree the character of the propositions decided. I am clearly of the opinion that the decision of the court of appeals of the Eighth circuit should be followed by this court. The decision of the board is reversed.

In re SPIELMAN et al.

(Circuit Court, S. D. New York. April 26, 1894.)

No. 1,039.

CUSTOMS DUTIES—CLASSIFICATION—VEILS.

Veils are within the provision of Act Oct. 1, 1890, par. 349, relating to "articles of wearing apparel of every description."

This was an application by Spielman & Co., importers of certain ladies' veils, for a review of the decision of the board of general appraisers as to the rate of duty on such merchandise.

A. P. Ketcham, for importers.

Thomas Greenwood, Asst. U. S. Atty., for collector.

COXE, District Judge (orally). The only question in this cause is whether or not the importation comes within the tariff provision for "articles of wearing apparel of every description." Although it is true that there is, perhaps, a distinction—no two cases being exactly similar—yet it seems to me that the facts here bring this importation within numerous decisions already made by this court. Of course an article of wearing apparel that is worn in connection with a hat necessarily requires the presence of a hat, just as a necktie requires the presence of a collar. A necktie cannot be worn without a collar. A garter implies the presence of a stocking which is held up by it. A shawl which is thrown around the shoulders implies some other garment over which it is placed. I see no important distinction. Suppose these articles of wearing apparel were fastened to other articles of wearing apparel they would not cease to be articles of wearing apparel for that reason. If we could imagine, for example, an apron permanently fastened to the waist of a gown it would not change its character as an article of wearing apparel because of that fact. I do not think the distinction now made, that these veils are not wearing apparel, because fastened to a hat, is well founded. If it were, it would exclude a great many articles that we all concede to be wearing apparel. The finding of the board of appraisers is not contrary to the law or the facts and this court should not disturb that finding. It is conceded that these veils are complete articles of commerce as they come to this port and are used only by females as headgear; whether they are attached to the hat or not does not seem to me to be a controlling circumstance. If they were worn about the head without a hat, in the manner so graphically illustrated by the learned district attorney, there would be no doubt as to their being articles of wearing apparel. The decision of the board of general appraisers is affirmed.

JOHNSON v. UNITED STATES.

(Circuit Court, S. D. New York. February 8, 1895.)

No. 918.

CUSTOMS DUTIES—CLASSIFICATION—PINEAPPLES—CANNED.

Pineapples, peeled, sliced, and placed in cans filled with cold water, and hermetically sealed, their juice permeating the water, are "fruits preserved in their own juices," within Act Oct. 1, 1890, par. 304, and cannot be classified, under paragraph 580, as "fruits, green, ripe, or dried."

This was an application by Joseph S. Johnson, the importer of certain canned pineapples, for a review of the decision of the board of general appraisers, sustaining the decision of the collector of the port of New York, as to the rate of duty on such merchandise.

Stephen G. Clarke, for importer.

Jason Hinman, Asst. U. S. Atty., for collector.

COXE, District Judge (orally). This controversy arises regarding pineapples imported in cans hermetically sealed. The collector

classified them under paragraph 304 of the act of 1890, which provides for "fruits preserved in their own juices." The importer protested insisting that they should have been classified under paragraph 580 of the same act as "fruits, green, ripe, or dried." It appears from the proof that the pineapples were peeled, sliced, placed in cans filled with cold water, and then hermetically sealed. In that condition they were imported. The board of general appraisers have found that the collector's paragraph more specifically describes the importations than the paragraph designated by the importer. Upon the proof presented, no additional proof having been taken in this court, the decision of the board is not so against the weight of evidence as to justify the court in setting it aside. The purport of their decision is that paragraph 304 is more applicable to this fruit than paragraph 580, and my own impression concurs with them on that question. It seems to me that "fruits preserved in their own juices" is clearly a more specific designation than "fruits, green, ripe, or dried, not specially provided for." The proof here is, as I stated, that the pineapple is sliced, peeled, put in cold water, and the juice of the pineapple, to a certain extent at least, permeates the water. As the district attorney says, if this be not fruit preserved in its own juice, it is difficult to see what congress meant by the provision in question. I think that paragraph 580 refers to fruits brought here in the state in which they are picked without being subjected to any preserving process. It is enough to say that the finding of the board of appraisers is sustained by the evidence. The decision of the board is affirmed.

In re STEINER et al.

(Circuit Court, S. D. New York. April 25, 1894.)

No. 592.

CUSTOMS DUTIES—CLASSIFICATION—STRUNG GLASS BEADS.

A finding of the board of general appraisers, supported by the weight of evidence, that glass beads, threaded on strings, were strung beads, dutiable as "manufactures of glass," under Act Oct. 1, 1890, par. 108, and not under paragraph 445, as "glass beads, loose, unthreaded, or unstrung," should be sustained.

This was an application by Steiner, Kohn & Co., importers of certain glass beads threaded upon strings, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

Stephen G. Clarke, for importers.

Thomas Greenwood, Asst. Dist. Atty., for collector.

COXE, District Judge (orally). In this case the collector assessed the importations under paragraph 108 of the tariff act of October 1, 1890, as "manufactures of glass." The importers insist that they should have been assessed under paragraph 445 of the

same act, which provides for "glass beads, loose, unthreaded, or unstrung, ten per centum ad valorem." A simple question of fact is thus presented where the burden is upon the importers to prove that the importations consist of unstrung glass beads. This question of fact was tried out before the board of appraisers and they have found that the articles in question are "manufactures of glass," and are not unstrung glass beads. As I recollect the evidence the only testimony before the board was to the effect that these are strung beads; in fact a mere ocular examination of them demonstrates that they are strung beads. As there is no evidence to the contrary the court would hardly be justified in overruling the decision of the board. If it were a disputed question of fact on evenly balanced testimony their decision should stand, but as it is the weight of evidence is clearly on the side of the collector. The decision of the board of appraisers is, therefore, affirmed.

In re BING et al.

(Circuit Court, S. D. New York. April 26, 1894.)

No. 959.

CUSTOMS DUTIES—REVIEW OF BOARD OF APPRAISERS' DECISIONS—WEIGHT OF EVIDENCE.

The court will not disturb the finding of facts of the board of general appraisers as to the nature of goods imported, even if against the weight of evidence, where the board had sufficient evidence to warrant their finding.

This was an application by F. Bing & Co., importers of certain merchandise, for a review of the decision of the board of general appraisers at New York as to the rate of duty on such merchandise.

Albert Comstock, for importers.

W. C. Low, Asst. U. S. Atty., for collector.

COXE, District Judge (orally). The question here is not of law, but of fact. It is whether or not Exhibit A is "spun silk," under paragraph 410 of the act of October 1, 1890. Even if it were also a question as to what the trade name of Exhibit A was at the time of the passage of the last tariff act, it seems to me that the Van Blankensteyn decision (5 C. C. A. 579, 56 Fed. 474), controls both propositions. The board came to their conclusion on the facts presented to them, and I cannot say it is so against the weight of evidence that the court should set it aside. If this case were an appeal from the decision of a referee the court, although it might have reached a different conclusion had the case been tried originally before it, would not, under familiar rules, disturb the report. The question is whether the finding of the board should be set aside as practically against the weight of evidence. I think the board had sufficient evidence to warrant their finding and their decision is, therefore, affirmed.

DENNISON MANUF'G CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 14, 1895.)

CUSTOMS DUTIES—CLASSIFICATION—CREPE OR CREPE TISSUE.

Merchandise imported and invoiced as "crepe" or "crepe tissue," which, according to the finding of the board of general appraisers, sustained by the evidence, "is made in a tissue-paper mill, invoiced, advertised, and sold as tissue," and "is tissue paper," is dutiable under Act Oct. 1, 1890, paragraph 419, which covers "all tissue paper * * * made up in any form," and cannot be placed under paragraph 422, referring to "all other paper not specially provided for."

This was an application by the Dennison Manufacturing Company, importer of certain merchandise invoiced as "crepe" or "crepe tissue," for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

The collector assessed the importations under paragraph 419 of the act of 1890, as "tissue paper." The importer insisted that they should have been classified either under paragraph 422, as "other paper not specially provided for in this act," or under paragraph 425, as "manufactures of paper."

C. H. MacDonald, for importer.

James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge. The board found that the merchandise in question invoiced as "crepe" or "crepe tissue," "is made in a tissue-paper mill, is invoiced as tissue, advertised as tissue, and sold as tissue" and "is tissue paper." Additional testimony was taken in this court, but it is cumulative in character and does not materially change the issue. There is evidence to sustain the findings of the board, and, even if it be conceded that the preponderance of testimony is the other way, still the court would not be warranted in reversing their judgment. It will be observed that the language of paragraph 419 is very broad. "All tissue paper * * * made up in any form." It covers tissue paper of all varieties. The process by which the imported paper is made is not known, but it is proved that similar paper is made in this country by passing tissue paper through a machine which crimps or crinkles it. One of the witnesses for the importer gave the following common-sense definition: "Tissue paper is a thin paper; that is all there is to tissue paper; a thin paper." There is testimony to the effect that the imported merchandise is in fact tissue paper, that it was commercially known as crepe tissue paper and was so designated in the trade, even by the importing company itself. It is not against the evidence to find that in a smoothed-out condition it is a kind of heavy-weight tissue paper. Subject this paper to a crimping process and it becomes crimped tissue paper. It is crinkled, to be sure, but it is tissue paper still, and consequently is specially provided for under paragraph 419. The change thus produced might suffice to place the paper under a more specific paragraph, if one existed, but it is not sufficient to take it

out of the paragraph providing for "all tissue paper" and place it under the paragraph providing broadly for "all other paper." The board has found that the imported merchandise is tissue paper, several witnesses have testified that it was known to the trade as crepe tissue paper and the importer has time and time again called it crepe tissue paper. In view of these facts the court is inclined to think that the collector has selected the proper paragraph, and, in any view, the court does not feel justified in interfering with the decision of the board. Affirmed.

TIFFANY v. UNITED STATES.

(Circuit Court, S. D. New York. January 31, 1895.)

No. 722.

CUSTOMS DUTIES—CLASSIFICATION—ANTIQUÉ OPAL—ACT OF OCTOBER 1, 1890.

A single antique opal produced at a period prior to 1700 is not entitled to free entry under paragraph 524 as a "collection of antiquities," but is dutiable at 50 per cent. ad valorem as jewelry, under paragraph 452 of the act of October 1, 1890, notwithstanding it was imported with other articles, whose production prior to 1700 had not been satisfactorily established by evidence.

The importation in question was a gem of great value and antiquity known as the "Hope Opal." The importer insisted that it was entitled to enter duty free under paragraph 524 of the free list of the tariff of 1890. The collector's action in assessing duty was sustained by the board of general appraisers. The importer appealed. Affirmed.

William B. Coughtry, for importer.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The section of the free list which is invoked by the importer, refers with great clearness, not to single articles which have been part of foreign collections or to single articles which are intended to be added to collections in this country, but it refers to collections of antiquities. The collection must be imported. If an importer assembles a collection of antiques, which, under the decisions of the courts, must certainly contain more than two articles, and intends to import the collection into this country, the mere fact that through mistake the articles forming the collection are imported in different steamers or at different times is not material. But there must be a collection of which the importation is a part. It seems to be conceded from the proof here that the importation in question came here alone, and there is no evidence of which the court can take cognizance that it was part of a collection of antiques assembled in London and imported to this country and reassembled. In order to reach such a conclusion I would have to substitute conjecture for proof, and surmise that "Babylonian cylinders," whatever they may be, are antiquities with-

in the definition of the statute. There is no proof to warrant the court in saying that the opal in question was part of a collection of antiques produced before the year 1700. This being so, it is an importation of a single article, and no court has gone to the extent of holding that one article constitutes a collection. The decision of the board sustaining the action of the collector in assessing duty under paragraph 452 must be affirmed.

UNITED STATES v. RICHARDS et al.

(Circuit Court, S. D. New York. January 31, 1895.)

No. 1,877.

CUSTOMS DUTIES—COVERINGS OF IMPORTATIONS—ADDITIONAL DUTY.

Wooden cases with cardboard partitions, in which opal glass bottles were packed and imported, being usual packages for such bottles, are not subject to additional duty as "unusual coverings," or as designed for any other use than the bona fide transportation of said bottles to the United States, within Act June 10, 1890, § 19.

This was an application by the United States for a review of the decision of the board of general appraisers reversing the decision of the collector of the port of New York as to the rate of duty on certain merchandise imported by C. B. Richards & Co.

The importations in question were opal glass bottles, packed in wooden cases with cardboard partitions. The collector imposed an ad valorem duty upon the bottles and the cases, and also an additional duty upon the cases, under section 19 of the act of June 10, 1890, upon the ground that they were unusual packages. The board of general appraisers decided that the additional duty was improperly imposed. The collector appealed. Affirmed.

Jason Hinman, Asst. U. S. Atty., for collector.

Everit Brown (of Comstock & Brown), for importers.

COXE, District Judge (orally). The articles imported were opal glass bottles. They were imported in wooden cases having cardboard partitions. The only question for the court to determine is whether or not the packages in which they were imported were unusual and designed for use other than in the bona fide transportation of the bottles to the United States. The trend of judicial decision upon this question is to the effect that the additional duty cannot be levied unless it appears that it was the intention of the importer to introduce into the United States some article under the guise of a covering which is designed by him for use other than as a covering after the importation is completed. If the covering is suitable, proper and not out of the ordinary, it should not be subjected to the additional duty. The court cannot say that this importer intended—to put it plainly—to commit a fraud upon the revenue or to introduce here the wooden cases for use other than as bona fide packages for his bottles. Of course bottles of this character require a package of some kind. To

place them in a common wooden box, and prevent breakage by placing straw or pasteboard between them, would seem to be a proper and usual manner of packing. Upon the evidence before the board it is quite clear that this importer has for a number of years been importing these bottles in precisely the same way in which the bottles in question were imported. The board of appraisers reached a correct conclusion when they said this was a usual package for these bottles. Other importers may have brought in other bottles, or possibly similar bottles in a different way, but to say that the packages in question are exceptional, unusual, and so out of the ordinary, as to bring them within the provision in question does not seem to be warranted by the proof. The decision of the board is affirmed.

PARK et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 8, 1895.)

No. 1,943.

CUSTOMS DUTIES—ACT OCT. 1, 1890—CALVERT'S MEDICAL SOAP.

Calvert's medical soap, containing 20 per cent. of carbolic acid, and used for curative purposes, *held* not to be dutiable as a "toilet soap," under paragraph 79, but under the last clause of said paragraph, "all other soaps not provided for in this act."

This was an application by Park & Tilford, copartners, and importers of certain merchandise known as "Calvert's Medical Soap," for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

Edward Hartley, for importers.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importation in this case consists of Calvert's medical soap. It was classified by the collector as "toilet soap" under paragraph 79 of the tariff act of October 1, 1890. The importers protested, insisting that it should have been classified under the last clause of that paragraph, which provides for "all other soaps, not provided for in this act." There was also an alternative protest, which it is unnecessary to consider. A toilet soap is used as a detergent for cleansing purposes only. That this is not such a soap is proved by an overwhelming weight of testimony. A medical soap is one used for remedial purposes. There is no doubt, I think, that this is what it purports to be—a medical soap. If it be a soap, unquestionably it is more specifically provided for under the last clause of paragraph 79 than any other provision of the tariff act. The district attorney advances the proposition that, although the collector might be wrong in his classification, the decision of the board may be sustained for the reason that both importer and collector are wrong, and the importation should have been classified under paragraph 77 of the same act.

What I have already said disposes of that contention. Paragraph 77 relates to "preparations used as applications to the hair, mouth, teeth, or skin, such as cosmetics, dentifrices, pastes, pomades," and so on, referring to that class of articles which properly come within the category of "toilet preparations." This soap is what it is advertised to be, a medical soap, used for curative purposes only, and should have been classified under the last clause of paragraph 79. The decision of the board of general appraisers is reversed.

MEXICAN ONYX & TRADING CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 1, 1895.)

No. 1,225.

1. CUSTOMS DUTIES—CLASSIFICATION—"MEXICAN ONYX."

So-called "Mexican onyx," a mineral consisting chiefly of carbonate of lime and certain impurities, principally ferrous oxides, imparting to the material its beautiful and variegated colors, crystalline in structure, and belonging scientifically to the group of calcites, recognized by the leading dictionaries and encyclopedias as belonging to the general class of "marble," used for the same general purposes in ornamental and interior decoration as marble, and being worked and finished by the same processes, is properly dutiable as "marble in block," at 65 cents per cubic foot, under Schedule B, par. 123, of the tariff act of October 1, 1890, and is not free of duty as a "crude mineral," under paragraph 651 of the free list of that tariff act, as claimed in the protest of the importer.

2. SAME—REVIEW OF FINDINGS OF GENERAL APPRAISERS.

Where, upon a conflict of evidence before the board of United States general appraisers, arising chiefly upon the commercial meaning of the term "marble," there is sufficient proof to sustain their findings, such findings will not be disturbed.

3. SAME—RETURN OF PROCEEDINGS BY GENERAL APPRAISERS.

The fact that the return to the circuit court was not signed by the members of the board of general appraisers who took the evidence does not overcome the presumption that the appraisers who heard the case decided it. Special reference upon the merits was made to *Batterson v. Magone*, 48 Fed. 289.

This was an application by the Mexican Onyx & Trading Company, the importer of certain Mexican onyx, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

W. Wickham Smith (of Curie, Smith & Mackie), for importer.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for collector and the United States.

COXE, District Judge (orally). The importation involved in this controversy is Mexican onyx. The collector classified it under paragraph 123 of the tariff act of October 1, 1890, which provides for "marble of all kinds." The importer protested insisting that it was covered by paragraph 651 of the free list as a "crude mineral." The board of general appraisers after taking proof sustained the classification of the collector. The importer appeals to this court.

The questions involved, as I understand them, are whether or not the importation in question is a species of the genus "marble" and was known as a variety of marble commercially and in common parlance. These are questions of fact and are presented to the court upon the same record that was presented to the board. I do not think it is necessary to enter into a discussion of these matters at length, for the reason that the question now presented to the court is not whether the court would have reached a different conclusion from the board had the proof been submitted to the court in the first instance, but whether or not the finding of the board is so contrary to the weight of evidence that the court is justified in setting it aside; whether or not the court, if this were an appeal from the report of a master or referee, would hold that there was such a lack of evidence to sustain the findings that the decision should be reversed. I think not. There was sufficient proof upon all the questions of fact presented to the board to sustain their findings. I cannot say that upon any of the questions involved there is no evidence to sustain the decision of the board or that the evidence so preponderates against their finding as to justify me in setting it aside.

It is suggested here that the rule, which I understand is the established rule of this court, is not applicable to this particular case, because the appraisers who heard the evidence did not decide upon the questions of fact. This contention is sought to be sustained by the suggestion that the report is signed by three appraisers who did not hear the evidence. I do not understand, however, that it follows from this fact that the case was not decided by the appraisers who heard the proof. The court should presume in the absence of proof to the contrary that the appraisers who heard the cause decided the cause. The mere fact that the report is signed by other appraisers is not conclusive to my mind as establishing a different proposition. It very frequently happens even in court cases that the judge who decides the case does not sign the decree. The decision of the board of general appraisers should be affirmed.

CHINA & JAPAN TRADING CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 30, 1895.)

No. 577.

1. CUSTOMS DUTIES—ACT OF OCTOBER 1, 1890—BAMBOO BLINDS AND SCROLLS.
Certain bamboo blinds and scrolls, assessed by the collector as "manufactures of wood," under paragraph 461, *held* to be dutiable as "manufactures of grass," under paragraph 460.
2. SAME—PAPER UMBRELLAS.
Giant paper umbrellas, used only for decorative purposes, *held* not dutiable as "umbrellas, parasols and sunshades," under paragraph 471, but as "manufactures of paper," under paragraph 425.

This was an application by the China & Japan Trading Company, the importer of certain bamboo blinds and scrolls and giant paper umbrellas, for a review of the decision of the board of gen-

eral appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

W. B. Coughtry, for importer.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). I am inclined to reverse the decision of the board of general appraisers in this cause. As to the first articles imported the question is whether or not the bamboo of which they are composed is wood. It seems to me that the weight of evidence is clearly to the effect that it is not wood. The extracts read from the various dictionaries and encyclopedias by the counsel for the importers, indicate that bamboo is a species of grass, and I think the testimony is to the same effect. In the testimony offered by the collector the nearest approach to contradicting the proposition that bamboo is a species of grass, is the opinion of one witness that in the process of time the character of the grass is changed to wood, but that to my mind is not a very satisfactory or conclusive view of the matter. It also appears that articles of bamboo are sometimes kept in stock with wooden articles, and sold by dealers in wooden ware, but that does not make it wood. If it were sold by a tinsmith with tin articles it would hardly be contended that this fact would make it tin.

As to the other branch of the case, it is undisputed that these large umbrellas are not used in the way in which ordinary umbrellas are used. They are not suitable for that purpose and are never so used. Their sole use is for the decoration of houses, halls and large buildings. This being so, it would be illogical to classify them with the ordinary cloth umbrellas which are used to protect individuals from the sun and rain. As the board of appraisers with this same evidence before it has in another case reached the conclusion that these importations should be classified as the importer now contends, I shall follow their second and more mature conclusion. The decision of the board is reversed.

MOVIUS et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 18, 1895.)

CUSTOMS DUTIES—CLASSIFICATION—"LANOLINE."

"Lanoline" being a manufactured article made from wool grease by an elaborate process through which the potash salts contained in the crude wool grease have been entirely removed; the volatile fatty acids partially removed; the removal of the potash salts having destroyed any combination that had existed between them and the fats, the fats having been thereby changed in condition; the resulting "lanoline" being chiefly cholesteroline and similar fats, fatty acids and varying percentages of water, an article patented as to its processes of manufacture and trade name and being widely advertised as possessing therapeutic and medicinal qualities, is properly dutiable as a "medicinal proprietary preparation" at 25 per cent. ad valorem under paragraph 75 of the tariff act of October 1, 1890, and not as "wool grease" at one-half of one cent per pound under

paragraph 316 of the act as claimed in the importers' protest. The classification of the merchandise for duty by the collector of customs as "rendered oil" at 25 per cent. ad valorem under paragraph 76 of the same tariff act was therefore affirmed.

This was an application by J. Movius & Son, importers of certain merchandise known as "Lanoline," for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

Albert Comstock, for importers.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge. The collector classified the merchandise in question under paragraph 76 of the act of 1890, which provides for "rendered oils" and "expressed oils." The importers protested, insisting that it should have been classified under paragraph 316 of the same act as "wool-grease." The board in an elaborate and carefully prepared opinion, after discussing the various questions involved, reached the following conclusions:

"The substance known as 'Lanoline' is:

"(1) A preparation composed of pure wool-fat and water.

"(2) It is not the wool-grease of commerce and is not an oil, but is commercially known as 'Lanoline.'

"(3) It is a preparation and composition recommended by the manufacturers to the public as a proprietary article.

"(4) It is a preparation and composition prepared according to a private and patented formula or process.

"(5) It is a patented composition or preparation.

"(6) It is a proprietary preparation recommended to the public as a remedy for diseases or affections affecting the human or animal body.

"(7) It is a medicinal proprietary preparation, in the preparation of which alcohol is not used, and of which alcohol is not a component part.

"(8) It is offered for sale by the manufacturers and protestants put up in tins, labeled with notice thereon that the same is patented.

"(9) The manufacturers have duly registered as their trade-mark the word 'Lanoline' in the United States patent office, and they affixed the trade-mark to each package of lanoline imported by the protestants.

"(10) The protestants entered such merchandise by their written entry as 'Lanoline, expressed oil.'"

The board decided that the merchandise should have been classified under paragraph 75 of the same act as a "medicinal proprietary preparation," but that it was not "wool-grease" in fact or commercially. The question, then, is, should "Lanoline" be subject to duty as wool-grease? If not, the decision of the board should be affirmed.

A number of witnesses have been examined in this court, but their testimony does not change materially the case as presented to the board. The conclusions reached by the board are substantially correct, most of them being sustained by the new evidence. Wool-grease is of a brown color and a viscous consistency. It is extracted from wool washings, and consists of cholesterine and other fats and volatile fatty acids. It contains from 15 to 30 per cent. of potash. It emits a rank, disagreeable odor, it resembles molasses and tar mixed together, it is imported in returned petroleum barrels, it is worth

from 2½ to 3 cents a pound and its chief use is for stuffing leather. "Lanoline," on the contrary, is an expensive, highly finished product produced from wool-grease by an elaborate patented process of elimination and purification, by means of which many of the impurities and all of the potash of the crude wool-grease are removed. "Lanoline" is white in color, is imported in small, carefully prepared packages and is used principally in therapeutics. It is not wool-grease, chemically, commercially, or in common parlance. One of the ingredients of wool-grease has disappeared entirely and the others are found in a changed and purified state. "Lanoline" is made from wool-grease just as vaseline is made from petroleum or cheese is made from milk, but it was never known as wool-grease in commerce and no business man would have thought of sending "Lanoline" to fill an order for wool-grease. The impression derived from the entire record is very strong that the term "wool-grease" would convey to the mind of every business man familiar with the subject an idea of the crude, raw material above described, and it is thought that congress so used it in the tariff act of 1890. It cannot be that a refined, expensive product like "Lanoline" should come in under a provision which was manifestly intended to apply to a crude, cheap product differing from "Lanoline" in almost every essential feature. The decision of the board is affirmed.

TIFFANY v. UNITED STATES.

(Circuit Court, S. D. New York. February 5, 1895.)

No. 898.

CUSTOMS DUTIES—ACT OF OCTOBER 1, 1890—PAINTED FANS.

Fans, composed of silk and bone, upon which are executed artistic paintings in water colors, of high value and merit, and which are displayed as ornaments and not used as fans ordinarily are, *held* not to be dutiable as manufactures of silk at 50 per cent. ad valorem under paragraph 414, but at 15 per cent. under paragraph 465 of the act of October 1, 1890 as "paintings in oil or water colors."

Appeal by importer from decision of board of general appraisers affirming the action of the collector in assessing duty on certain painted fans. Reversed.

William B. Coughtry, for importer.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in controversy consist of paintings upon fans made of silk and other materials. The collector assessed them under paragraph 414 of the tariff act of 1890 as manufactures of which silk is the material of chief value. His action was sustained by the board of general appraisers. The importer protested, insisting that the importations are "paintings" within the provisions of paragraph 465 of the same act. "Fans" are not mentioned *eo nomine* in the act, except in paragraph 564

of the free list, which is not applicable to this controversy. The court is not called upon to define the word "paintings" further than is necessary for the purposes of the present controversy. If these importations are paintings it disposes of the issue. In ordinary parlance it is, perhaps, true that a painting is understood to mean a picture in oil or water colors, painted on canvas or paper, inclosed in a suitable frame and intended to be hung on the walls of a public or private building. But such a definition is manifestly too narrow. Many of the works of the old masters are frescoes painted on stone. Some of the gems of more modern art are painted on wood, ivory, porcelain, china, silk, cotton and other textile fabrics. It is also true that paintings are not always used as mural decorations. They may be placed on fire screens, lamp shades, plaques, and, indeed, on almost any article which is to be ornamented. Nor is size a controlling factor. Some of the masterpieces of Meissonier and Meyer von Bremen are hardly larger than the subjects of this controversy. So too a painting may be of almost any conceivable shape. I presume we can all recall instances where the artist has painted his picture upon a fan-shaped background. Obviously, then, it is not size or shape or material or use which is to determine, arbitrarily, the character of these importations. There is no dispute that these productions are the works of artists of recognized ability and standing in their profession, and that at least two-thirds of the value is imparted to the fans by the skill, genius and reputation of the artist. The silk would be comparatively of no value but for the work of the artist. It is the painting, not the silk, which makes the fan valuable. Take for instance the picture by Houghton, which might properly be called "The Chess Players." No one who has the slightest knowledge of art can fail to see that in drawing, coloring, grouping and in attention to minute detail it is a painting of great beauty and merit. To call such a work of art "a manufacture of silk" seems almost as irrational as to call the Venus of Milo "a manufacture of marble." It is doubtless true that such a painting should be preserved under glass, but it does not cease to be a painting because it is placed upon a fan. These views lead me to reverse the decision of the board of general appraisers.

TIFFANY v. UNITED STATES.

(Circuit Court, S. D. New York. February 6, 1895.)

No. 1,122.

1. CUSTOMS DUTIES—TRAVELING CLOCKS.

Traveling clocks *held* dutiable as manufactures of metal, under Act Oct. 1, 1890, par. 215.

2. SAME—BRONZE STATUES.

Bronze statues *held* dutiable as manufactures of metal, under Act Oct. 1, 1890, par. 215, and not as "statuary" under paragraph 465, not being "wrought by hand" from metal

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This was an application by Tiffany, the importer of certain French traveling clocks and bronze statues, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

William B. Coughtry, for importer.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). There are two branches to this controversy. The first relates to certain importations known as traveling clocks; the second relates to two bronze statues known as "Manon l'Escaut" and "Christopher Columbus." The collector assessed the traveling clocks under paragraph 215 of the act of 1890 as "manufactures of metal." The importer protested, insisting that they should have been classified either directly, or by reference to the similitude clause, under paragraph 211 of the same act, which provides for "watches, parts of watches, watch cases, watch movements," etc. There is no dispute that the articles in question are traveling clocks. They usually consist of a case of brass and plate glass, which contains the watch or clock movement, the whole being surrounded by an outer case of leather. They are intended to be carried by travelers, and when in use are placed upon the table, mantel, etc. They are never carried upon the person and are not suitable for such use. It cannot be said therefore in any view that they are watches or parts of watches, nor can it be said that the similitude clause operates, for the reason that, being specifically covered by paragraph 215 as manufactured articles, they are not nonenumerated.

As to the second branch of this controversy, relating to the two bronze statues, the collector assessed duty upon them under the same paragraph as "manufactures of metal." They are claimed by the importer to be dutiable at 15 per cent. under paragraph 465 as "statuary," wrought by hand from metal, by a professional sculptor. There is no question upon this proof that both of these statues are the works of a sculptor of recognized ability. They came here accompanied by the sculptor's certificate. The evidence is undisputed that they are original productions, and also that they were fashioned and finished after coming from the mold by the hand of the sculptor himself. They were not made by skilled workmen or mechanics. *Merritt v. Tiffany*, 132 U. S. 167, 171, 10 Sup. Ct. 52. It is strongly my impression that the proof brings these importations within paragraph 465. But it is stated that they are not within that paragraph, because it does not cover a bronze statue which is molded, but refers only to such statues as are wrought by the hand of the sculptor himself. It seems to me that such a construction practically excludes all bronze statues, and a large number of marble statues as well, for the proof shows, and it is well known to all familiar with the matter, that the sculptor himself very frequently does not touch the marble. The more eminent the sculptor, the less likely

is he to do the work of the skilled workman. While this is my impression from the testimony presented, it seems that the question has been passed upon by this court in a case which, I understand, related to importations precisely similar and was presented upon identical testimony. If this be true, it is clearly an authority which is controlling. There is nothing to distinguish the present issue from the issue that was there tried. Therefore the decision of the board of appraisers upon both branches of the controversy must be affirmed.

GODWIN et al. v. UNITED STATES (two cases).

(Circuit Court, S. D. New York. February 5, 1895.)

Nos. 1,487 and 1,685.

CUSTOMS DUTIES—ANTIQUITIES—SALE AFTER IMPORTATION.

A collection of antiquities produced prior to the year 1700 is entitled to free entry under Act Oct. 1, 1890, par. 524, irrespective of the intention of the importer to sell the collection, or parts thereof, after its importation.

These were two applications by Godwin & Sons, importers of certain antiquities, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such importations

Stephen G. Clarke, for importers.

Jason Hinman, Asst. U. S. Atty., for collector.

COXE, District Judge (orally). The sole question in these causes is whether or not the importations should be admitted free under paragraph 524 of the free list of the tariff act of October 1, 1890, as collections of antiquities. They all stand on the same footing. I will consider the one composed of 10 articles. The evidence establishes the undisputed fact that each member of this collection was produced prior to the year 1700, and that they were assembled as a collection in Europe and imported here in 1891 under one invoice. Three of the 10 members of the collection were admitted without duty by the collector as antiquities. The contention is made that the remainder of the collection should not be admitted free for the reason that it appears from the evidence that it was the intention of the importer to sell the collection or parts thereof after its importation. A reading of the section in question convinces the court that there is nothing in the language employed to warrant the court in taking into consideration the intent or motive of the importer. Where it is established beyond dispute that he has imported a collection of antiquities produced prior to the year 1700, the collection is entitled to free entry under paragraph 524. The collector has nothing to do with the intent of the importer. The decision of the board of general appraisers in each case is reversed.

OPPENHEIMER v. UNITED STATES.

(Circuit Court, S. D. New York. February 6, 1895.)

No. 789.

CUSTOMS DUTIES—CLASSIFICATION—COTTON CHENILLE.

So-called "fascinators," made of cotton chenille, must be classified under Act Oct. 1, 1890, par. 351, and not under paragraph 349, as "cotton wearing apparel," which designation is less specific than that of "manufactures of chenille," in paragraph 351.

This was an application by H. Oppenheimer, importer of certain merchandise known as "fascinators," for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

The collector assessed duty upon the goods under paragraph 351, as "manufactures of cotton chenille"; the importer insisting that they were dutiable under paragraph 349, as "cotton wearing apparel."

Stephen G. Clarke, for importer.

Jason Hinman, Asst. U. S. Atty., for collector.

COXE, District Judge (orally). Chenille is a variety of cotton, a species of the genus cotton. Paragraph 351 is explicit in its provision. It refers to "all manufactures of chenille." My impression is that this is a more specific designation than the general one of "cotton wearing apparel." The decision of the board of general appraisers is affirmed.

In re ZEIMER et al.

(Circuit Court, S. D. New York. February 18, 1895.)

CUSTOMS DUTIES—CLASSIFICATION—ARTIFICIAL LEAVES.

Artificial leaves, made to resemble leaves of oak, ivy, currant, etc., and manufactured of colored cotton cloth, metal, and wax, cotton being the component material of chief value, cannot be classified as "artificial flowers or parts thereof," under Act Oct. 1, 1890, par. 443, and Act March 3, 1883, par. 429, Schedule N, but must be assessed under Act 1890, pars. 425, 355, and Act 1883, par. 388, Schedule M, and par. 324, Schedule L, as manufactures of cotton and paper.

This was an application by Zeimer & Feldstein, importers of certain artificial leaves, for a review of the decision of the collector of the port of New York as to the rate of duty on such merchandise.

The collector assessed the merchandise, consisting of artificial leaves made to resemble leaves of oak, ivy, etc., as "artificial flowers or parts thereof." A portion of this merchandise was imported prior to the act of 1890. The paragraphs in question are 443 of the act of October 1, 1890, and 429 (Schedule N) of the act of March 3, 1883. The importers protested, insisting that the merchandise in question should have been classified as manufactures of paper

and cotton under paragraphs 425 and 355 of the act of October 1, 1890, and under paragraphs 388 (Schedule M) and 324 (Schedule I) of the act of March 3, 1883.

Albert Comstock, for importers.

Jason Hinman, Asst. U. S. Atty., for collector.

COXE, District Judge. The question is whether the imported artificial leaves should be classified as "artificial flowers or parts thereof," or as "manufactures of cotton" and paper. The board found that these leaves were made of colored cotton cloth, metal and wax, cotton being the component material of chief value; that they are suitable for millinery ornaments and are used for branching and making mountings and that they are commercially known, imported, bought and sold as parts of artificial flowers. This finding was upon ex parte testimony, the importers, though invited to do so, gave no testimony before the board. In this court a mass of testimony has been taken which establishes the fact that artificial leaves are imported for three distinct lines of trade and are used by confectioners, decorators and milliners. Only in the millinery trade are leaves known as artificial flowers or parts thereof and not uniformly in that trade. By decorators and confectioners they are known only as leaves. Of course these leaves are not, in fact, flowers, or parts of flowers. Not being artificial flowers in fact, the evidence that they were known as such commercially must be "definite, uniform and general." It is not enough that they were so known in a single trade. *Berbecker v. Robertson*, 152 U. S. 373, 14 Sup. Ct. 590; *Maddock v. Magone*, 152 U. S. 368, 14 Sup. Ct. 588; *Cohn v. Erhardt*, 44 Fed. 747; *Dodge v. Hedden*, 42 Fed. 446. As the testimony here is confined to a single trade and is not entirely definite as to that trade it is obvious that no commercial usage has been established within the rule of the authorities cited. The decision of the board is reversed.

RILEY et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 6, 1895.)

No. 489.

CUSTOMS DUTIES—CLASSIFICATION—DRESS SHIELDS.

Dress shields, made of cotton and India rubber, India rubber being the component material of chief value, are dutiable as manufactures of India rubber, under Act Oct. 1, 1890, par. 460, and should not be classified under the proviso of paragraph 349 of the same act, which is confined to clothing and wearing apparel of which cotton is the component part of chief value.

This was an application by W. H. Riley & Co., importers of certain dress shields, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

Albert Comstock (of Comstock & Brown), for importers.

James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge (orally). The importations involved in this controversy are dress shields made of cotton and India rubber, India rubber concededly being the component part of chief value. The collector classified them under paragraph 349 of the tariff act of 1890. The importers protested, insisting that they should have been classified under paragraph 460 of the same act. The simple question is whether or not paragraph 319 is confined in the main clause as well as in the proviso to clothing and wearing apparel of which cotton is the component material of chief value. If it be so confined, it is clear that the collector's classification was wrong. I think that it is so confined. This appears not only from the paragraph itself, but also by a comparison with paragraph 413 of the silk schedule, which contains a proviso in precisely the same language. As the collector was wrong in assessing duty under paragraph 349, it is clear that the importers are right in insisting that their importations are dutiable under paragraph 460 as manufactures of India rubber. The decision of the board of general appraisers as to "Item 230" is reversed; in all other respects it is affirmed.

BURR et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 15, 1895.)

No. 2,100.

CUSTOMS DUTIES—RATE OF DUTY—NEW TARIFF LAW—REPEAL.

Where duties were liquidated on the day after the new tariff law (Act Aug. 27, 1894) went into effect, upon goods imported or withdrawn while the old law was in force, *held* that the rate of duty should be that prescribed by the new law, and not the higher rate imposed by the old; and that the right of the government to such higher rate was not saved by the provision of the new law (section 72) that the repeals therein made should not affect "any act done, or any right accrued."

This was an application by Burr & Hardwick for a review of the decision of the board of general appraisers in respect to the rate of duty to be imposed upon certain goods.

Curie, Smith & Mackie, for Burr & Hardwick.

Wallace MacFarlane, for the United States.

WHEELER, District Judge. The tariff act of 1894 became a law on August 27th. It began with the provision, "That on and after the first day of August, eighteen hundred and ninety-four, unless otherwise specially provided for in this act there shall be levied, collected, and paid upon all articles imported from foreign countries or withdrawn for consumption, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs respectively prescribed." These goods were imported, or withdrawn, on August 8th; the duties were liquidated on August 28th, at the rates prescribed in the former act, against the claim of the importers that the latter act should govern. This liquidation is the actual assessment of the duties (Davies v. Miller, 130 U. S. 284, 9 Sup. Ct. 560; Merritt v. Cameron, 137 U. S.

542, 11 Sup. Ct. 174), and it should be made according to the law at the time. This latter act was in force at that time, and whatever was done which it included should have been done according to its terms and effect. Its terms are plain, without room for construction or doubt, that, on all goods imported or withdrawn when these were, the duties should be assessed according to its own schedules. Each house, when it had the bill under consideration, fixed a then future date in this place; and from this an ingenious argument has been made to show that both houses concurred in an intention that this date should be future whenever the act should be passed. But the senate, with legislative deliberation, inserted this date in proposals of amendment; the house, with like deliberation, after the date had gone by, concurred in the proposals, and it so became a law. Thus the whole lawmaking power enacted that date as the date for that place in the law. What the effect of the law is as it stands is more open to doubt. The former law was in force when these goods were imported or withdrawn; this law might not affect anything already done under that act; it might and would affect what was not done. In *Stockdale v. Insurance Co.*, 20 Wall. 323, Mr. Justice Miller, in delivering the opinion of the court, said with reference to changing prior taxation:

"Both in principle and authority, it may be taken to be established that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated."

And again:

"Congress could have passed a law to reimpose this tax retrospectively; to revive the sections under consideration if they had expired; to re-enact the law by a simple reference to sections."

No question exists, or is really made, but that this whole subject was within the lawmaking power; but that a law should not have any retroactive application unless that is plainly intended is more strenuously urged. No intention that duties after a certain prior date should be collected at certain rates could be more plainly expressed than by saying, as was said here, exactly that. This could not be so distinctly declared and something else be meant. This act of 1894 provides:

"Sec. 72. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued."

This is said to save the right to the duties which had accrued to the government, under the existing laws, on the importation or withdrawal of the goods; and, if this saving includes the right of the government to duties, undoubtedly it would. The tariff act of 1883, upon the taking effect of which *Hartranft v. Oliver*, 125 U. S. 525, 8 Sup. Ct. 958, arose, contained a like saving of rights accruing and accrued. 22 Stat. 526, § 13. The goods were imported, and higher duties had accrued, as was said, before June 30th, when that part of the act relating to those goods took effect; still the rate

was held to have been changed by the new law, which could not have been properly done if the accrued duties had been within that saving clause. The tariff act of 1890, upon which *In re Gardiner*, 53 Fed. 1013, 4 C. C. A. 155, arose, also contained a similar saving clause. The vessel had arrived, and lower duties had accrued, before October 6th, when that part of the act relating to those goods took effect, but the new rate was held applicable. The right of the government to exact duties exists at all times, and was being exercised in the making of these laws; and not that, but individual rights, would seem to be intended in these saving clauses. Judgment reversed.

PASSAVANT et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 15, 1895.)

No. 2,097.

S. G. Clarke, for Passavant.
Wallace MacFarlane, for the United States.

WHEELER, District Judge. This case is like *Burr v. U. S.* (66 Fed. 742), except that the liquidation was on August 31st. Judgment reversed.

McCANN v. UNITED STATES.

(Circuit Court, S. D. New York. January 15, 1895.)

No. 2,106.

Hartley & Coleman, for McCann.
Wallace MacFarlane, for the United States.

WHEELER, District Judge. This case is like *Burr v. U. S.* (66 Fed. 742), except that the liquidation was on September 1st. Judgment reversed.

SCHMID v. UNITED STATES.

(Circuit Court, S. D. New York. February 21, 1895.)

CUSTOMS DUTIES—GOODS IN BOND—ACT JUNE 10, 1890.

Rev. St. § 2970, imposing an additional duty of 10 per cent. on goods withdrawn from bond more than a year after deposit, is repealed by the customs administrative act of June 10, 1890; and the duties on goods withdrawn after said act went into effect, though deposited before, are those only which are imposed by section 20 of said act.

Appeal by importer from the decision of the board of general appraisers affirming the action of the collector of the port of New York.

The imported merchandise was entered for warehousing prior to July, 1889, and remained there until September, 1890, when it was withdrawn and the duties paid. The collector assessed an additional duty of 10 per cent., under section 2970 of the Revised Statutes. The importer protested against the exaction of this duty, upon the ground that section 2970 had been repealed by the sections 20 and 29 of the customs administrative act, passed June 10, 1890. Section 2970 of the Revised Statutes is as follows: "Any merchandise deposited in bond in any public or private bonded warehouse may

be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges." Section 20 of the act of June 10, 1890, provides that "any merchandise deposited in any public or private bonded-warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: provided, that nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles." Section 29 of this act, after repealing various designated sections of the Revised Statutes (section 2970 not being among them), and after reciting various sections of acts subsequent to the Revised Statutes, continues as follows: "And all other acts and parts of acts inconsistent with the provisions of this act, are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made." Section 30 provides that the act shall take effect August 1, 1890. The merchandise in question had been in warehouse more than a year on August 1, 1890. It was withdrawn and paid duties during September, 1890.

Stephen G. Clarke, for importer.

James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge. That section 20 of the act of June 10, 1890, is inconsistent with section 2970 of the Revised Statutes, can hardly be doubted. Both sections deal with the same subject, and the later law substitutes three years for one year as the period within which bonded merchandise may be withdrawn on the payment of duties and charges. It omits all reference to the additional duty. It is hard to see what object congress expected to accomplish by this legislation if section 2970 was to remain in force. It was clearly the intention of congress to abolish the harsh provision for an additional duty. This is shown not only by a comparison of the two sections, but also by sections 50 and 55 of the act of October 1st, of the same year. *U. S. v. McGrath*, 50 Fed. 404; *In re Schmid*, 54 Fed. 145. Whether the repeal was accomplished by the act of June 10th is not, perhaps, free from doubt. The doubt, if one exists, should be resolved in favor of the importer. *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240; *U. S. v. Davis*, 4 C. C. A. 251, 54 Fed. 147.

In *Hartranft v. Oliver*, 125 U. S. 525, 8 Sup. Ct. 958, the supreme court said of a provision very similar to section 20, *supra*:

"The plain meaning of this section is, that, though goods are imported before the act takes effect, yet if they are kept until after that period in a public store or bonded warehouse, that is, in the custody and under the control of officers of the customs, they shall be subjected only to the duties thereafter leviable when they are entered for consumption. * * * In other words, goods imported before the act took effect, if kept in the custody and control of the government, are to be charged with duties according to the law in force when they are entered for consumption."

To the same effect is *Burr v. U. S.*, 66 Fed. 742.

As the law in force, when the goods in controversy were entered for consumption, was the act of June, 1890, which makes no provision for an additional duty, the exaction of such duty was unauthorized. The decision of the board is reversed.

In re MALLINCKRODT CHEMICAL WORKS.

(Circuit Court, E. D. Missouri, E. D. March 13, 1894.)

No. 3,749.

CUSTOMS DUTIES—CLASSIFICATION—HYDROCHLORATE OF COCAINE.

Hydrochlorate or muriate of cocaine is dutiable as an "alkaloid salt," under paragraph 76 of the act of October 1, 1890 (26 Stat. 570), rather than as a "medicinal preparation in the preparation of which alcohol is used," under paragraph 74; the former being the more specific description.

This was an application by the collector and surveyor of the port of St. Louis for a review of the decision of the board of general appraisers in respect to the rate of duty on certain merchandise imported by the Mallinckrodt Chemical Works.

George D. Reynolds, Dist. Atty., and E. P. Johnson, Asst. Dist. Atty., for the United States.

Everett W. Pattison, for respondent.

THAYER, Circuit Judge. It is a defect in the existing tariff law, and in preceding tariff laws of a like character which impose duties on a multitude of articles, that the language employed to describe dutiable articles is frequently so general that the same article is sometimes embraced by the descriptive language found in two or more paragraphs of the same schedule of the act. The case at bar furnishes a good illustration of the defect in the statute, and of the difficulties encountered in applying it, which would have been avoided had congress, in every instance, described dutiable articles by the names ordinarily applied to them in commerce. The article in question is "hydrochlorate or muriate of cocaine." To chemists this drug is known as an "alkaloid salt," consisting of hydrochloric acid in combination with cocaine, which is, chemically speaking, an alkaloid. The chemical compound in question is also a medicinal preparation, which is prepared for use by treating crude cocaine with hydrochloric acid to form the salt, and by washing it with alcohol to remove certain impurities found in crude cocaine. Now, paragraph 74 of Schedule A of the tariff act of October 1, 1890 (26 Stat. 570), imposes a duty of 50 cents per pound on "medicinal preparations, including medicinal proprietary preparations, of which alcohol is a component part, or in the preparation of which alcohol is used, not specially provided for in this act," while paragraph 76 of the same schedule imposes a duty of 25 per cent. ad valorem on "products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combina-

tions of the foregoing, and all chemical compounds and salts not specially provided for in this act." The correct chemical name of the drug in question is not found in the tariff act of October 1, 1890, and it becomes necessary to decide whether it is best described and should be assessed under paragraph 74, *supra*, as a "medicinal preparation in the preparation of which alcohol is used," or, under paragraph 76, *supra*, as an "alkaloid salt." The difference in the sum to be paid to the government as a duty, dependent upon the decision of the question whether it is dutiable at 50 cents per pound or at the rate of 25 per cent. *ad valorem*, amounts on this importation to \$2,195.35. It may be conceded that the description contained in both of the foregoing paragraphs is generic, and that neither of the descriptions is sufficiently specific to identify the article in question from many other drugs and chemical compounds. Nevertheless it is necessary to decide which description is most specific, the rule being, in this class of cases, to assess the duty under that clause of the schedule which contains the most accurate description. The term "alkaloid," as used among chemists, has a definite meaning, and is applied to a class of compounds found in plants which have the properties of an alkali in their capacity, or tendency to neutralize acids. It is true that there are very many alkaloids, but the name is applied to a specific group of organic substances, and to the mind of a chemist the word has a precise signification; much more so, in my judgment, than the phrase a "medicinal preparation in the making of which alcohol is used." This latter expression, considered as a definition of any particular article, is about as vague and uncertain as it could well be made. By the language employed in paragraph 76, *supra*, congress has manifested an intention to impose a duty of 25 per cent. *ad valorem* on all of a specific class of organic substances or compounds, known as "alkaloids" or "alkaloid salts," except where a duty is imposed on certain compounds belonging to that class by the name in which they are known to the trade.

Another view of the case at bar is also equally decisive. In *Hirzel v. U. S.*, 7 C. C. A. 491, 58 Fed. 772, the circuit court of appeals for the Second circuit have held (affirming the decision of the circuit court for the Southern district of New York; 53 Fed. 1006) that crude cocaine is dutiable, under paragraph 76, *supra*, as an alkaloid, at the rate of 25 per cent. *ad valorem*, and a duty at that rate is now being imposed, and, under the decision aforesaid, will continue to be imposed, at the port where most of the crude cocaine finds its entrance into the United States. The hydrochlorate of cocaine which figures in this case is a finished product, and it is hardly probable, in view of the general purpose and scope of the act of October 1, 1890, that congress intended to admit the finished product into the country at a less rate of duty than had been imposed on crude cocaine. It is desirable, for many obvious reasons, that the construction of the tariff laws should be uniform throughout the country, and, in view of the decision last above referred to, it can hardly be doubted that in the Second circuit the article now in question will hereafter be classified for duty under paragraph 76.

For the foregoing reasons the government's appeal from the decision of the board of general appraisers must be sustained, and it is so ordered.

LEHN et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 1, 1895.)

No. 2,031.

CUSTOMS DUTIES—CLASSIFICATION—HYDROCHLORATE OF COCAINE.

Muriate or hydrochlorate of cocaine, which is covered, for tariff purposes, both by paragraph 76 and paragraph 74 of Act Oct. 1, 1890, is dutiable under the former, relating to chemical salts, which is more specific than paragraph 74, providing for medicinal preparations. *Mallinckrodt Chemical Works Case*, 66 Fed. 746, followed.

Appeal by Lehn & Fink, importers, from a decision of the board of general appraisers affirming the action of the collector in assessing duty upon certain muriate or hydrochlorate of cocaine under paragraph 76 of the tariff act of 1890. The importers insisted that it should have been assessed under paragraph 74 of the same act.

Comstock & Brown (Albert Comstock, of counsel), for importers.
James T. Van Rensselaer, Asst. U. S. Atty., for collector.

COXE, District Judge (orally). I am inclined to think that this case is ruled by the *Mallinckrodt Chemical Works Case* (decided in the St. Louis circuit) 66 Fed. 746. That case, as I understand it, involved the precise substance that is in controversy here. Where a court has decided the identical question, another court of concurrent jurisdiction should follow it. It is conceded that both of the paragraphs in question cover this particular importation, that is, it is a chemical salt and also a medicinal preparation. The circuit court in the *Mallinckrodt Case* held that paragraph 76, which provides for chemical salts, is more specific than paragraph 74, which provides for medicinal preparations. It is not necessary for me to express my views upon the subject, for the reason that, in the circumstances, this court should follow that decision. The decision of the board of general appraisers is affirmed.

SCHULZE-BERGE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 8, 1895.)

No. 2024.

CUSTOMS DUTIES—CLASSIFICATION—"ANTIPYRINE."

"Antipyrine," a patented medicine, ready for administration in the condition as imported, made of the aniline from coal tar, alcohol being chemically used and broken up in the manufacture, was classified for customs duties by the collector of the port of New York as a "medicinal proprietary preparation," at 25 per cent. ad valorem, under paragraph 75 of the tariff act of October 1, 1890, and as a "chemical salt," at the same rate, under paragraph 76 of the same act. The importers protested under two heads: First, that the article was dutiable as a "medicinal preparation

in the preparation of which alcohol is used," at 50 cents per pound, under paragraph 74; or, secondly, as a "coal tar preparation not a color or dye," at 20 per cent. ad valorem, under paragraph 19 of that tariff act. The board of United States general appraisers sustained the importers' alternative protest that the merchandise was properly dutiable as a "coal tar preparation," under paragraph 19. The importers appealed to this court, claiming that the antipyrine was only dutiable, under paragraph 74 of the tariff act, at 50 cents per pound. The United States took no appeal. *Held*, that the antipyrine, as between paragraph 74, for "medicinal preparations in the preparation of which alcohol is used," and paragraph 19, for "preparations of coal tar," was more specifically designated as a "coal tar preparation," as decided by the board of general appraisers.

See *Matheson v. U. S.*, 65 Fed. 422, on the proper classification of "sulpho-toluic acid."

At Law. Appeal by importers from decision of board of general appraisers sustaining the alternative protest of the importers that the merchandise in question is dutiable under paragraph 19 of the tariff act of 1890. Affirmed.

Edward Hartley (of Hartley & Coleman), for importers.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for collector and the United States.

COXE, District Judge (orally). The importation in this cause is "antipyrine," which was classified by the collector under paragraph 75 of the act of 1890. The importer protested, insisting, first, that it should have been classified under paragraph 74, and if not dutiable under paragraph 74, then under paragraph 19 of the same act. The board of appraisers sustained the second contention of the importer, and held it to be dutiable under paragraph 19 as a "coal tar preparation." The importer now appeals from the decision of the board. The United States does not appeal.

Assuming that the importer can appeal from a decision in his own favor, the question is whether the article in suit, popularly known as "antipyrine," should be assessed under paragraph 74 rather than under paragraph 19, where the board of appraisers placed it. The decision of the circuit court of appeals in the case of *U. S. v. Battle*, 4 C. C. A. 249, 54 Fed. 141, seems to be an authority for the proposition that in the preparation of this article, alcohol is not used, within the meaning of the law. But assuming that alcohol is used in its preparation, the question then is, which is the more specific designation, "coal tar preparation," or "medicinal preparation, in the preparation of which alcohol is used"? It seems to me that under the various decisions which have been referred to, the classification by the board is the correct one as between these two paragraphs. It is true that these cases are not directly in point, but I think the reasoning of *Matheson v. U. S.*, 65 Fed. 422, and *In re Mallinckrodt Chemical Works*, 66 Fed. 746, leads directly to the conclusion that "coal tar preparation" is a more specific designation than "medicinal preparation." In the Case of *Mallinckrodt* the court considers the phrase "medicinal preparations" to be an exceedingly broad and general classification.

The decision of the board of general appraisers should be affirmed.

CALIFORNIA FIG-SYRUP CO. v. PUTNAM et al.

(Circuit Court, D. Massachusetts. March 6, 1895.)

No. 204.

TRADE-MARKS—DECEPTION A BAR TO RELIEF.

Plaintiff, the manufacturer of a laxative compound called "Syrup of Figs," sought to restrain the use by defendants, on a laxative medicine manufactured by them, of the name "Fig Syrup," as an infringement of plaintiff's trade-mark. It appeared that syrup made from figs has no considerable laxative properties; that plaintiff's compound contained a very small amount of the juice of the fig, and its laxative ingredient was senna; but that plaintiff placed conspicuously on the bottles containing its compound labels describing the same as a "Liquid Fruit Remedy," and otherwise conveying the impression that it was made from figs and derived its laxative properties from them. *Held*, that the use of such labels was an imposition upon the public, which deprived the plaintiff of the right to seek the aid of equity.

This was a suit by the California Fig-Syrup Company against Kate Gardner Putnam and others to restrain the infringement of a trade-mark. The cause was heard on the pleadings and proofs.

R. A. Bakewell, Paul Bakewell, and Louis D. Brandeis, for complainant.

Fish, Richardson & Storror, for defendants.

COLT, Circuit Judge. The plaintiff is the proprietor and manufacturer of a liquid laxative compound called "Syrup of Figs". The defendants manufacture and sell a laxative medicine which they term "Fig Syrup". The plaintiff claims a trade-mark in the words "Syrup of Figs" or "Fig Syrup", and seeks to enjoin their use by the defendants. There is no evidence that the defendants have imitated the plaintiff's labels or packages except in this particular. If this preparation is in fact a syrup of figs, the words are clearly descriptive, and not the proper subject of a trade-mark. Upon this point the contention of the plaintiff is that its preparation is not a syrup of figs, since it contains only a very small percentage of the juice of the fig; that the laxative ingredient in it is senna; that while the fig in the form of fruit may have laxative properties arising from the seeds and skin, the fig in the form of a syrup is no more laxative than any other fruit syrup; that it follows from these facts that these words, as applied to this compound, are not descriptive, but purely fanciful, and therefore constitute a valid trade-mark. The evidence shows that the compound is not a syrup of figs. It might more properly be termed a "syrup of senna", if the words were intended to be descriptive of the article. But, assuming this is not a syrup of figs, we are met with the inquiry whether these words, as applied to this preparation are not deceptive. The label on every bottle reads as follows:

"SYRUP OF FIGS.

The California Liquid Fruit Remedy.

Gentle and Effective."

On the sides of each bottle are blown the words, "Syrup of Figs", and on the back the words, "California Fig Syrup Co., San Fran-

cisco, Cal." On the face of every package is a picture of a branch of a fig tree with the hanging fruit, surrounded with the words, "California Fig Syrup, San Francisco, Cal."; and beneath this the words:

"SYRUP OF FIGS

Presents in the Most Elegant Form the
Laxative and Nutritious Juice of the Figs of California."

The advertisements are headed with this picture:



Thus we see that the leading representation on the labels, packages, and in the advertisements of this preparation is that it is a laxative fruit syrup made from the juice of the California fig. Mr. Winslow, a witness for the plaintiff, fairly expresses the public idea of this compound in reply to the following question:

"What did you suppose 'Syrup of Figs' was composed of when you purchased your first bottle? A. I supposed it was made from the natural fruit. It called for the fruit."

The popularity of this medicine arises from the belief in the mind of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is senna. The ethical principle on which the law of trade-marks is based will not permit of any such deception. It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false. This is not an immaterial representation the effect of which is harmless, but it is a representation which goes to the very essence of the plaintiff's right to a trade-mark in these words. The cases are numerous where the courts have refused to grant relief under these circumstances. In the leading case of *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 137, 142, 144 (affirmed 11 H. L. Cas. 523), which was a suit where the statements on the face of the trade-mark were untrue, Lord Chancellor Westbury says:

"When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation; for, if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity. * * * Where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained."

That case was cited and approved by the supreme court in *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, where a trade-mark was claimed in "Atwood's Vegetable Physical Jaundice Bitters". The labels attached to the bottles stated that the medicine was manufactured by Moses Atwood, of Georgetown, Mass., whereas in fact it was manufactured by another person in New York. Mr. Justice Field, speaking for the court, says on page 223, 108 U. S., and page 436, 2 Sup. Ct.:

"To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place, by a person whose manufacture there had acquired a great reputation, when, in fact, it is manufactured by a different person at a different place, is a fraud upon the public which no court of equity will countenance."

In *Clotworthy v. Schepp*, 42 Fed. 62, 63, the right to a trade-mark was claimed in the word "Puddine" in connection with the words "Rose" and "Vanilla". In his opinion Judge Lacombe says:

"The complainant himself is engaged in deceiving the very public whom he claims to protect from the deception of others. He calls his preparation 'fruit' puddine. In nine different places on his package this word 'fruit' is repeated, as descriptive of the article, and a dish of fruit (pears, grapes, etc.) is most prominently depicted on one face of each packet. His packages plainly suggest that fruit of some kind enters in some shape into his compound. A chemical analysis produced by defendant, the substantial accuracy of which is not disputed, discloses the fact that his 'Puddine' is composed exclusively of corn starch, a small amount of saccharine matter, and a flavoring extract, with a little carmine added to give it color. It contains no fruit in any form. Under these circumstances, complainant's rights are not sufficiently clear to warrant the granting of a preliminary injunction."

In *Alden v. Gross*, 25 Mo. App. 123, 128, 130, a trade-mark was claimed in the words "Fruit Vinegar". In that case the court says:

"The vinegar thus branded was not manufactured out of fruit, in the plain, ordinary, usual sense of that term, but out of low wines distilled from cereals, and fruit enters into its composition only to a very insignificant extent. * * * It would be a novel application of the rule governing the subject of trade-marks if one who manufactures vinegar out of cereals could appropriate for the article thus manufactured the word 'Fruit,' and thereby exclude another from using the word as descriptive of an article which is, in point of fact, manufactured out of fruit. * * * But whether the word 'Fruit,' in this connection, is purely indicative of the character or quality of the article or not, the plaintiffs' exclusive claim to it must fail on the further ground that the use of the word, in that connection, is clearly deceptive."

In *Connell v. Reed*, 128 Mass. 477, the plaintiff sought to establish the exclusive right to the words "East Indian" as applied to his remedy. In that case Chief Justice Gray says:

"The conclusive answer to this suit is * * * that the plaintiffs have adopted and used these words to denote, and to indicate to the public, that

the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public."

In *Siegert v. Abbott*, 61 Md. 276, 284, the subject-matter of the trade-mark was "Angostura Bitters", which purported to have been prepared by Dr. Siegert, at Angostura, now Port of Spain, Trinidad. In fact Dr. Siegert was dead, and had never lived at Port of Spain. In dismissing the bill, the court says:

"It is a general rule of law, in cases of this kind, that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade-mark or labels."

In *Seabury v. Grosvenor*, 14 Blatchf. 262, 263, Fed. Cas. No. 12,576, the word "Capcine" was sought to be appropriated as a trade-mark. In that case Mr. Justice Blatchford says:

"A registered trade-mark is claimed in the word 'Capcine.' Courts of equity refuse to interfere in behalf of persons who claim property in a trade-mark, acquired by advertising their wares under such representations as those above cited, if they are false. It is shown that there is no such article as 'Capcine' known in chemistry or medicine or otherwise. The authorities are clear that, in a case of this description, a plaintiff loses his right to claim the assistance of a court of equity."

In *Krauss v. Jos. R. Peebles' Sons Co.*, 58 Fed. 585, 594, it was shown that the liquor sold as "Pepper Whisky" was in fact a mixture of Pepper whisky and other whiskies. Judge Taft in his opinion says:

"To bottle such a mixture, and sell it under the trade label and caution notices above referred to, is a false representation, and a fraud upon the purchasing public. A court of equity cannot protect property in a trade-mark thus fraudulently used. It is not material whether the foreign whisky mixed with Pepper's is as good or better whisky than Pepper's, or whether the mixture is better than pure Pepper whisky. The public are entitled to a true statement as to the origin of the whisky, if any statement is made at all. The complainants and Pepper are not to be protected in a deception of the public, even if it works to the advantage of the public."

In *Manufacturing Co. v. Beeshore*, 8 C. C. A. 215, 59 Fed. 572, 574, a trade-mark was claimed in the words "One-Night Cough Cure". In the opinion of the court Mr. Justice Shiras says:

"In the present case, the so-called trade-mark 'One-Night Cough Cure' asserts a manifest falsehood or physiological impossibility. A cough or cold, so far seated as to require medical treatment, cannot be cured in a single night, and a pretense to the contrary is obviously an imposition on the ignorant."

In *Fetridge v. Wells*, 13 How. Pr. 385, 390, 393, the plaintiff sold a soap under the name of "Balm of Thousand Flowers". In denying the plaintiff's right to the exclusive use of these words as a trade-mark, Judge Duer says:

"I am fully convinced that the name 'Balm of Thousand Flowers' was invented, and is now used, to convey to the minds of purchasers the assurance that the highly-scented liquid to which the name is given is, in truth, an extract or distillation from flowers, and therefore not merely an innocent, but a pleasant and salutary, preparation. Not only is this the meaning that the words used naturally suggest, but in my opinion it is that which they actually and plainly express, and were designed to convey. * * * Let it not be

said that it is of little consequence whether this representation be true or false. No representation can be more material than that of the ingredients of a compound which is recommended and sold as a medicine. There is none that is so likely to induce confidence in the application and use of the compound, and none that, when false, will more probably be attended with injurious, and perhaps fatal, consequences."

In *Schmidt v. Brieg*, 100 Cal. 672, 678, 35 Pac. 623, the supreme court of California, in a case where a trade-mark was claimed in the words "Sarsaparilla and Iron", says:

"We think the words 'Sarsaparilla and Iron' are generic terms, and were used for the purpose of indicating, not so much the origin, manufacture, or ownership of the beverage, as the quality of the article itself. * * * The words 'Sarsaparilla and Iron' describe ingredients well known to the public. * * * But it is claimed by respondents [plaintiffs below] that the words 'Sarsaparilla and Iron' do not, in fact, indicate the character, kind, or quality of their beverage; that it is not a composition of sarsaparilla and iron, but a solution of various substances; that it contains only a small quantity of sarsaparilla, and a small quantity of iron, and the name was given to the beverage only as a name by which it might be known, without in any way being descriptive; but it is sufficient to say in answer to this claim that the name given to the article is either generic, or it is of such a character that it can as well be applied to defendants' beverage as to the plaintiffs'."

In *Phalon v. Wright*, 5 Phila. 464, 467, the subject of the trade-mark was "Extract of Night-Blooming Cereus". In that case the court says:

"They [the plaintiffs] admit that the name is a deception, as far as it is used to indicate the real character of the compound; that the perfume is no extract from the flower, and that the trade-mark is in that respect a pure invention. 'The Night-Blooming Cereus,' however, exists, a flower well known by that name, which, when first introduced to public notice, excited much attention. An extract may be made from that flower, any perfumer has the right to make such an extract, and to call it what it is, by the name of the flower."

In *Prince Manuf'g Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 38, 39, 31 N. E. 990, the New York court of appeals, in denying the right to a trade-mark in the words "Prince's Metallic Paint", by reason of a false representation as to the place from which the ore was obtained, says:

"Any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not, in such cases, take into consideration the attitude of the defendant. * * * And, although the false article is as good as the true one, 'the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce.'"

The plaintiff relies on the decisions of the circuit court for the Northern district of California, and the circuit court of appeals for the Ninth circuit, in a case brought by it against the Improved Fig-Syrup Company (51 Fed. 296, and 4 C. C. A. 264, 54 Fed. 175). That case, however, was only heard on motion for preliminary injunction; it also presented a different state of facts. Under these circumstances, it cannot be considered as a binding authority in this case. *Consolidated Fruit-Jar Co. v. Bellaire Stamping Co.*, 27 Fed. 377, 382; *Andrae v. Redfield*, 12 Blatchf. 407, 425, Fed. Cas. No. 367; 1 High, Inj. (3d Ed.) § 5. Bill dismissed, with costs.

GUGGENHEIM et al. v. KIRCHHOFER et al.

(Circuit Court of Appeals, Second Circuit. February 11, 1895.)

1. PATENTS—LICENSE—INTERPRETATION—RATE OF ROYALTY.

G. & Sons entered into a contract with K. & Co. by which G. & Sons licensed K. & Co. to use a certain patented method of doing up embroideries, in consideration of an annual payment of \$1,500. G. & Sons were to furnish, each year, 75,000 license stamps, one of which was to be affixed by K. & Co. to every piece of embroidery done up in the patented method, such stamps to be paid for at the rate of 2 cents each by the payment of \$1,500, previously stipulated. Any stamps required by K. & Co. for pieces of embroidery in excess of 75,000 were to be furnished by G. & Sons at the same rate of 2 cents each. By a separate clause of the contract, G. & Sons agreed not to license any other party under said patent at a less rate of royalty than that paid by K. & Co., and, if they should do so, that K. & Co. should be entitled to a like reduction from the date of any such reduction to a third party, and that, from the date of G. & Sons' acceptance of a lower rate from any third party, K. & Co. should only be obligated to the payment of such lower royalty. Subsequent to the making of this contract, but during the same year, G. & Sons made a contract with another party, licensing him to use the patent at the rate of 2 cents per stamp, but providing that any stamps required in excess of 12,500 should be furnished by G. & Sons free of charge. K. & Co. made the payments stipulated in their contract for the first three years. *Held*, that it was the purpose of the contract between G. & Sons and K. & Co. to require K. & Co. to take 75,000 stamps annually, but to put them upon an equality, as to license fees, with any other licensee from the date of his license; that the subsequent contract permitting another licensee to obtain stamps for less than 2 cents each was an acceptance of a lower rate of royalty; and that K. & Co. were entitled to recover from G. & Sons the payments for all stamps in excess of 12,500 on hand when the second contract was made, together with the payments for stamps in excess of that number in subsequent years, whether the second licensee had ever availed himself of the privilege accorded by his contract or not.

2. PRACTICE—GENERAL EXCEPTION.

An assignment of error based upon a general exception to the ruling of the court in not permitting the cause to go to the jury upon the questions of fact involved, without specifying any particular question of fact to be submitted, is not valid.

3. SAME—REFUSAL TO PERMIT WITHDRAWAL OF COUNTERCLAIM.

Where a counterclaim sets up matter entirely distinct from the plaintiff's cause of action, and no evidence is offered in respect to such counterclaim, and a verdict is directed which does not purport to and could not conclude the defendant in a future action on such counterclaim, the defendant is not prejudiced by a refusal of the court to permit him to withdraw such counterclaim.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Paul Kirchhofer, Ferdinand Kirchhofer, Bernard Huber, and Max Hoffman, copartners as Ulrich de Gasp Von Willer, against Meyer Guggenheim, Isaac Guggenheim, Daniel Guggenheim, Morris Guggenheim, and Solomon Guggenheim, copartners as M. Guggenheim's Sons. There was a judgment in the circuit court for the plaintiffs. Defendants bring error.

John R. Bennett, for plaintiffs in error.

Thos. P. Wickes and Chas. H. Deuell, for defendants in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The plaintiffs in error were defendants in the court below, and bring this writ of error to review a judgment for the plaintiffs, entered upon the verdict of a jury, by the direction of the court.

The action was brought by the plaintiffs to recover back the amount of certain royalties paid by the plaintiffs to the defendants during the years 1889, 1890, and 1891, under a contract of the date of May 16, 1889. On that date the defendants made a contract with the plaintiffs, whereby they licensed the plaintiffs for a term of years to use certain embroidery stamps. The contract contained the following conditions:

"First. In consideration of the parties of the second part paying the sum of fifteen hundred dollars per year to the parties of the first part, said parties of the first part do hereby grant unto the said parties of the second part a license under the said Rice patent No. 266,525, thereby permitting them to do up embroideries in the style known as 'Automatic,' and mark them with the name 'Automatic'; said sum to be payable to the parties of the first part on the first day of May in each year hereafter for that year, payable for the present year beginning on the date of these presents, to be made on or before the 15th of June. And the said parties of the first part hereby agree to furnish the said parties of the second part with 75,000 license stamps during each year hereafter, so long as this license shall remain in force, dating from this date, at the rate of two cents per stamp, accepting in payment therefor the said sum of fifteen hundred dollars per annum, one of which stamps said parties of the second part are to place upon each and every piece of embroideries done up by them, and by them brought into or sold, or both, in the United States of America; said 75,000 license stamps to be used by the said parties of the second part within the year for which they are issued, and not to be by them sold or otherwise disposed of to others, being intended for use solely upon embroideries done up by the said parties of the second part. Should the said parties of the second part do up in any one year more than 75,000 pieces of embroidery in the style known as 'Automatic,' thereby requiring more than 75,000 stamps per year, the parties of the first part are to furnish such additional stamps to the said parties of the second part at the rate of two cents per stamp, which shall be paid for by the said parties of the second part to the said parties of the first part at the time of the delivery of such additional stamps. The license stamps are to be furnished by the said parties of the first part, as and in such numbers as they may be demanded by the said parties of the second part, upon their giving for each lot after the first lot forty-five days' notice of the number of stamps required. Second. The parties of the second part covenant and agree, for and in consideration of the parties of the first part granting them a license under the said Rice patent, and agreeing to protect and defend them in the use of the invention specified in said Rice patent, to pay unto the said parties of the first part the said sum of fifteen hundred dollars on or before the 15th day of June, 1889, and the further sum of fifteen hundred dollars on the first day of May in each and every year hereafter, so long as this license shall continue in force, and agree to receive in exchange and full payment therefor the license heretofore granted, and 75,000 license stamps, one of which stamps they will place upon each and every piece of Automatic embroidery done up by them, and brought into or sold or delivered in the United States of America; and they further agree that, in case they shall do up more than 75,000 pieces of such embroideries in any one year, they will obtain an additional number of license stamps from the said parties of the first part, paying therefor to the said parties of the first part, at the time of the delivery of the stamps, the sum of two cents per stamp, so as to have a sufficient number of such stamps to place one upon each and every piece of such embroideries that they may do up, and this they covenant and agree to do. * * * Fifth. The parties of the first part covenant and agree not to hereafter license any other party or parties under the said Rice patent to do up embroideries under or in accordance therewith at a less rate

of royalty than that herein specified; and that should they so license any other party or parties under the said Rice patent to do up embroideries in the Automatic style, or in any other manner, at a less rate of royalty than two cents per stamp, one stamp to be placed upon each piece of embroidery, the parties of the second part shall be entitled to a like reduction from the date of any such reduction. And the parties of the first part further covenant and agree that, if they shall hereafter accept from any party or parties a less rate of royalty than two cents per stamp for each piece of embroidery, the parties of the second part shall be obligated only to the payment of an equally low royalty."

It appeared upon the trial that December 17, 1889, the defendants made a second license contract, by which they licensed third parties for a term of years to use stamps at the rate of two cents per stamp; but the contract further provided that, if the licensees should require for use more than 12,500 stamps in any one year, the defendants would furnish them the additional number free of charge. It was shown that under their contract the plaintiffs had paid the defendants \$1,500 during each of the years 1889, 1890, and 1891, and that during the same time the defendants had been supplying the licensors under the second contract with stamps free of charge for the number used by them beyond 12,500 in each year. It also appeared that during the three years the sum paid by plaintiffs for stamps used by them in excess of 75,000 per year amounted, at the royalty rate, to \$680. At the close of the evidence, the trial judge directed a verdict for the plaintiffs for the sum of \$4,446.40. The defendants excepted to this direction, and have assigned error of the ruling.

The defendants did not ask to have any specific questions of fact submitted to the jury, and there is no error of which they can now be heard to complain unless the trial judge erred in placing a construction on the contract contrary to that upon which they insisted at the trial. They insisted that, under a proper construction of the contract, the plaintiffs were bound to pay the defendants \$1,500 annually, and the only royalty as to which the plaintiffs were entitled to a reduction, if others were licensed at a lower rate, was in respect to payments for stamps in excess of that sum. We think the contract does not bear the construction thus contended for. Notwithstanding its tautologies and ambiguities, the intention of the parties in two particulars is clearly manifested. One of these was to require the plaintiffs to take a specific number of stamps annually, and pay for them whether they used them or not. Another was to place the plaintiffs in a position of entire equality, as to royalties or license fees, with all other licensees of the defendants. The provisions intended to prevent discrimination in the royalties are found exclusively in three covenants, contained in the fifth clause of the contract, and little, if any, light upon the interpretation of these covenants can be derived from any language used in the other clauses of the contract. By the first of these covenants, the defendants agree not to license any other persons than the plaintiffs at a less rate of royalty. By the second, they agree that, should they license others at a less rate of royalty than two cents per stamp, the plaintiffs are to have a like reduction from the date of any such reduction. By the third covenant, they

agree that, if they shall accept from any other licensee a less rate of royalty than two cents per stamp, the plaintiffs shall be obligated only to the payment of an equally low royalty. Read together, these covenants permit but one conclusion, and that is that the defendants are not, during the life of the contract, to license any others at a less rate than two cents per stamp, and, if and when they do, the plaintiffs are to have the benefit of that rate. The obligation of the plaintiffs found in the second clause of the contract, to take and pay for 75,000 stamps each year, is independent of these covenants, and is not qualified or affected by them. It follows that, while the licensors were at liberty to make their own terms with other licensees as to the number of stamps to be taken and paid for annually, they were not at liberty to make better terms as to the rate of royalty. When they entered into a binding contract with another licensee enabling him to obtain stamps for less than two cents each, they accepted a lower rate of royalty, within the meaning of the third covenant. Having licensed another by a contract to supply him without charge for all stamps in excess of 12,500 annually, they were bound to accord similar terms to the plaintiffs, and to supply them, during each year of the license, with all stamps in excess of that number without charge. Were it not for the second covenant, it might be doubtful whether the plaintiffs did not become entitled, when the second license was granted, to be repaid for all the stamps in excess of 12,500 which had been supplied to them during the year 1889. But that covenant provides that they are to be entitled to the reduction given another licensee "from the date of any such reduction." It is to be construed so as to effectuate the intention of the contract not to subject the plaintiffs to the competition of other licensees at a lower rate. It means that, from the date of a license giving a lower rate of royalty to another licensee, the plaintiffs shall be entitled to a similar rebate; but the rebate is not to apply to stamps which have been used by the plaintiffs, and as to which they have completely enjoyed the privilege of the patent. As to all stamps previously used, competition could not hurt. We, therefore, conclude that the plaintiffs were entitled to recover the payments for all stamps on hand December 17, 1889, in excess of 12,500, together with the payments for stamps supplied them in excess of that number in each of the following years.

It was not shown upon the trial how many stamps the plaintiffs had on hand or unused when the second contract was made. It had been shown by the testimony for the plaintiffs that their orders from customers for embroideries received after the middle of May in each year were, in the usual course of business, filled in the following months of November, December, and January, but there was no evidence to show what proportion of the orders for 1889 had been filled prior to December 17th. So far as appeared, they may not have had 12,500 on hand. Upon this state of the evidence, if the defendants had so requested, they would have been entitled to an instruction that plaintiffs' recovery be limited to payments for stamps subsequently supplied. The trial judge, in directing a

verdict, seems to have assumed that the plaintiffs had on hand five-twelfths of the 75,000, and allowed a recovery for that year on that basis. But the defendants did not impugn the correctness of this assumption, or ask to go to the jury upon the question of fact involved in it. They excepted generally "to the ruling of the court in not permitting the cause to go to the jury upon the questions of fact involved," without specifying any particular question of fact which they desired submitted to the jury. An assignment of error based upon such an exception is not valid.

Error is assigned of the ruling of the court in admitting the testimony of the witness Wolf in respect to matters of which it is insisted he had no personal knowledge. It suffices to say as to this exception that the evidence received was of no importance, and its reception was harmless. It was unnecessary for the plaintiffs to show how many stamps the second licensees had actually used. They were entitled to recover the rebate, irrespective of the fact whether the other licensees had ever availed themselves of their contract. The defendants accepted a lower rate of royalty when they made the second license contract, and, if the second licensees had never used a stamp under their license, the plaintiffs would, nevertheless, have been entitled to the reduced rate.

Error is also assigned of the refusal of the trial judge to permit the defendants to withdraw the counterclaim alleged in their answer. The counterclaim set up matters entirely distinct and independent from the cause of action of the plaintiffs, and which in no respect involved an inquiry into the merits thereof. It alleged that the plaintiffs had conspired with various licensees of the defendants to dispute the title of the defendants to the invention of the patent, and use the invention in violation thereof, and sought to recoup damages sustained thereby against the claim of the plaintiffs. As no evidence was offered in respect to the matters thus alleged, and as the verdict directed did not purport to, and could not by any implication, conclude the defendants in any future action from litigating these matters, the defendants were not prejudiced by the refusal. *Cromwell v. County of Sac*, 94 U. S. 351; *Ressequie v. Byers*, 52 Wis. 650, 9 N. W. 779; *Bascom v. Manning*, 52 N. H. 132; *Sweet v. Tuttle*, 14 N. Y. 465; *White v. Chase*, 128 Mass. 158.

We find no grounds for a reversal of the judgment, and it is therefore affirmed.

ROUSSEAU v. PECK et al.

(Circuit Court, E. D. New York. March 15, 1895.)

1. PATENTS—VALIDITY—CLAIMS FOR RESULTS—ELECTRIC CIRCUIT BREAKERS.

Claims for an automatic electric circuit breaker, so operated by time mechanism as to permanently break the circuit at a predetermined time, and for an electro-magnet arranged to release a clockwork motor whenever the circuit remains closed for longer than a normal period, appear to be claims for results, or for all means for producing them, rather than for invented means for producing them.

2. SAME—INFRINGEMENT.

The Rousseau patent, No. 279,107, for an automatic opener of electric circuits, construed as to claims 1 and 2, and *held* not infringed, and apparently invalid.

This was a bill by David Rousseau against John B. Peck and others for infringement of a patent.

Richard N. Dyer, for plaintiff.

Edwin H. Brown and Edward P. Payson, for defendants.

WHEELER, District Judge. The questions in this case arise upon patent 279,107, dated June 5, 1883, and granted to the plaintiff for an automatic opener of electric circuits to prevent too long closing of the circuit, and exhaustion of the battery. The specification describes an electro-magnet in the circuit, with an armature near it, to be attracted and moved whenever the circuit is closed, and by this motion to start clockwork which, when continued, by intricate mechanism in two or three forms, raises detents that release other clockwork or start other devices, which permanently break the circuit. These claims are for:

(1) The combination, with an electric generator and an electric circuit emanating therefrom, of an electro-motive device which is vitalized by the closing of said circuit, automatic time mechanism which is started into operation by said electro-motive device when so vitalized, and an automatic circuit breaker which is operated by said time mechanism to permanently break said circuit at the expiration of a predetermined time after the closing of the same, substantially as set forth.

(2) An electric circuit of the kind described, provided with an electro-magnet arranged therein, in combination with a clockwork motor, arranged, when released, to work a contact breaker to permanently break the circuit, and having the said magnet arranged to thus release the said clockwork whenever said magnet remains active and the circuit remains closed longer than a normal period, substantially as herein set forth.

Such circuit breakers starting by clockwork were well known and in use before the plaintiff's invention, and among those put in evidence is one called the "Gibson Cut-Off," of unquestioned priority. This device is compared with that of the patent by the plaintiff testifying thus:

"When the armature is drawn down, it releases the clock movement, and proceeds towards cutting off, while the Rousseau apparatus releases a clock movement, and proceeds towards cutting off, but the parts come back to their normal condition if the circuit is not closed long enough to cut off."

And by one of his witnesses thus:

"After each normal closure of the circuit to light the gas, the Gibson apparatus runs down a little, and does not recover the ground lost; while in the case of the Rousseau apparatus the normal closure of the circuit in lighting the gas allows the spring to run down a little, but the circuit-breaking appliances have not moved towards or approached a condition wherein the circuit is broken; but, on the other hand, they at once, on the opening of the circuit after the normal closure, recover their positions and reinstate themselves in their original condition."

These claims are not for the specific mechanical devices which constitute these parts,—the other claims are for those,—but are for the combination of parts composed of devices which will do these things. One element of the combination of the first claim is

a circuit breaker operated by time mechanism to permanently break the circuit "at the expiration of a predetermined time after the closing." One of the second is a magnet arranged to release clockwork whenever the "magnet remains active and the circuit remains closed longer than a normal period." In neither is any arrangement of devices, or anything composed of devices, for the recovery of the parts to place, included. The same witness testifies with reference to the alleged infringement:

"With the defendants' apparatus, the normal closure of the circuit for the purpose of lighting the gas, though it starts the clockwork, allows the same to come to rest, and the circuit-breaking appliances to return to their normal position, after each lighting operation, or after each normal closure, so that a predetermined period of time can be settled upon by the constructor for the permanent breaking of the circuit should an accident occur; and this is the vital feature that gives the distinguishing characteristic to the Rousseau device, and which feature is clearly found in the apparatus of the defendants."

So this improvement, the alleged taking of which is the only infringement to be considered, does not appear to be covered by these claims.

Again, these claims do not appear to cover the specific mechanism. *Wing v. Anthony*, 106 U. S. 142, 1 Sup. Ct. 93. If they did, the defendants do not use it. The only new thing which they can cover is the circuit breaker of the first, so operated by time mechanism as to permanently break the circuit on predetermined time; or the magnet of the second, arranged to release a clockwork motor whenever the circuit remains closed longer than a normal period, in their respective combinations. These appear to be results, or all means of producing them, rather than invented means of producing them. The plaintiff would not seem to be any more entitled to a patent in a combination on mechanism that will break a circuit, or a magnet that will release clockwork on predetermined time, merely, than the patentee was on connecting the reed with the yarn beam, in *Stone v. Sprague*, 1 Story, 270, Fed. Cas. No. 13,487; or than the Hansons were on forming pipes of metal under heat and pressure, in *Le Roy v. Tatham*, 14 How. 175; or than Morse was on the electric current for marking or printing at a distance, in *O'Reilly v. Morse*, 15 How. 62.

Bill dismissed.

BLOUNT MANUF'G CO. v. BARDSLEY.

(Circuit Court, E. D. New York. March 15, 1895.)

1. PATENTS—ANTICIPATION OF COMBINATION.

Where prior machines show similar parts in other arrangements for other purposes, but nothing shows them working together in any arrangement like that of the patent, for the purpose of the patent or any other purpose, there is no anticipation.

2. SAME—INFRINGEMENT OF COMBINATION CLAIMS.

A claim for a combination, which specifies among its elements a piston and its piston rod operating upon certain spring mechanism, *held* infringed by a machine having all the parts of the claim except that its piston has no piston rod proper, but is itself extended so as to reach the parts which the rod would reach.

3. SAME—LIMITATION OF CLAIMS—INFRINGEMENT.

Of the first four claims of a patent, all covering combinations, the first and fourth described a shaft and a crank and pitman connecting the shaft with a piston; the second described the shaft as connected with the piston, to operate the same; and the third, as being connected with the piston to operate the same and be operated thereby,—but neither specified the means of connection. *Held*, that the connection provided for in the latter two claims was not an actual attachment preventing separation, but such a relation of parts as would produce simultaneousness of motion between the shaft and the piston, and hence that such claims were infringed by an apparatus having a cam connection which produced such simultaneousness of motion; but *held*, further, that the first and fourth claims made the crank and pitman so material (the combination being of special improvements) that they were not infringed by such cam connection.

4. SAME—MARKING ARTICLE "PATENTED"—DAMAGES.

Plaintiff, manufacturing an apparatus covered by two patents, marked the same as patented by one of them, but not by the other. *Held* that, although both were infringed, he was entitled to an accounting under the former only.

5. SAME—VALIDITY AND INFRINGEMENT—SPRING DOOR CLOSERS.

The Blount patents, Nos. 289,380 and 458,357, for improvements in spring door closers with checks to prevent slamming, construed, and the second claim of the former *held* valid and infringed, and the first four claims of the latter *held* valid, the fifth *held* invalid, and claims 2 and 3 *held* infringed, and claims 1 and 4 not infringed.

This was a bill by the Blount Manufacturing Company against Joseph Bardsley for infringement of certain patents for spring door closers.

Melville Church and Charles E. Mitchell, for plaintiff.
Charles C. Gill, for defendant.

WHEELER, District Judge. This suit is brought for infringement, by the same apparatus, of the second claim of letters patent 289,380, dated December 4, 1883, and the first five claims of 458,357, dated August 25, 1891, granted to Eugene I. Blount for improvements in spring door closers with checks to prevent slamming. The most analogous of such contrivances before known were that described in patent 140,638, dated July 8, 1873, and granted to Charles W. Oldham, which was on the wall at the side of the door, and had a piston, with ports in it, working with a spring in liquid in an upright plain cylinder, and an elbow lever with one arm attached to the piston and spring, and the other connected by a rod to the door; and those described in patents 228,776, dated June 15, 1880, and 251,790, dated January 8, 1882, and granted to Lewis C. Norton, which had each, in an air cylinder, a spiral spring to close, with a piston to regulate the closing of, the door.

The apparatus of the first of these patents of Blount has a volute spring, like that of a watch, working in a case attached to the door or jamb, with the shaft of the spring connected by levers with the jamb or door, to close the door, and connected by a crosshead with a piston, having ports in it, working in liquid in a cylinder, having an outside passage connecting its ends, controlled by a valve, to regulate the closing. The second claim of this patent is for:

"(2) The actuating spring, and mechanism for transmitting its force to the door, combined with the regulating cylinder, having a passage connecting its

ends, and a controlling valve therefor, and the piston, provided with ports through it, and a valve controlling them, and its piston rod operating upon the said mechanism actuated by the spring, substantially as described."

In the apparatus of the other the cylinder is brought under, and at right angles to, the spring chamber, and becomes a closed liquid chamber; the piston is divided into two parts, with connections between them, one being the working part and the other a guide, and the shaft is connected by a crank and pitman with the working end of the piston. The first five claims of this patent are for:

"(1) A door check embracing in its construction a closed spring chamber and its spring, a closed cylindrical liquid chamber arranged at a right angle to the spring chamber, a piston in said chamber, a valve adapted to operate longitudinally in said chamber, an oscillatory shaft extended through said spring chamber into the liquid chamber, and a crank and pitman connecting the shaft with the piston, as set forth.

"(2) A door check embracing in its construction a closed spring chamber, a liquid chamber below said spring chamber arranged at right angles to the spring chamber, an oscillatory shaft extending through said spring chamber into said liquid chamber, and a piston having a valved port and longitudinally movable in said liquid chamber at a right angle to the axis of said shaft, the latter being connected to the said piston to operate the same, as set forth.

"(3) A door check embracing in its construction a vertically arranged spring chamber, a closed liquid chamber arranged at a right angle to the axis of the spring chamber, an elongated piston in said liquid chamber, adapted to operate longitudinally of said liquid chamber, and having a valved port, and provided at its front and rear ends with bearings to substantially fit the interior of the chamber, and a shaft extending through the said spring chamber into the liquid chamber, and connected with the piston to operate the same and be operated thereby, as set forth.

"(4) A door check comprising in its construction a closed spring chamber and its spring-closed elongated liquid chamber arranged at a right angle to the axis of the spring chamber and in juxtaposition thereto, an elongated piston in the said liquid chamber, reduced in size, intermediate of its ends, an oscillatory shaft in said spring chamber, and extended into the liquid chamber, and a crank and pitman connecting the shaft with the piston and arranged to operate intermediate the ends of the latter, as set forth.

"(5) A door check comprising in its construction a closed spring chamber and a closed liquid chamber arranged at a right angle to the axis of the spring chamber, and in juxtaposition thereto, as set forth."

The defendant's admitted apparatus is made according to patent 464,951, dated December 15, 1891, and granted to him, but having a closed liquid chamber below the spring chamber. It is like the plaintiff's, except that the piston is worked by an eccentric on the shaft fitted between the two parts of the piston, instead of by a crank and pitman. These patents of Oldham and Norton, and many others, and other things, are set up as anticipations and as showing want of patentable invention or novelty; and the want of allegation and proof of marking articles made and sold under these patents as so patented, or of notice of the patents, is relied upon against recovery of damages.

As Blount was not the inventor of door closers with checks, he was entitled to a patent for such only as were different from, and improvements upon, the others. The parts, and their arrangement, of the second claim of his first patent, are essentially different from those of either Oldham or Norton, and together they quite obviously constitute a door closer and check different from, and

better than, that of either. These, and the other things referred to, show similar parts to these in other arrangements for other purposes; but nothing shows them working together in any arrangement like this, for this or any other purpose. The taking of these parts and bringing them together, and making them work in this arrangement, was more than mechanical, and appears to have well amounted to a patentable invention. As those mentioned contained the things nearest to these parts, a detailed reference to the others seems to be unnecessary. That claim appears, upon these considerations, to be valid.

The other patent could properly cover only specific improvements upon the apparatus of this, which had not been patented to Blount, nor known to and used by others before. *Railway Co. v. Sayles*, 97 U. S. 554. He and others had taken out several patents relating to this subject in time between these two; of them all, 435,678, dated September 2, 1890, and granted to him, seems to be the nearest, and is understood to be most relied upon. The principal feature of it appears to be the working of a wing on the shaft against a partition from the shaft, both having ports, in a liquid chamber below the spring chamber, for regulating the closing of the door. This was bringing a liquid chamber containing regulating devices under the spring chamber; but not such of either as those of this other patent, and still more not the combination of either of the first four claims. Both chambers, however, appear to be closed, and the liquid chamber to extend outward, for inclosing the mechanism, at right angles to the axis of the spring chamber, and it is in juxtaposition thereto, which constitutes the combination of the fifth claim. No reference to the more remote elements and arrangements of other patents of this time is deemed to be necessary. In this view the first four claims appear to be valid, and the fifth invalid.

The scope of the second claim of the first patent is argued to have been narrowed by the rejection of other claims acquiesced in while the application was pending. But the claims rejected would have covered, as the patent of Oldham, and that of Clark and Gillon, 262,005, referred to, did, plain cylinders and pistons, while the fourth claim, which became this second claim without alteration, did not. Nothing was rejected which that claim would cover, and nothing was abandoned, as to that claim, by acquiescing in the rejection. In that second claim the actuating spring with mechanism transmitting its force to the door is combined with the regulating cylinder described, the piston described, and its piston rod operating upon the spring mechanism substantially as described. The defendant's apparatus has all these parts precisely, except that the piston has not a piston rod proper, by which it operates upon the spring mechanism. It is itself so extended as to reach the parts which the rod would reach. This extension does what the rod would do, in the same way. The working piston in the regulating cylinder is the principal thing in that place; the manner of its connection with the spring mechanism so as to operate upon it is subordinate, and not specified, beyond mentioning the rod. The

piston rod, as such, is not in fact material to the operation; and the claim does not appear to so make it a material element of the combination that it must be considered such. So the defendant appears to use this combination, and to infringe this claim.

The first and fourth claims of the other patent make the crank and pitman distinct parts of the working mechanism. The second and third do not, but merely describe the shaft as connected with the piston, without mentioning how. Question is made, in expert opinion and in argument, as to whether the shaft is connected with the piston within the meaning of these claims. The second of them provides for the connection of the shaft to the piston to operate the same; and the third, for connection of it with the piston to operate the same and be operated thereby. This shows that the connection provided for is not an actual attachment, that will prevent any separation, but such a relation of parts as will produce simultaneousness of motion between the shaft and the piston. In the defendant's apparatus the cam produces such simultaneousness of motion between the shaft and piston, and in the sense of these claims connects them. Thus this apparatus appears to infringe them.

The first and fourth claims make the crank and pitman so material, in a combination of improvements so special, that they do not seem to be infringed by anything not having these parts.

The bill alleges that the plaintiff notified and warned the defendant to desist from infringement, account for profits, and pay damages, and that he neglected and refused so to do; but does not allege otherwise that he continued the infringement after notice, nor allege that the plaintiff marked its articles patented by these patents as so patented. The answer is silent upon this subject, but the defendant showed by cross-examination of one of the plaintiff's witnesses that they were marked as patented by the first and by other patents, but not by the later one. As these facts so appear, they are considered, although under such defective allegations. Upon them the plaintiff appears to be entitled to an account of damages under the first patent, and not under the other. *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576; *Traver v. Brown*, 62 Fed. 933. Decree for plaintiff for an injunction, and an account as to the second claim of 289,380, and for an injunction as to the second and third claims of 458,357.

DE LA VERGNE BOTTLE & SEAL CO. v. VALENTINE BLATZ BREWING CO. et al.

(Circuit Court of Appeals, Seventh Circuit. March 22, 1895.)

No. 161.

1. PATENTS—LIMITATION OF CLAIM—INFRINGEMENT—BOTTLES AND CORKS.

The De La Vergne patent, No. 232,468, for an improvement in bottles and corks, and which describes a cork made in the form of a truncated cone, adapted to be inserted, larger end innermost, into a receptacle of the same shape, must be limited to a cork which is conical in form before in-

sérption, and is therefore not infringed by a cylindrical cork, which by reason of its expansive force necessarily assumes a conical shape after insertion, to conform to the shape of the receptacle.

2. SAME—ENLARGEMENT OF CLAIM WITHOUT NEW OATH.

An enlargement beyond the scope of the original application, which alone is supported by the required oath, would seem to render the patent invalid. *Eagleton Manuf'g Co. v. West, Bradley & Carey Manuf'g Co.*, 4 Sup. Ct. 593, 111 U. S. 490, and *Machine Co. v. Featherstone*, 13 Sup. Ct. 283, 147 U. S. 209, followed.

3. SAME—INVENTION—INDIA RUBBER.

The characteristics of India rubber, its powers of compression, expansion, and elasticity, having been long well known and understood, there is little room for invention merely in devising and adapting new forms to old uses. *Temple Pump Co. v. Goss Pump & Rubber Bucket Manuf'g Co.*, 7 C. C. A. 174, 58 Fed. 196, followed.

4. SAME—ANTICIPATION—PRIOR ART.

In considering the force of the prior art, the question is more of the identity than of the differences between the old and the new; and it is needless to point out details of difference which are accidental, or which can be made to disappear by substituting one form for another, without disturbing the relation and operation of essential parts.

5. SAME—INVENTION.

It requires no invention to revert to old and well-known forms and processes from which an alleged anticipating patent departed for the sake of economy.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This suit was brought by the De La Vergne Bottle & Seal Company, a corporation of New Jersey, against the Valentine Blatz Brewing Company and Valentine Blatz, individually and as president of the latter company, both of Wisconsin, to enjoin infringement of letters patent No. 232,468, issued September 21, 1880, to John C. De La Vergne, and assigned by him to the complainant, and to obtain an accounting and damages. The defendants answered, denying invention and infringement, and alleging that the supposed invention of De La Vergne had been anticipated in letters patent of the United States: No. 20,778, dated July 6, 1858, to M. C. Cronk; No. 39,208, dated July 14, 1863, to C. F. Baxter; No. 1,576 (reissue), dated November 24, 1863, to W. A. Shaw; No. 41,532, dated February 9, 1864, to S. J. Parker; No. 49,916, dated September 12, 1865, to Perry and Lazell; No. 54,015, dated April 17, 1866, to G. M. Ramsey; No. 77,559, dated May 5, 1868, to Worcester and Brown; No. 205,011, dated June 18, 1878, to A. Templeton; No. 208,043, dated September 17, 1878, to F. J. Seybold; No. 217,072, dated July 1, 1879, to A. Cunningham,—and in letters patent of Great Britain: No. 2,361, dated June 16, 1877, to Warner and Tully, and No. 2,399, of 1866, to Alexander S. Stocker. Prior use of the invention by persons named is also alleged. Replication in denial.

The specification, claim, and drawings of the patent in suit are as follows: "Be it known that I, John C. De La Vergne, of the city, county, and state of New York, have invented certain new and useful improvements in bottles and stoppers, which are fully set forth in the following specification and accompanying drawings. The said invention is applicable for the bottling of all kinds of liquids, but especially so for malt, fermented, and such other liquids as have latterly been bottled under pressure and subjected to extreme heats and outward pressures for the purpose of destroying the germs of life or coagulating the albuminous constituents of the ferments contained within the bottle. The cork must be free from complex combinations, must be readily inserted, and not likely to be injured by the extreme heat or pressure to which it will be subjected. It is also very desirable to have one in such form as to obviate the necessity of any outside appliances to hold it in position, as they would materially retard the operation of corking; and, again, it is a well-known fact that even corks made of rubber, if compressed, in time

lose their power of expansion, which would permit the inclosed gas to escape and the ingress of atmospheric air, together with a fresh supply of germs, which would soon decompose the inclosed material. This invention consists in a bottle or jar having a receptacle for the cork or stopper made in the form of a truncated cone, with its base or large diameter innermost, and having an annular ring or shoulder at the bottom of said receptacle, to prevent the cork from being driven into the bottle by outside pressure, and in combination therewith a solid cork or stopper, of rubber or other elastic material, made to fit tightly in said receptacle, and press with force against its converging sides. The said cork or stopper is made larger than the receptacle which holds it, and is compressed and inserted to its seat, where it expands with the elastic force due to compression in an oblique and upward direction, all of which will be apparent, reference being made to the drawings, wherein * * * Figure 1 is a perspective of a bottle, showing the form of the receptacle for the cork by the dotted lines a, b, c, d, and d a. Fig. 2 is a cross section, showing the outline of the cork receptacle with a cork placed therein, as at a, b, c, d, and at the base of said receptacle an annular ring or shoulder e f. Fig. 3 is a top view of the bottle neck, wherein is plainly shown the annular ring or shoulder, e f, which prevents the cork from being driven into the bottle. Fig. 4 is a cross section of the cork. Fig. 5 is a view of the bottom of the cork which presses against the shoulder e f, showing by the dotted line h that part of the cork against which a pressure of the compressed air or gas is exerted. Fig. 6 is a cross section of a jar, showing a solid cork inserted in a receptacle of the form described, and above it a plate which may be used to aid in holding a cork in place should it be thought desirable to make the cork in two parts as a matter of economy. Fig. 7 is a top or plan view of said plate. By reference to Figs. 1, 4, and 6 it will be observed that, when the cork is inserted in a bottle or jar, the base or greater diameter of the cone-shaped cork is innermost, and forms a wedge or dovetail, and, having been compressed, the converging sides g g press with force against the sides of the cork receptacle. Heat being applied to the bottles after the cork is inserted, the rubber of the cork firmly adheres in spots to the surface of the bottle, and with such tenacity as to require a considerable force to separate it therefrom. By this means, in addition to the resistance of the compressed cork against the converging sides of the bottle neck, the tendency of the compressed air or gas within the bottle to eject the cork therefrom is entirely overcome, thus obviating the necessity of using outside fastenings, which would render it difficult to obtain an equable gaseous pressure within the bottle. It will also be observed that in case the rubber should lose its power of expansion, as it often does after a lapse of time, and cease to press with force against the sides of the cork receptacle, the inclosed gas could escape between that part of the cork not attached to the glass of the bottle and the side of the bottle neck. In this invention this difficulty is overcome by the cork being pushed forward by the pressure of the compressed air or gas, and tightly wedged, that part of the rubber cork which is attached to the glass stretching. In this manner bottled liquids may be retained hermetically sealed for any reasonable length of time. That part of the corking apparatus which appertains exclusively to the insertion of the cork consists of a stationary tapering metal tube, beneath which the bottle or jar is placed, and which will admit of the introduction of the wet cork or stopper by hand, and which is compressed by being forced through the smaller end of said tapering tube by a plunger into the aperture or cork receptacle of the bottle by the application of force. At Figure 6 is shown a jar, B, having a cork, A, and a cork receptacle of the form described, as at a, b, c, d, and d a. e f is the annular ring or shoulder, which prevents the cork or stopper from being driven into the bottle. In this case a solid cork is used; but it is evident that some cheaper material, such as pottery, clay, or cheap metal, might be inserted in the central part of said cork to lessen its cost. In such a case, a plate, D, might be used to hold the cork in place. The said plate is a circular disk of cheap metal, a little smaller than the neck of the jar, having a segment of a circle cut out, as at O, Figure 7, to a depth of two-thirds of its thickness, as shown in Figure 6, to permit the movable arm K, which is secured to the plate D

Fig. 1.

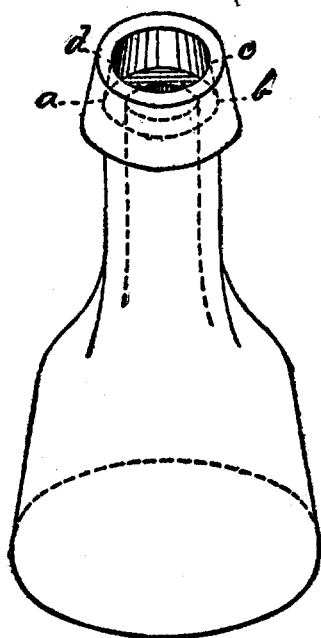


Fig. 2.

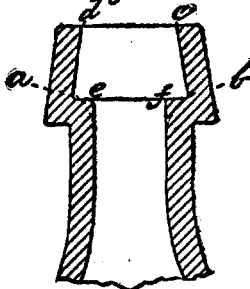


Fig. 4.



Fig. 3.

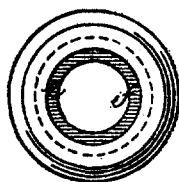


Fig. 5.



Fig. 6.

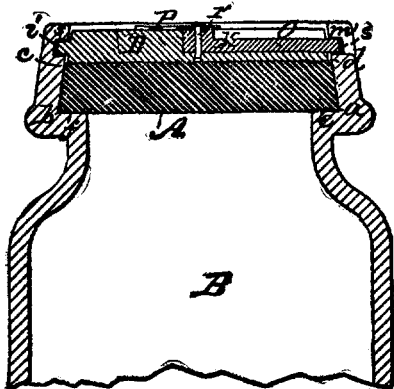
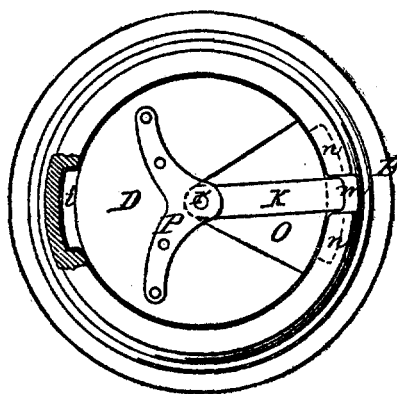


Fig. 7.



by means of the plate P, and rivet r, to move in a horizontal direction. The movable arm K extends beyond the periphery of the plate D, for the purpose of extending into an inclined recess, n, of the jar B, and which serves as a locking bar when the plate D is inserted in its place, with the extension i on one side of said plate also inserted in the recess n, Figure 7. Before inserting said plate D in position, a thin strip of tin or other metal, S, Figure 6, corresponding in form to the groove n, is placed in said groove n, to prevent the arm K from chipping out the edges of the glass. The plate D is then introduced by holding it in an angular position, inserting the extension i into the groove n (shown at Figure 7), when the plate D can be forced down to its seat by allowing the end of the locking bar K to pass through the notch m in the jar B, Figure 7, and be firmly secured to the jar by forcing the arm K to either side of the notch m in the inclined recessed groove n. Having described my invention, which I claim as new, and desire to secure by letters patent of the United States, is—A bottle or jar having a receptacle for a cork made in the form of a truncated cone, with its base or larger diameter innermost, and formed with an annular ring or shoulder at its bottom, in combination with a solid cork of rubber or other elastic and compressible material, made to fit tightly therein, and press with force against the converging sides of said receptacle, substantially as and for the purposes set forth."

It appears from the file wrapper and contents that in the first instance De La Vergne assumed to have invented only an improvement in bottles, the claims being in substance for a bottle with a receptacle for the cork in the form shown in the patent, but nothing was claimed for the cork in combination with the bottle or otherwise. The specification was criticised and the claims rejected on references to the patents of Ramsey, Cronk, Baxter, and Shaw, and attention was called to Fig. 11, English patent No. 2,361, A. D. 1877, of Warner and Tully, and to patent No. 208,043, of Seybold. Thereupon a second application was made, in which the claim was for a "bottle or jar having a receptacle for the cork made in the form of a truncated cone, in combination with a shoulder at the base of said cone, and a cork of rubber or other elastic and compressible material, also made and used in combination therewith as described." This claim was rejected June 23, 1880, "for indistinctness in that the last two lines compel reference to the specification to make it intelligible," and also "on references previously cited, especially Baxter and Shaw." The specification was again criticised, and the suggestion made that "the description should be amended to disclose the manner of compressing and inserting the stopper into the neck of the bottle." "This," the applicant responded by letter of June 28, 1880, "could be readily effected by any of the devices generally in use for corking bottles; but, for special reasons given in the amended or substituted specification, we prefer to use a device which has been the subject of an application for letters patent, filed May 11, 1880;" and with that letter he sent another specification which he suggested might be substituted for the one on file. The office responded July 3d, refusing to enter the amendment without specific direction, and, besides noting further corrections which would be necessary in the specification proposed, suggested an amendment of the claim for the purpose of removing uncertainty whether it covered an article or combination; the wording proposed being that of the claim as allowed, lacking the word "solid" before "cork." Accordingly, on July 29th, the applicant gave specific direction for the substitution of the specification last proposed, together with a new description of Fig. 6, and for the amendment of the claim as stated. The office admitted that this claim escaped the references before cited, but declared it anticipated by the patent of Parker (No. 41,532), which had been found. On August 13th the applicant proposed an amended drawing of Fig. 6, an additional drawing, Fig. 7, the insertion of the word "solid" in the claim, and later, in conformity with requirements of the office, made further alterations in the specification, but not of a character which need be noted. Thereupon the patent was granted. Except as stated, no change was made in the drawings which accompanied the first application, and the change made in Fig. 6 affects no question involved in this appeal. The bottles made, used, or sold by the appellees, it is asserted, were made under and in conformity

with letters patent No. 327,099, granted September 29, 1885, to William Painter. The cause was heard upon the pleadings and proofs, and a final decree entered that the bill be dismissed for want of infringement by the defendants of complainant's patent.

The substance of the very elaborate arguments made in support of the appeal is contained or suggested in the following extracts from the brief of Mr. Carter: "The great desideratum was some contrivance in the shape of an external stopper which would not require outside fastenings of any kind. De La Vergne solved this problem. He first hit upon the idea that the article of India rubber, and other materials of similar qualities, would, by their own elastic and expansive force, when powerfully compressed by a machine and inserted in a recess below the mouth of a bottle, expand and fill the recess so as to make a perfectly tight joint. He had two difficulties to contend with. The first was to so overcome the internal pressure that after the bottle was withdrawn from the machine, and especially after the pressure had increased by fermentation or otherwise, the stopper would not be blown out. The other was that India rubber deteriorated in quality and lost its elastic property by age, and the joint was thus likely to become broken and allow the gas to escape. He overcame both these difficulties by making the form of his recess conical, and with an annular ring or flange at its base so constructed that the stopper, by virtue of its elastic property, would, when first inserted, make a joint against that, and thus confine the pressure from within to a part only of the inner surface of the stopper; and when it had lost its elastic power, and had become contracted, so as to break the joint at its side, the expansive power of the contents of the bottle would force it up the cone, and by a wedging action preserve the joint. This latter result could not, perhaps, be gained unless the rubber, in losing its expansive power, became at the same time more rigid, a quality which De La Vergne was the first to avail himself of. All the elements of the combination which produced this result had been previously employed in this very art of stoppering bottles. The conical recess in the bottle neck was not new; the elastic cork or stopper was not new; the flange at the bottom was not new; the use of the internal pressure to make a tight joint was not new; but nobody had before combined them for the purpose and with the result of making an effective stopper against liquors under pressure without the aid of outside fastenings, or for any other purpose. In this contrivance, De La Vergne displayed several distinct forms of novelty: First. He was the first to grasp the idea that one might rely for making a tight joint, in the first instance, wholly on the expansive power of the rubber stopper, provided the whole of that power were employed, in the first instance, in lateral expansion; that this would first force the sides of the stopper tightly against the sides of the recess, and then (its expansive power not yet being exhausted) would force it against the flange, and make a joint there. Second. He was the first to grasp the idea that, to accomplish the end he had in view, the stopper must be, at first, wholly seated within the neck of the bottle, because if, when inserted, any part remained above the neck, that part would tend to pull the rest out of the bottle. He perceived that the end he had in view—namely, to dispense with outside fastenings—was one of the requirements for its own accomplishment, for outside fastenings would or might require a large part of the cork to be outside the bottle neck. In short, he perceived, and fully employed what had never before been fully employed, the peculiar qualities of the material which he used; namely, that, while rubber is by no means as elastic as many other substances, its elasticity has very wide limits, so that its original form may be prodigiously distorted, and its available expansive force correspondingly increased. His device was to shorten the lateral and increase the vertical diameter of his stopper, and thus secure its entire elastic power for lateral expansion. And inasmuch as rubber has very little compressibility, in the scientific sense of that word, the whole of the force employed with the machine in shortening the lateral and lengthening the vertical diameter of the stopper is, when it is forced to its recess, exerted in its effort to regain its original form; that is, in lateral expansion. The cork thus springs to its recess at a jump. It has no direct tendency to go out, but, on the contrary, to remain there. Its tendency to expand vertically, and thus to go

out of the bottle, is secondary only, and because of the resistance to further lateral expansion furnished by the sides of the bottle neck. Most corks wish to go out rather than in. This prefers to stay in. Third. He was the first to use a conical recess in a bottle neck in combination with a cork to which a prodigious power of lateral expansion had been given by machine insertion, as a machine, operated by the increased pressure from beneath, to preserve the joint by a wedge action, and thus enable the stopper to continue to perform its function after it had lost its elasticity. It will be observed that De La Vergne's specification requires the cork to be made larger than the receptacle which holds it. This means, of course, larger laterally, but not very much larger in cubical contents, as he evidently by his drawing assumes that the cork is to be substantially seated in its recess; and as already pointed out, if it were made greatly larger, like ordinary corks, inasmuch as rubber has little compressibility, there would necessarily be a large part outside of the recess, which would not only not aid the object in view, but would hinder it. With this knowledge of the characteristics of De La Vergne's invention, all the suggested anticipations in the record are easily avoided. * * * Inasmuch as De La Vergne did not pretend to patent a conical bottle neck, the use of such a bottle neck, with an ordinary cork, of the kind, and in a manner, and for a purpose, having none of the characteristics of De La Vergne's contrivance, would not be an anticipation. Certainly, such a use, if later in date, would not be an infringement of his patent, and therefore, if earlier, could not be an anticipation. Any use of a conical recess in a bottle, in order, if earlier in date, to be an anticipation of De La Vergne's invention, or, if later in date, an infringement, must be in combination with a cork possessing the characteristics of De La Vergne's stopper. It must be (a) made of rubber or other similar elastic material, larger than the bottle, and yet not so much larger as when inserted to leave any considerable part outside the bottle, so as to create a tendency to work itself out; (b) it must be insertable by machine only. The powerful compression necessary in order to convert the requisite amount of lateral into vertical diameter is an essential characteristic of the cork in De La Vergne's combination. * * * The contrivance thus discovered by De La Vergne is well described and embraced in the specification of his patent. It was by a denial of this proposition that the learned judge in the court below reached the conclusion that the defendants were not guilty of an infringement."

Thomas A. Banning and Ephraim Banning (James C. Carter and Hubert A. Banning, of counsel), for appellant.

Edmund Wetmore (Robert H. Parkinson, of counsel), for appellees.

Before WOODS, Circuit Judge, and BAKER and GROSSCUP, District Judges.

WOODS, Circuit Judge, after stating the case, delivered the opinion of the court.

We are of opinion that the circuit judge did not err in holding the patent to be limited to a conical or cone-shaped cork. That the inventor so understood when he first claimed the combination of bottle and cork is conceded, and is demonstrated by the explicit language both of the claim and the specification. It is true that the language of the specification and of the claim of the patent is different in this respect from that first used in the application, but the correspondence contained in the file wrapper discloses no purpose to change the character or scope of the invention in this particular. To say that the change is immaterial because when in place the stopper necessarily conforms to its seat, and has the same effect as if it had been conical before insertion, is evasive of the

question. The mechanical and practical effect of the stopper may not in any degree depend upon its original form, but a patent limited to a particular form of cork is necessarily more narrow than a patent which covers any form that may be compressed into and made to fill the seat designed for it. The difference is so essential as to be determinative of the question of infringement. If the claim of the patent is not limited to a cork made in the form of a truncated cone, it is an enlargement beyond the scope of the original application, which alone was supported by the required oath, and for that reason the patent would seem to be invalid. *Eagleton Manuf'g Co. v. West, Bradley & Carey Manuf'g Co.*, 111 U. S. 490, 4 Sup. Ct. 593; *Machine Co. v. Featherstone*, 147 U. S. 209, 229, 13 Sup. Ct. 283. We are of opinion, however, that, when the patent is construed with reference to the specification and drawings in their final shape, there can be no reasonable doubt that the claim is limited to a conical cork. It is only a cork made in that shape which, when inserted in the receptacle, will most completely fill the space, "fit tightly therein, and press with force against the converging side," equally from bottom to top, and give the best effect to that power of lateral expansion, on which, it is asserted, *De La Vergne* "was the first to grasp the idea" of relying "for making the tight joint, in the first instance." Fig. 4 represents the cork in the form of a truncated cone. There is no suggestion in the specification that it may be of a different form. On the contrary, the following expressions, considered together, are unmistakable: "This invention consists in a bottle or jar having a receptacle for the cork or stopper made in the form of a truncated cone, with its base or larger diameter innermost." "The said cork or stopper is made larger than the receptacle which holds it, and is compressed and inserted to its seat, where it expands with the elastic force due to compression in an oblique and upward direction, all of which will be apparent, reference being made to the drawings, wherein * * * Fig. 4 is a cross section of the cork." "By reference to Figs. 1, 4, and 6 it will be observed that, when the cork is inserted in a bottle or jar, the base or greater diameter of the cone-shaped cork is innermost, and forms a wedge or dovetail, and having been compressed, the converging sides g g press with force against the sides of the cork receptacle." These expressions cannot without distortion be made to mean that the cork, when forced into the receptacle, becomes cone-shaped. The clear purpose was to say that, by reason of being cone-shaped and larger than the receptacle, when inserted it will fit tightly, and press with force against the sides.

This conclusion does not rest upon an implication, but upon the fair and reasonable construction of the patent. To say that it deprives the patentee of a part of his invention is to beg the question; and it is scarcely better to say that it deprives him of his whole invention because "every one can see, and it is not disputed, that a cylindrical cork will operate as well as a conical one, and is much more easily and cheaply made." That argument might be pertinent to the question whether or not upon any construction

the patent shows invention, but, as against the specification and drawings, it is of little weight in determining what the construction should be. Indeed, unless the patent be limited to a cork of the particular form described, and when so limited can be upheld, we think it clear, in view of the prior art, that it contains no invention. Bottles and jars with receptacles for their stoppers in the form described, it is conceded, are not new. They are shown, in this record, in the patents of Stocker, Cronk, Baxter, Shaw, Parker, and Seybold. Corks in conical form, and made of rubber, are likewise old, and, of the patents mentioned, are shown in those of Parker, Shaw, Baxter, Seybold, and Stocker; and in some of them the elastic and compressible, or, as it would perhaps be more nearly accurate to say, pliable or flexible, qualities of rubber, perform, and were designed to perform, the same offices as in the combination of De La Vergne. In the case of Temple Pump Co. v. Goss Pump & Rubber Bucket Manuf'g Co., 7 C. C. A. 174, 18 U. S. App. 229, and 58 Fed. 196, where the patent was "for improvements in expansion rubber buckets for chain pumps," the question of infringement turned upon the peculiar qualities of India rubber, and the opinion delivered in that case is in some respects applicable to the present discussion. Without quoting literally, we may say here, even with more emphasis than we said there, that it cannot be pretended that the characteristics of rubber which are brought into play—its powers of compression, expansion, and elasticity—were not already well understood, and that, besides its use in the earlier patents in the particular art in question, its employment in various arts and manufactures had made its qualities so well known as to leave but little room for invention merely in devising new forms for old uses. Witnesses and counsel have not omitted to point out with elaborate precision the particulars in which the bottles and stoppers of the earlier patents differ from each other and from those of the patent in suit,—differences which are accidental, and in most instances might be made to disappear by substituting one form for another, without disturbing the relation and operation of essential parts, and without the display of invention. In considering the force of the prior art in any case, the question is more of the identity than of the differences between the old and the new. If the novelty claimed for the new is found in the old, in substantially the same form and performing in a useful degree the same function, the anticipation must be recognized, and it becomes a waste of effort to look after details of difference which are irrelevant and cannot affect the conclusion. For example, the patent of Stocker shows a bottle with a receptacle and a cork of similar form and in the same relation to each other as in the patent of the appellant, and performing in a degree and in the same manner the same functions. The cork is described as elastic, and, filling the receptacle, it rests upon a shoulder or annular ring below, the necessary and manifest effect of which would be to prevent the cork being thrust below its proper position, and to diminish the amount of internal pressure exerted on the under surface. It is also declared in the specification that the inner por-

tion of the neck of the bottle should "be expanded or rather wider than the lip of the neck, whereby the cork, by expanding and assuming that form, will be prevented from becoming accidentally * * * withdrawn from the bottle neck, and will be held more firmly therein." To meet this explicit description and anticipation of every characteristic feature and advantage of De La Vergne's combination what suggestions are made?

1. It is urged that the cork of the patent in suit must be inserted in its place under powerful compression by a machine, "so that its original form may be prodigiously distorted, and its available expansive force correspondingly increased"; or, as it is also expressed, there must be "a bottle neck in combination with a cork to which a prodigious amount of lateral expansion has been given by machine insertion." That is to say, the cork is to be inserted by machine with such force as to make it tight enough to stay, and, excepting the use of a machine, that is the meaning of Stocker's specification. But the use of machines for inserting stoppers in bottles was already so well understood that there could be no novelty in that mode of insertion, and whatever advantage results from it is of degree merely. Besides, we are not able to agree that the claim of the appellant's patent is limited to a cork inserted by a machine. In response to a demand from the patent office, made presumably for the purpose of eliciting evidence of the practical utility of an invention which required the insertion of a cone-shaped cork larger end foremost, he added to the specification the clause concerning "the corking apparatus"; but we do not suppose that it was intended, or rightfully could have been required, that he thereby should limit his claim to a combination of bottle and cork effected by machinery, and we do not think that his compliance with the suggestion or demand of the office had that effect.

2. It is said that the receptacle in the neck of Stocker's bottle was made in the process of blowing, and for that reason is necessarily defective. If the defect be real and more than a matter of degree not affecting the question of patentability, it involved no invention to revert to bottle necks put on by the process of welding, from which Stocker departed for the sake of economy. If, too, instead of a bottle for sauces, he had been planning for liquids which are bottled under pressure, he would have been under no necessity to invent, but simply to adhere to the use of bottle necks put on in the old way, and to insert his corks by means of machines already in use. Indeed, his specification says that, "in order to facilitate the introduction of the cork ring or improved stopper," he preferred "to expand the lip or upper edge of the part, so as to cause it to assume a slightly bell-mouth form"; and, if unknown before, that would have been a fair suggestion of the use of converging tubes as means for compressing and forcing the corks or stoppers into place.

3. Stocker's cork, it is said, differs from that of the appellant in that its central portion is made of glass, provided with screw threads and with a roughened or milled glass head; its outer portion is made of a ring of corkwood, etc., and it is not capable of

insertion by compression through a tapering tube. But Fig. 3 of the drawings of Stocker shows a solid block of cork, from which a piece, it is explained, is to be removed for the admission of the glass portion, and it manifestly required no invention to reject the glass head, and by forcing the solid piece of cork into place, either by hand or by machine, to produce the exact combination of the appellant's claim. Instead of devising or using new corks with screw-threaded glass heads, it was only necessary to employ the old and familiar forms, and to put them in place by means which were not less well known.

4. It is said that the stopper of Stocker's patent is not a solid or one-part stopper, such as is required by the claim of the patent in suit. Whatever significance there is in that objection is answered by what has just been said. It required no invention to revert to old and simple forms. We do not perceive, however, that the word "solid" in the claim of appellant's patent requires that the cork shall be of "one part" or one material, "homogeneous throughout." That is not among the definitions of the word, and, if it were, its application to this patent is forbidden by the specification which recognizes it as "evident that some cheaper material, such as pottery, clay, or cheap metal, might be inserted in the central part of the cork to lessen its cost." If it were conceded that the solid cork means one made of a single homogeneous material, the appellees have not infringed, because their cork, though solid, contains different substances. If there were nothing else, the presence of the metal ring or staple would be enough, under the definition, to distinguish the stopper of the appellees from that of the appellant. Though the ring is designed mainly to be used in extracting the cork, yet the end imbedded in the body of cork, it is evident, constitutes a different and nonhomogeneous substance; and, if considerably enlarged, it might, by reason of the cheapness of the metal as compared with caoutchouc, serve materially to lessen the cost. At the same time, it is manifest that a cheaper substance within the body of the cork, if the exterior parts be sufficiently thick, will not affect the fitness of the cork for insertion and use in appellant's combination; and, this being so, it is evident that, unless limited to a conical cork, the combination is fully anticipated by the patent of Parker. It is not material that Parker's invention may have been intended mainly for putting up and preserving fruit. The appellant's jar is adapted and was designed in part for the same purpose, and the patent, whether considered as related to bottles or jars, contains no feature of construction, unless it be in the cone-shaped cork, nor principle or mode of action, which is not illustrated in the specification and drawings of Parker.

So, too, in the patents of Shaw and Baxter, there needs only to be a return to the solid cork, from which they sought to escape, and in each there is a perfect anticipation of De La Vergne's patent. It is true that the corks of Shaw and Baxter extend above the lips of the bottle, but, if the complainant's invention be worthy of the name, it cannot be evaded by making a part of the cork to

protrude from the mouth of the bottle. It is an unessential incident, easily removed, which would not affect the operation and efficiency of a cork the main body of which had been compressed into the converging receptacle. The specification and claim of De La Vergne do not in terms require that the cork be "wholly seated within the neck of the bottle," and we do not perceive it to be true, as contended, that "if, when inserted, any part remained above the neck, that part would tend to pull the rest out of the bottle." Unless that part were the larger, its tendency would be rather to follow the greater mass into the receptacle,—the disposition of elastic bodies when compressed or distorted being always to return to the original or normal form. It is evident that if the Shaw stopper were solid, and had been thrust into place by means of "prodigious compression," shortening the lateral and increasing the vertical diameter, and thereby creating a "prodigious power of lateral expansion," the portion outside the lip would have no effective power to pull out the parts within the neck. On the contrary, the vertical diameter both inside and outside being abnormally extended, upon withdrawal of the compressing force of the machine the force of lateral expansion alone, both within and without the receptacle, would come into action, and the portion of the cork outside the receptacle would gather or at least tend to gather into a cap or bulb over the mouth of the bottle, with shortened vertical and extended lateral diameter. To say the least, the tendency to pull out would not equal the tendency to be drawn in, because of the greater mass being within the receptacle.

But, without further consideration of the prior art, we deem it sufficient to add that if the De La Vergne claim is not limited to a cork in the form described it necessarily follows that the patent covers any and all kinds of stoppers made of rubber, common cork, or other elastic and pliable material, when inserted in a cone-shaped bottle neck, under such compression as to cause it to fit tightly and press with force against the converging sides of the receptacle, no matter what the form before insertion. The art of stoppering bottles had long been too well advanced to admit of a claim so broad; the patentee did not conceive it; and no ingenuity of argumentation or charm of eloquence can justify his efforts to appropriate it. The decree below is affirmed.

BRAUER et al. v. CAMPANIA NAVIGACION LA FLECHA.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

1. SHIPPING—LIBEL FOR LOSS OF CATTLE—PRACTICE.

Where cattle injured by perils of the sea are thrown overboard together with others not injured, the failure of respondent to prove a definite number as injured does not make him liable for all that were lost, but the court will endeavor to ascertain the number injured with as near an approach to accuracy as the testimony will permit.

2. SAME—CONSTRUCTION OF BILL OF LADING—EXCEPTED PERILS.

The sending overboard, during a severe storm, of sound cattle along with the maimed, without any attempt to separate and save the former,

because of exaggerated apprehensions on the part of master and crew, and their deep sense of the inconveniences caused by the presence of the cattle on deck,—the ship being in no actual peril, and the sacrifice being unnecessary to the preservation of other property,—*held* not to come within clauses of the bill of lading excepting the carrier from liability for losses occasioned by “accident or mortality, from whatever cause arising,” or by “causes beyond his control, by perils of the sea, * * * by accidents of navigation, of whatever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners,” etc. Wallace, Circuit Judge, dissenting, on the ground that the acts of the master were justified, under the proofs, by a prudent regard for the safety of the ship. 57 Fed. 403, affirmed.

8. ADMIRALTY APPEALS—QUESTION NOT RAISED BELOW ON AN ASSIGNMENT OF ERRORS.

A point not presented in the district court, or pointed out in the assignment of errors, will not be considered in the circuit court of appeals.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by William W. Brauer and Frederick C. Brauer, copartners as W. W. Brauer & Co., and the Reliance Marine Insurance Company, Limited, against the Campania Navigacion La Flecha, to recover damages for the loss of certain cattle shipped on respondent's steamship Hugo. The district court rendered a decree for libelants for part of the cattle lost (57 Fed. 403), and subsequently modified and affirmed the report of the commissioner appointed to ascertain the damages (61 Fed. 860). Both parties appeal.

MacFarland & Parkin, for libelants.

Butler, Stillman & Hubbard and Wilhelmus Mynderse, for respondent.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The libelants, being the persons who constituted the firm of W. W. Brauer & Co., and the Reliance Marine Insurance Company, brought their libel before the United States district court for the Southern district of New York against the Campania Navigacion La Flecha, a Spanish corporation, and the owner of the steamship Hugo, in which libel they alleged that on October 24, 1891, William W. Brauer & Co., being the owners of 165 head of cattle, shipped the same in good order and condition on board the steamship Hugo, then lying in the port of New York, and bound to the port of Liverpool, in England, and to be carried to said port, and that the shippers thereupon received from the master or agent of said steamer a bill of lading whereby he undertook, on behalf of the owner of said vessel, to carry the cattle to Liverpool, and there to deliver the same to the said shippers, or their order, they paying freight therefor; that on or about October 31, 1891, the said vessel, while on her voyage to Liverpool, with the cattle on board, having encountered rough weather, the master and crew of said vessel became panic-stricken, and drove overboard 126 head of cattle; that the act of said master and crew, in driving overboard said cattle, was wholly unnecessary. Thereafter, the vessel

arrived safely in the port of Liverpool, and delivered to the shippers or their agents 38 of said cattle in good condition (one having died), but failed to deliver the 126 head, whereby the libelants sustained damage. The respondent, in its answer, admitted that 126 head of cattle were lost, but averred: That by the terms and conditions of the contract and bill of lading under which the cattle were received for transportation and delivery, it was provided that the carrier should not be liable for loss or damage occasioned by causes beyond his control, by the perils of the seas or other waters, or by other accidents of navigation, even when occasioned by the negligence, default, or error in judgment of the master, mariners, or other servants of the shipowner, and that the cattle were carried on deck at the owners' risk, and under a special provision that the steamer should not be held accountable for accident to or mortality of the animals, from whatsoever cause arising. There was a further provision that the contract should be construed and governed by the law as administered in the courts of Great Britain, with reference to which law the contract was made. And that the loss of said cattle was due to the perils of the sea encountered upon the said voyage, which broke certain of the cattle houses and set the cattle adrift, and that during the continuance of the perils, and by reason thereof, certain of the cattle were washed overboard, and others were thrown about the deck, bruised and with broken limbs, and reduced to a dead, dying, or helpless condition, and that upon such being taken to the gangways they were washed over by the seas. And that the care given to said cattle was according to the best judgment of the master of said steamer, and that if he erred in his judgment, or was in any degree negligent, the respondent was absolved from accountability and responsibility, by reason of the terms of the bill of lading, and by the law as administered in the courts of Great Britain. The history, in outline, of the three days during which the events in controversy occurred, is stated by the district judge as follows:

"The steamer sailed from this port on the 24th of October. During three days, from October 30th to November 1st, inclusive, the vessel met heavy weather, during which there was heavy rolling of the vessel. The cattle were in pens on deck,—a few forward, under and near the turtle back, which were saved. The rest were in the vicinity of Nos. 3 and 4 hatches, forward and aft of the engine room, in pens built in the wings on the port and starboard sides of the ship, all of which were lost. The storm was heaviest on the afternoon and night of Saturday, the 31st; the wind and seas coming first and heaviest from the northwest, but on Saturday hauling to the northward and to east northeast, with cross seas. Some slight damage was done to a few pens on the 30th. More were broken on Saturday, the 31st; but these were repaired, and the cattle put in place towards nightfall. About 5 o'clock on that day the after gangways were opened on each side, and about 10 or 12 cattle that had become maimed and helpless were sent overboard through those gangways. The chief loss was during that night and the following morning, when, shortly after daylight, the captain gave orders to open the forward gangways, also; and the whole deck was cleared of all the cattle, save the 39 under the turtle back."

The principal questions of fact in dispute which arose under this general statement were as to the character and severity of the

storm, and the necessity which existed for the drowning of the cattle, and, if there was an absence of necessity, whether the conduct of the captain, in clearing the decks of the entire number of cattle, except those under the turtle back, was or was not a destruction of property which could not be characterized as resulting from negligence, or the accidents of navigation. The libelants also introduced expert testimony to show that the judgment of the master in regard to the navigation of the ship at the time of the storm was defective, and that the ship was badly handled. The district judge, having quoted at length from the testimony, and stated the various considerations which influenced his mind, came to the following conclusions upon the questions of fact:

"Upon the whole testimony in this pitiful case, I am not disposed to pronounce any unfavorable judgment upon the handling of the ship by the master. His record as a master appears to have been good, and, on any doubtful question of navigation, he is entitled to the benefit of his record. He had some, though not large, experience in the transportation of cattle; and the experts called by each party place so much stress upon the special circumstances of the situation, the quality of the ship, and the necessary determination of the master's own judgment at the time, that, in the circumstances testified to, I do not find any conclusive proof adverse to the master's judgment as to the navigation of the ship. The evidence leaves not the least doubt in my mind, however, that the sacrifice of a considerable number of live cattle that were not maimed or substantially hurt was made on the morning of Sunday, the 1st of November, not from any pressing necessity, but solely from mere apprehension, and I am further persuaded that there was no reasonable or apparent necessity for the sacrifice. It was morning. The night was past. No one testifies to any pressing peril to the ship. The log does not hint of it. No reason appears why such cattle as could go about, and were actually going about, should not have been cared for and preserved. There was plainly no effort made to separate the sound from the maimed. Even the master says, in answer to the question, 'Were these cattle standing up that went overboard? A. They were down. Some may have been up. I don't know.' His object, plainly, was to clear the deck of all the cattle from No. 3 aft, with no attempt to discriminate, or to save any. His state of mind is shown by his concluding words, 'We all breathed happily when we saw it open [No. 3 hatch].'"

His legal conclusion was that the libelants were entitled to a decree; and a reference was had to a commissioner to report the damages for such of the oxen as were of any market value, and not fatally wounded or maimed at the time when the houses and cleats provided for them were designedly torn up, and which were cast overboard, or negligently or designedly suffered to go overboard, through the open gangways, on the morning of November 1st, and on the evening and night previous. The commissioner heard some additional testimony from one of the two cattlemen who had previously testified, re-examined all the evidence before the district court, and made a lengthy report. His history of the last two days of the storm, and of the destruction of the cattle, is so full, and is stated with such care, that it is quoted in extenso:

"The next morning, October 31st, between eight and nine o'clock, the master stopped the vessel, repaired the pens by replacing a few boards, but leaving them without coverings; and all the loose cattle were put back into the pens, watered, and fed, except the one fatally injured, and the vessel then proceeded on her course. The wind and the seas, however, increased until about

two o'clock in the afternoon, when the seas again broke the pens that had been repaired, and the cattle came out, and went loose again, and collected upon the starboard side of the vessel. The engine was then stopped, but according to the testimony of the master, corroborated by other witnesses of the respondent, the wind and the sea had so increased that he was unable to put these cattle back again into pens. Nor do I see that the cattlemen showed any disposition to try and do so, or to seek to have it done. From two o'clock until about five that afternoon, these loose cattle were especially exposed to the effect of the wind and sea. At this time the master, anticipating, and having, I think, reason to anticipate, a very severe night, determined to open the gangway on the starboard side, opposite No. 4 hatch, and let these loose cattle go overboard, and free the vessel of them; and the result was that the above-mentioned fatally hurt ox, and nine others, were designedly sent overboard by the master. I find, on the evidence, that all these nine cattle were set loose by the sea from the stalls or pens on the port side, and not by the action of the master or crew. I also find that the only breaking down of pens and taking up of flooring and cleats by the master or crew that day, or the following night, were of such as were in front of the gangway opposite No. 4 hatch, on the starboard side. But the evidence shows, as it appears to me, that these were removed by order of the master; and the cattle in them, I think, must have gone overboard, and were designedly suffered to go overboard, through this gangway. How many there were of these does not clearly appear, but I think it may be assumed that at least two of these pens, covering a space of say sixteen feet in length, were taken down, and the flooring removed, and the cattle—say, at least, eight—allowed to go overboard. I am inclined to think that the opening of the gangway on the starboard side, opposite No. 4 hatch, was determined upon by the master, not merely for discharging the ten loose cattle from the port side,—for why could not this have been done through the starboard gangway, opposite the deckhouse,—but that it was a part of his preparation for the night to have this gangway opposite hatch No. 4, and the gangways on each side of the deckhouse, open for the night, for the reason, stated by him, that, in case cattle should be carried down to either of these gangways during the night, they might go overboard. There is evidence that some of the remaining cattle did go through some of these gangways during the night, and they must, I think, be regarded as designedly suffered to go overboard. No doubt, the night was a trying one. The master remained up all night. Nothing, apparently, could be done to relieve the situation, beyond lying to in as favorable a way as possible; and so the vessel pitched and rolled all night, and the seas beat over the deck. I am compelled to believe that the pens, except those well forward, under and near the turtle back, were very much injured, and that the cattle which these contained, or at least very many of them, suffered severely. I think I am justified in this view, without accepting the extreme statements of the witnesses on either side. On the morning of November 1st the storm had not begun to abate. On the statements on the log, and of the master and other witnesses on the part of the respondent, all the cattle, except the thirty-nine under or near the turtle back, were loose, and very many of them in a wrecked and ruined condition, from the effects of the storm; and the master thereupon determined to open another gangway,—that on the starboard side, opposite No. 3 hatch,—and through these gangways, thus opened, to clear the deck of all the loose cattle, and in pursuance of this determination he designedly suffered or compelled all that remained of the 126 cattle, for the loss of which this suit is brought, to go overboard."

His conclusion was "in favor of the probability that the proportions between the dead and the fatally maimed and wounded, on the one hand, and those that were alive, and not fatally maimed or wounded, on the other, are about equal." The damages resulting from the destruction of 63 head of cattle, amounting to \$6,839.54, were decreed by the court in favor of the libelants, with costs. From this decree each party appealed.

The questions in the case are mainly those of fact, for when the facts, and the reasons which directed the captain's conduct, are clearly settled, the questions of law are not perplexing. It cannot be denied that the ultimate facts are not easy of ascertainment. The witnesses for the libelants were two of the cattlemen, with manifest and strong prejudices against the captain and crew, and with a desire to protect themselves from the charge of having skulked during the storm. On the other hand, all the respondent's witnesses, except the chief engineer, were foreigners, who spoke through an interpreter. Mudie, the chief engineer, was a Scotchman; and, although he saw what was done on Sunday morning, he was not questioned upon that subject. The oral testimony of all who testified in regard to the condition of the cattle was much exaggerated, and the circumstances and the probabilities resulting therefrom must be our guide in coming to a conclusion. The facts which appear to us to give character to the acts of the master are the following: Before the night of the 31st the cattle had received but little damage. The district judge finds that before nightfall the pens were repaired, and the loose cattle were put back in their places. The carpenter testified to this, but the testimony of the captain and of other witnesses for the respondent is to the effect that on this afternoon they could not put the cattle back in their pens; and as this part of the history is not of vital importance, and we prefer to base our conclusion upon facts substantially proven, we express no opinion upon this point. But it is true that about 5 o'clock on the afternoon of the 31st the captain took up the flooring and cleats in two pens, containing eight cattle, in front of the gangway opposite No. 4 hatch, on the starboard side. This was done not merely to discharge the 10 loose cattle on the port side, one of which was fatally injured, and perhaps the others, who were also designedly sent overboard, were maimed, but this gangway was opened and left open for the night, so that the cattle might easily be carried down to it, and might go overboard. The fact that the flooring and cleats were taken up, so that the cattle might have no foothold during the night, but be carried down to the gangway by the rolling of the ship, is significant that the captain wanted to expedite the delivery of cattle into the ocean. He wanted this not for the safety of the ship, or to end the sufferings of maimed cattle. The preparations were made so that sound as well as maimed cattle could be washed overboard. Whether, during the night, sound cattle were actually washed overboard, cannot be known with certainty. On Sunday morning, the testimony makes it apparent that the master determined to rid the ship of every head of cattle, except those under the turtle back. He intended to clear the decks of cattle, whether well or injured, and no effort was made "to separate the sound from the maimed." The cattle not injured were pushed or prodded and driven across the slippery iron deck, and were hurried over the gangways as rapidly as possible, and in a short space of time. "No attempt was made to discriminate or to save any," because the master and

the crew wanted none saved. We concur with the district judge in the conclusion that there was "no reasonable or apparent necessity" for the nonexistence of an attempt to separate the two classes. There was a storm, but nothing belonging to the ship was injured. No one testifies that anything was loosened or unshipped, or that there was any leakage, and no one claims that she was in pressing peril. The sacrifice was not to save the vessel or her cargo, but the presence of the cattle during the storm was a great inconvenience, and there was, as found by the district judge, an apprehension that the storm would continue, and that the existing inconvenience would be increased. The reason for throwing both sound and maimed cattle overboard was a great dissatisfaction with the existing state of the decks, an apprehension that the same state of things would continue, and a determination to put an end to trouble from cattle. The commissioner has found that it is impossible to tell, with mathematical accuracy, the number which were thus sacrificed. That some were injured, and perhaps some were incapable of moving themselves, is perhaps apparent from the time which was taken to clear the ship while the work was hindered by the storm. The work commenced between 6 and 7, and was finished at 11. That a pile of dead or maimed cattle should be removed in that time, during the storm, by the aid of a donkey engine, is improbable. But for the very careful study of the question by the experienced commissioner, we should be inclined to place the number of the uninjured at a higher figure than he did, but the testimony has no such approximation to accuracy as to enable us to say that he was wrong. In view of the fact, which is undoubtedly true, that fatally injured cattle were properly thrown overboard, the libelants' claim is not well founded,—that, in the absence of proof by the respondent of any definite number, it must be held liable for all that were lost. It is not reasonable to suppose that, under the circumstances which have been described, accuracy in regard to the number of the sound cattle which were designedly permitted to go overboard was attainable. It is both reasonable and just to endeavor to ascertain the number with as near approach to accuracy as the testimony will permit, and not to solve the question with known inaccuracy, by throwing the entire loss upon the carrier.

The respondent relies for freedom from liability upon the terms of its contract, which are claimed to furnish immunity from the acts of the captain. The bill of lading declares that the cattle were shipped "on deck, at owner's risk; steamer not to be held accountable for accident to or mortality of the animals, from whatsoever cause arising." The acts which drove the 63 animals into the ocean were not an accident. Neither is the destruction by the same violence to be regarded as the "mortality" to which the rest of the clause relates. The respondent had undertaken to transport the animals safely to Liverpool. Its agents had taken charge of them, and entered upon the service. The clause relieving the carrier from liability in case of mortality has no relation to the

consequences of the violence which pushed the animals into the ocean. But the respondent relies chiefly upon the provision which relieved the carrier from liability for losses "occasioned by causes beyond his control; by the perils of the sea; * * * by accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner"; and by the provision which declared that the contract should be governed by British law, with reference to which it was made. Waiving the question whether, at the time when the contract was made, contracts which relieved carriers by sea from the consequences of the negligence of the master were not void, as against the public policy of this country, the acts of the master and crew of the *Hugo* in regard to the 63 cattle were not occasioned by an accident of navigation caused either by the negligence or error in judgment of the master. It was an entire clearance of the decks, without apparent necessity, and with no attempt to discriminate, or save any. There was no pretense that it was to save the ship or the cargo, or that it was necessary to sacrifice these animals for the benefit of the survivors. While the defense upon the facts is that the animals thrown into the ocean were either dead, or so maimed or so helpless, that they could not live, and there is no claim that sound animals slipped into the sea, either by negligence, or were thrown into the sea through error of judgment in regard to their condition, yet if it is found that this defense is not sustained, and that the master intentionally caused the drowning of sound cattle, the respondent insists that it is relieved because such determination of the captain was the fruit of an error of judgment. The reasons which actuated the master have already been stated. He had an apprehension of a continuance of the storm, and he consequently had an apprehension that more cattle might be injured; but he also had a deep sense of the inconveniences to which his cargo on deck subjected him, and the combined emotions were significantly suggested by the assertion, "We all breathed happily when we saw No. 3 hatch open." The act of the master was not the result of an opinion that the drowning of the sound cattle was called for by prudential considerations for the ultimate safety of the lives or the property in his charge. The question remains whether, apart from the question of negligence, the loss was occasioned by one of the excepted causes of calamity. The injury to and the drowning of the maimed animals were caused by the perils of the sea. Under the facts, as found by this court, nondelivery of the sound cattle was not caused by a peril of the sea, or the accidents of navigation, or circumstances properly incident to navigation. The master's unfounded but existing apprehension in regard to the future relieves his conduct from a charge of barratry. There was a destruction of property, but it was not so much tainted with dishonest views or fraudulent breach of trust as to come within the definition of barratrous conduct.

The respondent offered proof of the British law, as announced by English decisions, which permits the shipowner to relieve himself,

by express contract, from the consequences of the negligence of his captain or crew; but no decision touches with any closeness the state of facts which are disclosed in this record, and we are left to decide, without the aid of English authorities, the question whether the acts of the master which caused the nondelivery of 63 cattle were within the clauses in the bill of lading which freed the ship-owner from liability.

The respondent's counsel has presented the point in his brief that the commissioner and the district court erred in the assessment of damages, because the market price of the cattle should have been taken at the port of destination, instead of at the port of New York, with freight and cost of maintenance. It is sufficient to say that this point was not presented in the assignment of errors. Neither was it presented to the district court in either of the exceptions to the commissioner's report. The question seems to have been raised in this court for the first time. The decree of the district court is affirmed, without costs in this court in favor of either appellant.

WALLACE, Circuit Judge (dissenting). I dissent from the opinion of the majority of the court. I do not think that the master sacrificed the uninjured cattle simply for the sake of the comfort and convenience of the ship. I agree with the commissioner when he says, "I do not doubt the entire good faith of the master, and that he would gladly have saved the other cattle, as well as the thirty-nine that remained on board." The theory of the libel is that the master and crew of the vessel became panic-stricken, and drove the cattle overboard, and the evidence more nearly supports this theory than the one which has been adopted. I think a prudent regard for the safety of the ship and crew, in view of the situation as it was at the time, justified him in clearing the deck of the mass of dead and wounded cattle, and that it is idle to say that there was any practicable opportunity, upon that storm-swept deck, to separate the dead cattle from the wounded and dangerous live ones. After the event, and with the wisdom which comes from retrospect, it is not difficult to conjecture, in case of disaster, what might have been done that was not done; but I am satisfied from the proofs that the master did everything which a prudent and honest navigator would have done, under the circumstances, from the time he hove to his vessel until the hurricane was over, and that the loss of the cattle was caused by perils of the sea, and therefore within one of the excepted risks of the bill of lading.

SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD v.
WILSON.

(Circuit Court of Appeals, Fifth Circuit. February 12, 1895.)

No. 258.

1. REMOVAL OF CAUSES—WHAT CONSTITUTES RECORD.

The petition for removal of a cause from a state to a federal court forms part of the record in such cause, and when such record, including the petition, shows the suit to be one of which the federal court would have original jurisdiction, it may be removed.

2. MUTUAL BENEFIT INSURANCE—CONDITION PRECEDENT—GOOD STANDING.

One W. made application for membership in a mutual benefit society, agreeing to conform to and obey its laws, rules, and regulations, or submit to the penalties therein contained. Certificates were thereupon issued to him, entitling his wife, as beneficiary, to \$3,000 insurance upon his life. One condition of such certificates was that W. should be in good standing at the time of his death. Seven months before his death, W. was suspended from the society for misconduct. He was notified of the proceedings against him, but did not appear to defend against the charge, and did not take an appeal, as he was permitted to do by the rules of the society. After W.'s suspension, no dues were charged against him or paid by him. His widow brought an action to recover the amount of the insurance. *Held* that, as W. had ceased to be a member of the society in good standing, and had not availed himself of the remedies provided by the rules of the society, nor resorted to direct legal proceedings to obtain reinstatement, there could be no recovery.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

This was an action by Mattie Wilson, widow of William R. Wilson, against the Supreme Lodge Knights of Pythias of the World, to recover upon a certificate of insurance upon the life of said William R. Wilson. The action was brought in a court of the state of Alabama, and was removed by the defendant into the United States circuit court, where the plaintiff recovered a judgment. Defendant brings error. Reversed.

Oscar R. Hundley, for plaintiff in error.

R. W. Walker, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. The defendant in error, who was the plaintiff in the court below, sued the plaintiff in error in the state court on a certificate of membership in the Endowment Rank of the order of Knights of Pythias; said certificate of membership having been issued to William R. Wilson, the husband of the defendant in error, she being named therein as beneficiary. The cause was removed upon the petition of the plaintiff in error to the United States circuit court. Upon the trial a judgment was rendered for the plaintiff in the court below, and a writ of error sued out to this court to reverse that judgment. The plaintiff in error now moves the court to reverse the judgment, and to remand the cause to the circuit court, with instructions to remand the same to

the state court from which it was removed, on the ground that the complaint of the plaintiff below fails to show that the suit was one arising under the constitution and laws of the United States, of which the circuit court of the United States has jurisdiction. The authority relied on to support this motion is the case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654. There were three cases disposed of by that decision, one of which was a case of removal from the state to the federal court. The only federal question that could have been raised in these cases was a matter of defense, which might or might not arise. As we understand that decision, so far as applicable to this case, it is that a defendant is not entitled to remove from the state court into the circuit court of the United States any suit against him in respect to which the original jurisdiction of the federal court would not be invoked by the plaintiff, even where his defense to the cause of action was based entirely upon the constitution and laws of the United States; in other words, that the right of a defendant in a suit to remove it from the state court to the federal court depends upon the inquiry whether the suit was one in respect to which the original jurisdiction of the federal court could be invoked by the plaintiff in the suit. The court, in effect, holds that the federal court should remand to the state court a suit which the record at the time of removal failed to show was within the jurisdiction of the federal court; that it cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend. The statutes authorize the jurisdiction of the federal court to be invoked in a suit where the matter in dispute exceeds the value of \$2,000, and arises under the constitution and laws of the United States, or in which there is a controversy between citizens of different states. The declaration in this case shows the matter in dispute to exceed the value named, but it does not show the diverse citizenship of the parties, or that the plaintiff in error is a corporation of the United States. It appears, however, from the petition for removal that the plaintiff in error is a corporation created and organized under the acts of congress, and that it was at the time of the commencement of the suit a citizen of the District of Columbia. The existence of these facts gives the United States circuit court original jurisdiction. In *Water Co. v. Keyes*, 96 U. S. 199, the court said:

"For the purposes of a transfer of a cause the petition for removal performs the office of pleading. The record in the state court, which includes the petition for removal, should be in such a condition, when the removal takes place, as to show jurisdiction in the court to which it goes."

The record of this case in the state court shows this suit to be one of original jurisdiction in the United States circuit court, which could have been invoked by the plaintiff in the suit. We think, therefore, that, tested by the rule announced in *Tennessee v. Union & Planters' Bank*, *supra*, this case is within the jurisdiction of the United States circuit court. The motion to reverse and remand the cause for the want of jurisdiction is overruled.

The facts in this case are that William R. Wilson, who was at the time a member in good standing of Franklin Lodge, No. 19, Knights of Pythias, of Russellville, Ala., made application in due form to become a member of section 304 of the Endowment Rank of Knights of Pythias, agreeing in his application "to conform to and obey the laws, rules, and regulations of the order governing the rank now in force, or that hereafter may be enacted, or submit to the penalties therein contained." Certificates were thereupon issued to said Wilson in the first and second classes, which were afterwards, at his request, changed to the fourth class, under the same terms and conditions, and Mattie Wilson, the defendant in error, was made the beneficiary under said certificate. One of the conditions for the payment of the \$3,000, as provided in said certificate, is that said William R. Wilson shall be in good standing in the rank at the time of his death. Wilson died on December 16, 1887. On the 28th of May, 1887, he was suspended by said Franklin Lodge, No. 19, for "conduct unbecoming a knight." Of the proceedings of the lodge he had due notice by the proper officer whose duty it was to give him such notice, said officer testifying that the "forms of procedure and laws of the order, as laid down in the code of procedure in force at the time of the suspension, were followed to the letter." Wilson did not appear and defend against the charge, and was not present at the trial. He took no appeal from the decision of the lodge, nor did he ask for a new trial, nor was he thereafter reinstated in the lodge. Subsequent to May, 1887, no assessment for dues was made against him, and he paid no dues. The suspension was duly reported to the endowment rank. The laws, rules, and regulations of the order bearing upon the questions at issue were introduced in evidence. They provide that either party may appeal from the decision of the order in a case of suspension; if in a subordinate lodge, the appeal to be taken to the grand lodge; and they provide that the accused may, within a time specified therein, apply for a new trial. They also provide that whenever a member of the endowment rank is suspended from his lodge his membership in the endowment rank ceases from the time of such suspension.

There are several assignments of error; among others, that the court erred in giving the charge that, "if the jury believe the evidence, they must find for the plaintiff." The exception to this charge raises every question which is material in the case. The right of the defendant in error (the plaintiff below) to recover must rest upon the ground that her husband was at the time of his death a member in good standing of the Endowment Rank of the order of Knights of Pythias, the defendant below. Before his death, he had been suspended from his lodge, and from the time of such suspension his membership in the endowment rank ceased. The defendant in error claims that the proceedings against her husband were irregular and illegal, and did not conform to the laws and regulations of the order. Under the laws and rules of the society, to which he voluntarily subscribed, he had an appeal to the grand lodge, to which he could have resorted. He failed to take any appeal from the decision of suspension, and must be held

to have acquiesced in it. "Members of private societies and associations must exhaust the remedies given them by the rules of the society before appealing to the courts for relief." *Jeane v. Grand Lodge* (Me.) 30 Atl. 70. The decided weight of authority is that a member of a mutual benefit society must resort for the correction of an alleged wrong done to him as such member to the tribunals of the society, and, when the proceedings are regular, the action of the society is conclusive, and cannot be inquired into collaterally. *State v. Grand Lodge* (N. J. Sup.) 22 Atl. 63. The method of suspension or expulsion, as provided by the laws and rules of the society, must be strictly complied with. But if the suspension is irregular and illegal (which we do not find to have been the case here) the remedy for such irregular and illegal suspension is a writ of mandamus. *State v. Grand Lodge*, supra; 5 Am. & Eng. Enc. Law, 688, 689, and note; *Society v. Weatherly*, 75 Ala. 248. As said by the supreme court of Maine in the case of *Jeane v. Grand Lodge*, supra:

"It is just and reasonable to hold that when a member of such society has a remedy, under the rules of his order, from any supposed erroneous action injurious to himself, he should first exhaust that remedy, before appealing to the courts for relief. It is quite apparent that the efficiency of such organizations cannot be maintained if a member may, at his pleasure, remove such controversies into the civil courts, to the exclusion of the tribunals which have been established for their adjudication."

The court erred in instructing the jury to find for the plaintiff, and in refusing to charge them to return a verdict for the defendant. The judgment is therefore reversed, and the cause remanded. Reversed and remanded.

HUPFELD v. AUTOMATON PIANO CO. et al.

(Circuit Court, S. D. New York. April 6, 1895.)

1. FOREIGN CORPORATION—ALIEN PLAINTIFF—APPEARANCE—JURISDICTION.

The complainant, an alien, brought suit against the defendant company, a foreign corporation, and joined with it as defendant a resident ancillary receiver of said company, to restrain the infringement of a patent. No notice of appearance was filed by the defendants, but they applied to the court, and obtained an extension of time to plead, answer, demur, or take such other action as might be advised. On motion to dismiss the complaint as against the corporation on the ground of want of jurisdiction, *held*, that the obtaining of such extension of time was the equivalent of a general appearance.

2. RECEIVER—JURISDICTION.

The suit against the receiver was being prosecuted without the consent of the state court appointing the receiver. *Held*, that the general rule that a court will not entertain jurisdiction of a suit against a receiver appointed by another court until the appointing court has given its consent, does not apply when the jurisdiction of the court in which the receiver is sued is conferred by federal laws, and when such jurisdiction is exclusive.

3. JURISDICTION IN PATENT CASES.

In a suit by the owner of a patent to restrain the infringement of the same by a receiver, the federal courts will entertain jurisdiction of such suit, without leave of the state court first obtained, to enjoin individuals, even though they be officers of a state court, from acts of infringement.

This is an action by Ludwig Hupfeld against the Automaton Piano Company and Abram B. De Frece, as receiver of said company, to restrain the infringement of a patent.

Goepel & Raegener (Thomas M. Rowlette, of counsel), for complainant.

S. O. Edmonds, for defendants.

LACOMBE, Circuit Judge. This is a bill in equity for infringement of United States letters patent No. 429,419, with the usual averments. Complainant is an alien, the defendant piano company is a New Jersey corporation, and the defendant De Frece a citizen of the state of New York, and an inhabitant of the Southern district thereof. The present motion is to set aside the service of the subpoena ad respondendum, and to dismiss the bill on the ground that this court has not jurisdiction of the defendants, or either of them. The defendant piano company has obtained extension of time to plead, answer, demur, or take such other action as it may be advised. This is the equivalent of a general appearance, and the motion to dismiss, as to it, is therefore denied. The defendant De Frece was appointed receiver of the defendant corporation by the chancery court of New Jersey, and subsequently was appointed ancillary receiver by the supreme court of this state. Motion to dismiss as to him is made upon the ground that complainant has not obtained leave to sue him from either of the courts appointing him. Leave was obtained from the New York court, but the order giving it has since been vacated. The general rule undoubtedly is that a court will not entertain jurisdiction of a suit against a receiver appointed by another court until the appointing court has given its consent that he be sued. This rule rests on principles of comity, and is considered essential for the protection of the receiver as an officer of the court appointing him against unnecessary and expensive litigation touching controversies wherein it may often be within the power of the appointing court to give ample relief to any person aggrieved. But the rule has its qualifications, and the case at bar does not fall within it. This suit is one under the federal laws, involving questions as to the validity and infringement of United States letters patent, which the state courts have no jurisdiction to determine. *Store Service Co. v. Clark*, 100 N. Y. 370, 3 N. E. 335. The federal courts cannot assent to the proposition that they have no jurisdiction, without leave of the state courts first obtained, to enjoin individuals, even though they be officers of state courts, from infringing upon the rights of the owner of a patent. To do so would be to abdicate functions which, under the federal constitution, are confided to them, and to them exclusively, by the federal laws. Such a refusal would leave it within the power of the state courts to exclude the holder of rights granted to him by the United States from the only tribunals which have jurisdiction to vindicate those rights. The reasoning in *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931, and other similar authorities applies perfectly to such a case as this. The motion is denied.

PULLMAN'S PALACE-CAR CO. v. WASHBURN.

(Circuit Court, D. Massachusetts. March 8, 1895.)

No. 336.

1. INDORSEMENT OF WRIT—MASSACHUSETTS STATUTE — COSTS AFTER REMOVAL TO FEDERAL COURT.

A statute of Massachusetts (Pub. St. c. 161, § 24) provides that "original writs, * * * in which the plaintiff is not an inhabitant of the commonwealth, shall, before entry thereof, be indorsed by some sufficient person who is such inhabitant," who shall be liable for costs. *Held*, that the indorser of a writ, under this statute, is liable for costs incurred in a federal court after removal to it of a suit commenced in a state court, as well as for the costs in the state court.

2. FEDERAL COURTS—JURISDICTION—ANCILLARY PROCEEDINGS.

Held, further, that a writ of scire facias to enforce, against such indorser of a writ, a liability for costs under a judgment of a federal court, is not an original but an ancillary proceeding, of which the federal courts have jurisdiction without regard to the citizenship of the parties or the amount in controversy.

3. JUDGMENTS—COLLATERAL ATTACK.

A judgment, rendered in a federal court, in an action removed from a state court, cannot be collaterally attacked for want of proper jurisdictional allegations in the petition for removal.

4. SAME.

A judgment cannot be collaterally attacked merely because erroneous and voidable on a writ of error as between the parties to it.

5. SAME—PRIVIES.

The indorser of a writ is privy to a judgment against the plaintiff in such writ, and cannot, upon scire facias against him, dispute the validity of such judgment.

This was a writ of scire facias sued out by the Pullman's Palace-Car Company against Frank L. Washburn to enforce against him a liability for costs as indorser of the writ in an action brought against the Pullman's Palace-Car Company by one Maggie M. Harrison, in which a judgment had been rendered against the plaintiff for \$813.94, costs.

Johnson & Underwood, for plaintiff.

Freedom Hutchinson, for defendant.

PUTNAM, Circuit Judge. The pith of the statute by virtue of which the indorsement of the writ in the original cause was made by the defendant in this suit, as found in Public Statutes of Massachusetts (chapter 161, § 24), is as follows:

"Original writs, * * * in which the plaintiff is not an inhabitant of the commonwealth, shall, before entry thereof, be indorsed by some sufficient person who is such inhabitant. * * * Every indorser, in case of avoidance or inability of the plaintiff, shall be liable to pay all costs awarded against the plaintiff, if the suit therefor is commenced within one year after the original judgment."

The present suit is by scire facias, issued out of this court against the indorser. The original writ was brought in the state court, and removed to this court on the petition of the Pullman's Palace-Car Company, the present plaintiff, and defendant in the original suit. The petition for the removal was filed in the state

court July 12, 1889, and failed to set out sufficient jurisdictional facts touching the Pullman's Palace-Car Company. We are not furnished with the other papers which were on file in the state court when or before the removal was effected.

The grounds of defense are as follows: First, that the indorser's liability does not include the costs which accrued in the circuit court; second, that, as it appears on the face of the declaration in the present cause that the matter in dispute is less than the sum or value of \$2,000, this court has no jurisdiction; third, that the present defendant can take advantage in this suit of the want of proper jurisdictional allegations in the petition for removal.

We think there is no difficulty in regard to the first point of defense. The defendant in this case voluntarily assumed his responsibility, and, by the terms of the statute covering the indorsement, he voluntarily made himself "liable to pay all costs awarded against the plaintiff." The defendant overlooks the fact, when urging that there is no law or rule of this court which creates against him a liability for the costs claimed in this case, that the liability comes from no rule or law of any court, but from the contract of the parties. There is nothing in the terms of the obligation assumed, or in the substance of the subject-matter, which leads to any other construction of the obligation than that it related to all costs in the suit. The fact that the case was transferred to the circuit court did not change the identity of the suit. It remained the same throughout. The defendant in this case having voluntarily assumed an obligation, plain and simple in its terms, he ought not to be discharged from it, unless there is something in the condition of the litigation arising from the removal which makes it necessary that he should be. We see nothing of that character. It is true that our old rule 40, which was in force when this suit was removed, and which has been succeeded by the present rule 6, provided for security for costs in this court. But the rule, in the first place, makes it optional for the defendant to ask for such security; and, further, whether the security shall be ordered depends on the exercise of judicial discretion. It is not to be assumed that this qualified provision for security deprives a defendant of an absolute right, given him by statute, and vested in him before a suit is removed. If it applies at all to suits which are removed by a defendant, which we need not consider, it should be regarded as an optional, cumulative remedy, with reference to which the court, in the exercise of judicial discretion, will give due consideration to the fact that security has already been obtained by an indorsement of the writ. All doubts arising from this rule are removed by the provision of the act of March 3, 1875, c. 137, § 4 (18 Stat. 471), to the effect that "all bonds, undertakings, or securities given by either party in the suit prior to its removal, shall remain valid and effectual notwithstanding such removal." This has clearly not been repealed by subsequent legislation, and is of the broadest application. No term can be more sweeping in this connection than the word "undertakings," and it clearly covers the indorsement in this case. Therefore, if the

rule referred to could be assumed to have the effect of discharging the liability of the indorser, it would, to that extent, be invalid as conflicting with the law. It is true this statute leaves it to be ascertained what are the nature and extent of the undertaking, so that if the statutory indorsement, by its proper construction, covers only costs in the state court, it would fall so far as costs in the circuit court are concerned. That there is no reason for thus limiting its plain and simple terms we have already remarked.

Also, the second proposition in defense, we think, there is no difficulty in meeting. From the earliest reported cases in Massachusetts, proceedings against the statutory indorsers of writs have been almost universally by *scire facias*. The appropriateness of this is apparent when it is considered that every allegation involved is a matter of record in the court from which the *scire facias* issues, except that of the genuineness of the signature of the alleged indorser. Of course, we are considering only the class of writs of *scire facias* which issue on matters of judicial record in courts of common law. In *McGee v. Barber*, 14 Pick. 212, Chief Justice Shaw, on page 215, referring to *scire facias* against an indorser, said it is clearly analogous to that against bail, and described the writ issuing against an indorser as a judicial one. Indeed, in all respects this proceeding is in harmony with the definition of the writ of *scire facias* found in 8 Bac. Abr. p. 598, as follows:

"*Scire facias* is deemed a judicial writ, and founded on some matter of record, as judgments, recognizances, and letters patent, on which it lies to enforce the execution of them or to vacate or set them aside."

It is true that, unlike some other judicial writs,—as, for example, the ordinary writs of execution,—this writ of *scire facias* is so far in the nature of an original that the defendant may plead to it; so that the proceeding is considered as an action, and is embraced in a release of actions. But it is said on the highest authority that, when it is founded on a recognizance, its purpose is, as in cases of judgments, to have execution, and, although it is not a continuation of a former suit as in the case of an execution, yet, not being the commencement and foundation of an action, it is not an original, but a judicial, writ, and, at most, is only in the nature of an original action. It can lie only out of the court where the recognizance is entered of record, or the court to which the same has been removed, as in the case before us. These expressions, it is to be noticed, are guarded with the words "in the nature of an original writ." At common law, the distinction between original and judicial writs was of such a substantial character that no degree of similarity touching the proceedings following their issue was sufficient to confound them. The original writ always issued from the chancery. Blackstone says (3 Bl. Comm. p. 273) it was a "maxim introduced by the Normans that there should be no proceedings in common pleas before the king's justices without his original writ, because they held it unfit that these justices, being only the substitutes of the crown, should take

cognizance of anything but what was thus expressly referred to their judgment." It therefore follows that, as this particular writ cannot initiate litigation, it only marks a stage in the course of proceedings already commenced, in whatever terms that stage may be characterized. It follows, further, that proceedings by scire facias of the character which we are considering fall into the class commonly known in the language of the federal courts as ancillary.

It is true that in *Society v. Ford*, 114 U. S. 635, 5 Sup. Ct. 1104, it was held that an action of debt on an ordinary judgment of a circuit court does not raise any question under the laws of the United States, and would not fall within the jurisdiction of the circuit courts without proper diverse citizenship; but an action of debt was, at common law, commenced by a writ out of chancery, so it does not afford us any guide with reference to scire facias. The liberal construction given by the supreme court to the word "ancillary" in this connection is illustrated by *Gwin v. Breedlove*, 2 How. 29, where it was held that an attachment against a marshal to compel him to bring money into court is not a new suit, but an incident of the prior one; by *Dietzsch v. Huidekoper*, 103 U. S. 494, where it was held that the circuit court might, on a bill brought for that purpose, enjoin a suit in the state court on a replevin bond given in a replevin suit removed to the circuit court, and that the bill was ancillary; by *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, and other cases of the same class, where the circuit court has taken jurisdiction to determine the title to property attached on its writ, or otherwise under its control; by *Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 Sup. Ct. 583, where a bill was entertained to set aside a former decree of the circuit court, and held to be ancillary; by *Dewey v. Coal Co.*, 123 U. S. 329, 8 Sup. Ct. 148, where proceedings to set aside a conveyance by persons charged with a debt in the same court were held to be ancillary; by *Johnson v. Christian*, 125 U. S. 642, 8 Sup. Ct. 989, 1135, where the circuit court took jurisdiction of a bill to enjoin the enforcement of its own judgment at common law, the supreme court holding that no other court could interfere with that judgment; and by *Lamb v. Ewing*, 54 Fed. 269, where the circuit court of appeals for the Eighth circuit held that a suit on a bond given to refund the amount of a judgment, if reversed, was ancillary to the original proceeding. In all these cases jurisdiction was held, regardless of the citizenship or the amount involved. *Reilly v. Golding*, 10 Wall. 56, seems to be strictly in point. There suit was commenced in the state court, where what was styled "a forthcoming bond" was given, to obtain redelivery of property attached. Afterwards the case was removed to the circuit court of the United States, and judgment obtained; and, according to the local practice, a rule was entered against the surety on the "forthcoming bond" to show cause why he should not be condemned to pay the debt. The supreme court sustained the jurisdiction, regardless of citizenship, holding that the proceeding was merely incidental to the principal suit. That case involved several of the most im-

portant points in the case at bar,—among the rest, that this is an incidental suit, and that in a proceeding on an obligation given in the state court, touching the payment of a judgment or some part thereof, the circuit court, after removal, may administer the peculiar local remedy, especially when the obligation itself is peculiarly local. We do not find that in any case whatever, on *scire facias* or by *mandamus*, of an incidental or ancillary character, the supreme court has indicated that the amount in controversy is of any consequence. Rev. St. § 716, vests in the federal courts power to issue writs of *scire facias*. While, of course, under the constitution, this cannot be accepted as a universal power, nevertheless it is well settled that the various statutory limitations on the jurisdiction of the federal courts, with reference to amounts in controversy and citizenship of the parties, relate entirely to litigation as to which there is a concurrent remedy in the state tribunals. In *re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221; *King v. Asylum*, 64 Fed. 331, 333. This principle applies to the pending case, because, for the reasons already given touching the intrinsic nature of *scire facias* against bail, and, by analogy, against this indorser, the state court could issue no writ of that class on a record which had been removed to the circuit court.

For these reasons, we fully agree with the plaintiff as to the second proposition.

The third point seems to be covered by the decisions of the supreme court. No doubt there are judgments of the circuit courts and district courts which are void when attacked, even though by *habeas corpus* by or on behalf of parties to them. Some of these are of the classes described in *Noble v. Railroad Co.*, 147 U. S. 165, 173, 13 Sup. Ct. 271; others are of that of *Ex parte Rowland*, 104 U. S. 604; others, of that of *In re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850; others, where the judgment was not the act of the court, as in *Lamaster v. Keeler*, 123 U. S. 376, 8 Sup. Ct. 197; and still others are of the class where the court assumes to proceed clearly in violation of rights secured to a citizen by the constitution. Whether it may always be easy to distinguish the cases referred to from that at bar we need not determine, because that a judgment rendered on a suit brought in the circuit court is not void for want of proper allegations touching the citizenship of the parties was directly settled in *McCormick v. Sullivan*, 10 Wheat. 192, which case has been ever since followed. That this applies to a case removed, though the allegations of the removal papers are not sufficient so far as citizenship alone is concerned, was settled in *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 Sup. Ct. 217. In that case, indeed, the removal papers were not only lacking proper allegations, as in the case at bar, but apparently described a proceeding of which the circuit court could not take jurisdiction by reason of facts expressly stated, showing apparently that, as between certain parties, there was no diversity of citizenship. These principles have been quite fully reviewed in *Kennedy v. Bank*, 8 How. 586, 611, *Dowell v. Applegate*, 152 U. S. 327, 337, 14 Sup. Ct. 611, and *Evers v. Watson*, 156 U. S. 527, 15 Sup.

Ct. 430, and need no further expressions from us. It is to be understood that we are considering exactly the case which is before us, wherein the state court proceeded no further, and submitted to the circuit court in its taking jurisdiction and rendering judgment. What complications would have arisen if the state court had proceeded to judgment, as it did in *Stone v. State of South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, without any reported action of the circuit court, or if the state court had proceeded with the suit, as it did in *Pennsylvania Co. v. Bender*, 148 U. S. 255, 13 Sup. Ct. 591, without any action on the part of the circuit court amounting to a judgment, express or implied, that the case has been properly removed, we need not consider.

We refer, as affording practical support to our conclusions on this branch of the defense, to the rule that it is not always necessary that the jurisdictional facts should appear by the petition for removal, and that perhaps they might in this case have been gathered from other parts of the record before the state court at the time the proceedings for removal took place. *Steamship Co. v. Tugman*, 106 U. S. 118, 121, 1 Sup. Ct. 58. The fact that we are not furnished with everything which was at that time before the state court, without any express stipulation as to what otherwise might have appeared, illustrates the impropriety of assuming to determine the validity of legal proceedings in a superior court of judicature, merely because, in what is presented, errors may be suggested. *Voorhees v. Bank*, 10 Pet. 449, 476, states the difference between judgments or decrees reversible only by an appellate court and those which are nullities, and urges in vigorous terms the great mischiefs which would come if the former were allowed to be avoided, except on appeal or by writ of error, taken within the time limited therefor by law. We refer to this case, without citing it in extenso, merely adding that the mischiefs it points out would be extensively realized if the numerous cases in the federal courts with reference to which the necessary jurisdictional facts in truth existed could be nullified or collaterally attacked for want of technical allegations such as are said to be lacking in the case at bar.

The defendant, nevertheless, contends that, although the original judgment was not void, yet it was on its face erroneous and voidable on a writ of error as between the parties to it, and that, therefore, it may be collaterally attacked by him. He urges strongly *Vose v. Morton*, 4 Cush. 27, where the court, in an opinion by Chief Justice Shaw, permitted a judgment of the circuit court of the United States to be attacked collaterally by evidence that the citizenship of the real parties to the controversy was different from that of the nominal parties, so that the circuit court had on the facts no jurisdiction. It may well be assumed, in the present state of the authorities, that, on a writ of error to the supreme court of the United States, the judgment in *Vose v. Morton* would have been reversed; but it is not necessary to examine that proposition. The basis of that judgment was that, as a matter of fact, the circuit court had no jurisdiction, and that, if the allegations had conformed to the truth, this would have appeared on the face of

the record. The expressions used by Chief Justice Shaw were limited to judgments "erroneous and void." Although the word "void" was, perhaps, not used in the sense of including only judgments which are mere nullities, yet there is nothing which shows it was intended to hold that a judgment can be attacked collaterally merely because it is erroneous. Another case relied on is *Downs v. Fuller*, 2 Metc. (Mass.) 135, in which a judgment was impeached collaterally on plea and proof, for want of notice to the defendant in the cause. The proposition of the court (on page 138) is that a void judgment may be impeached by plea and proof. The court proceeds that it is generally true that an "erroneous judgment" can be avoided only by appeal; "but," it continues, "this rule does not apply where the party has a right to impeach the judgment, and yet no right to reverse it by a writ of error." This still leaves to be defined the class of errors for which such a party has the right to impeach a judgment. The court illustrates the class by instancing a judgment obtained by fraud or collusion, and is very far from holding that a judgment merely erroneous on its face, and which, after all, may have been justly rendered, can thus be impeached. Another case is *Pond v. Makepeace*, 2 Metc. (Mass.) 114, where the judgment was recovered by an administrator appointed in another state, the court holding it no bar to a suit by an administrator appointed in Massachusetts. Here the first judgment was broadly *inter alios*. Still another is *Leonard v. Bryant*, 11 Metc. (Mass.) 370, where it was held that there was no statutory service of the original writ, the defendant being out of the state. Another is *Clark v. Fowler*, 5 Allen, 45, in which also the original judgment was obtained without notice to the defendant. And another is *Fall River v. Riley*, 140 Mass. 488, 5 N. E. 481, which was of the same class as the one last named.

It must be admitted that, although in these various Massachusetts cases the original judgments were spoken of as void, yet, down to the decision last cited, they were not in strictness so regarded, because it had been held by *Hendrick v. Whittemore*, 105 Mass. 23, and elsewhere, that the judgment of a superior court of judicature in that state was not absolutely void merely for want of proper service or notice, but only voidable. It is true that later the supreme judicial court of Massachusetts followed the supreme court of the United States, and held such judgments nullities; but the later cases do not apply, because it is apparent from the entire tenor of the decisions of the former court that they do not necessarily intend that a judgment cannot be impeached collaterally unless it is strictly void. Nevertheless, the use by Chief Justice Shaw of the words "erroneous and void," and the illustration referred to from *Downs v. Fuller*, *ubi supra*, and the character of the cases cited, show conclusively that even with this court the word "void" has some effect beyond the mere word "erroneous." It is not necessary to concede that, if the rule of the supreme judicial court of Massachusetts were otherwise than as we find it, it would bind us in the case at bar. It is sufficient that we find it in harmony with the generally accepted view, and with the de-

cisions of the supreme court of the United States. Except in extreme cases, as where a judgment was beyond the scope of the powers of the court, or no jurisdiction was obtained over the person or the res, or there was fraud or collusion, the decisions of the supreme court are numerous that it cannot be attacked collaterally for mere errors. From them we cite *Huff v. Hutchinson*, 14 How. 586, 588; *Cooper v. Reynolds*, 10 Wall. 308, 315; *Michaels v. Post*, 21 Wall. 398, 428; *Colt v. Colt*, 111 U. S. 566, 4 Sup. Ct. 553; *Mellen v. Iron Works*, 131 U. S. 352, 367, 9 Sup. Ct. 781; *New Orleans v. Gaines' Adm'r*, 138 U. S. 595, 607, 11 Sup. Ct. 428; *Insley v. U. S.*, 150 U. S. 512, 515, 14 Sup. Ct. 158.

But the matter will bear some further investigation. In none of the cases relied on by the defendant has the relation of the parties been that of a person holden to the precise performance of the original judgment, or of some part of it. *Fall River v. Riley*, *ubi supra*, was a suit against the sureties on a constable's bond. In the case at bar, the defendant, by his indorsement, stipulated to perform specifically what the original defendant became holden to. It is difficult to see how he can stand any better with it than the original defendant; and that the latter cannot avoid the judgment is fully settled by the citations we have made. The principles and authorities to which we have referred make clear the analogy between the liability of an indorser of an original writ and of bail. While the practice at common law was well settled, by which, pending a writ of error from a judgment of the common pleas or the king's bench, the bail might plead it as a bar until it was disposed of, or obtain a stay by motion, yet no plea on the part of bail directly setting up error can be found in the books, so far as we have been able to examine them. The common plea and the common proceeding on the part of bail, pending a writ of error, are fully stated in *Tidd, Prac.* pp. 470-475, and in *Petersd. Bail*, p. 368. The fact that the plea of writ of error pending and the motion to stay were so well known, while no plea of defense of error itself is found in the common-law authorities, affords a very persuasive presumption that there existed no right to the latter. Indeed, *scire facias* against bail, or against the indorser in this suit, is not strictly a collateral proceeding. It is ancillary to the original judgment, and in execution of it. In a *mandamus* to enforce the collection of taxes to pay a judgment of the circuit court, in *Harshman v. Knox Co.*, 122 U. S. 306, 317, 7 Sup. Ct. 1171, it was said that that writ is a direct proceeding on the judgment, and in the nature of an execution for the purpose of collecting it. The essence of the suit at bar justifies the same language. By the effect of the statute under which the indorsement was made, the indorser bound himself to pay a specific award, to be enforced against himself by the usual proceedings. These are supplemental to the judgment, and in execution of it. He cannot justly complain if the court declines to reject from his stipulation terms which he impliedly made a part of it. In *Sherburne v. Shepard*, 142 Mass. 141, 7 N. E. 719, on *scire facias* against an indorser, the court held that he was a party to the record in the original suit,

and so far interested in it and privy to it that he had a right to be heard on the taxation of costs. We are not required to go to this extent, but the case illustrates in a marked manner the difference between a stranger attempting to impeach a judgment when sought to be enforced by a subsequent original suit, and an indorser or a surety on a bail bond, who has specifically bound himself to perform the precise liability of the original defendant as ascertained by the original suit, and impliedly submitted himself to proceedings therefor by scire facias or other ancillary writ issuing from the court which rendered the original judgment.

On all points submitted to us, our views are with the plaintiff. There will be a judgment for the plaintiff for the amount claimed, with interest thereon from the date of the writ.

SMITH v. FERST et al.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1895.)

No. 236.

PRACTICE ON APPEAL.—FAILURE TO ISSUE WRIT OF ERROR.—JURISDICTION.

Where, after the rendition of judgment in a cause, a writ of error is duly allowed to the defeated party, and a bond is afterwards given and a citation issued, but the citation is not served, and no writ of error is actually issued, the appellate court is without jurisdiction, and the case should be dismissed.

In Error to the Circuit Court of the United States for the Northern District of Florida.

J. N. Stripling, for plaintiff in error.

E. P. Axtell, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. This was an action at law in the circuit court for the Northern district of Florida, in which final judgment was entered on December 22, 1893, in favor of M. Ferst, Sons & Co., plaintiffs, and against E. P. Smith, administrator, etc., claimant. On January 27, 1894, at the same term the judgment was rendered, the presiding judge, in open court, on the motion of claimant's attorney, allowed a writ of error from said judgment to this court, and granted a supersedeas, on claimant giving bond in the sum of \$1,000, conditioned according to law. Thereafter, on the 22d of March, a citation was issued signed by the judge, but it does not appear to have been addressed to any particular party, or to have been served upon any one. On the same day a bond was filed by E. P. Smith, as administrator of the estate of E. P. Jones, deceased, in favor of M. Ferst, Sons & Co. in the sum of \$1,000, conditioned to answer all costs and damages if the said E. P. Smith, as administrator, etc., should fail to prosecute his writ of error to effect. This bond appears to have been approved by the judge. The record, however, does not show that

any writ of error was actually issued in the case. On this state of facts, the motion made to dismiss the case for want of jurisdiction must be granted. *Mussina v. Cavazos*, 6 Wall. 355-358; *Ex parte Ralston*, 119 U. S. 613, 7 Sup. Ct. 317. So ordered.

SECURITY SAVINGS & LOAN ASS'N v. BUCHANAN et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 226.

1. EQUITY—PLEADING—MULTIFARIOUSNESS.

A bill brought by the S. Savings & Loan Association against several defendants alleged that five of the defendants, constituting the plaintiff's local board, at a place distant from its home office, charged with the duty of examining and reporting upon applications for loans, had made a grossly false and deceptive report upon an application; that two of the defendants, also members of such board, had given a note and mortgage to secure the loan so procured; that two other defendants, who were insolvent, had become sureties for the construction by the borrowers of a building on the mortgaged land, which had never been begun; and that the application for the loan and accompanying paper, the note, mortgage, and bond, had all been lost. Thereupon the bill prayed for recovery against the borrowers upon the note; foreclosure of the mortgage; establishment of the lost instruments; recovery against the sureties on the bond; and damages against the other members of the local board for their fraudulent representations. *Held*, that the bill was multifarious.

2. SAME—ADEQUATE REMEDY AT LAW.

Held, further, that, as to the members of the local board other than the borrowers, the complainant had a complete and adequate remedy at law.

3. SAME—ESTABLISHMENT OF LOST INSTRUMENTS.

Equity will not entertain a suit to establish a lost instrument merely as a piece of written evidence to assist in sustaining an action for a tort.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

This was a suit by the Security Savings & Loan Association against J. S. Buchanan, A. A. Crabbs, Anna Crabbs, A. P. Petty, W. H. Hutsell, E. C. Swabey, O. B. Jenkins, and W. H. Thomas for the foreclosure of a mortgage and other relief. The circuit court dismissed the bill. Complainant appeals.

As shown by the bill, the complainant in this case is a corporation organized under the laws of Minnesota, having its home office there, and is engaged in the business of a building, savings, and loan association. It was doing business in Tennessee; and for the purpose of receiving applications for loans, and transmitting such applications to the home office with such necessary information as would be required to determine the value of the security offered for the proposed loans, it had appointed a local board at Dayton, in that state. This local board consisted of five members, all of whom were shareholders in the corporation, and are defendants in this suit. Thomas was president; Buchanan, treasurer; Crabbs, secretary; and Petty and Hutsell, ordinary members. On December 17, 1892, the defendants Buchanan and Crabbs made an application to the complainant, through the local board, for a loan of \$4,000, and proposed to secure it by a mortgage on a lot in Dayton, on which, as they stated, they were building a two-story brick building 50 feet wide and 100 feet long, with stone foundations. They stated that the lot without the building was worth \$1,500; that at the last assessment it was valued at \$1,000; that the value of the building they were then erecting was

\$8,000; and that it was at the business center of the town. The local board forwarded the application and statement to the home office of the company, and sent therewith a "confidential appraisal of property," in which the board confirmed, as of matters within their personal knowledge, the statements above mentioned of the proposed borrowers, and stated that they considered "this a good risk." This appraisal was signed by all the five members of the board who are above named. On the faith of these statements made by the defendants Buchanan and Crabbs, and by the local board, the complainant granted the application, and agreed to pay the \$4,000 in three installments,—one of \$1,000, in January, 1893; another of \$1,000, in February; and the other \$2,000, in May following. On January 6, 1893, Buchanan and Crabbs and Anna Crabbs, the wife of the latter, executed and delivered to complainant a note for \$4,000, and the proposed mortgage on the Dayton lot to secure the same, in the form of a deed of trust to the defendant Thomas for that purpose. There were some minor details about the time and mode of application of the payment to be made by the borrowers, but they are not material to the decision. On January 28, 1893, Buchanan and Crabbs, with the defendants Swabey and Jenkins as their sureties, executed and delivered to the complainant a bond in the sum of \$4,000, conditioned that the building on the mortgaged lot should be completed at a cost of \$8,000, and that all claims for which liens might be filed should be paid. The complainant paid the January and February installments of \$1,000 each to Buchanan and Crabbs as agreed. It turned out that all the statements made as above by Buchanan and Crabbs and by the local board to the complainant were false. The lot was not worth more than \$100; had never been assessed for \$1,000, nor for any sum whatever separately from other land; no building was ever constructed or ever begun on said lot; the lot was a mile away from the business center of the town, and surrounded by vacant town lots; Buchanan and Crabbs were insolvent, and failed in April following; and it likewise developed that Swabey and Jenkins, the sureties on their bond, were insolvent, and that nothing could be collected from any of the four. No part of the loan was ever repaid, and, according to the terms thereof, all is now due. All these things are set out in the bill with much amplification. And it is further alleged that the above-mentioned application, appraisal, note, and bond have, without the fault of the complainant, been lost, and cannot now be found; that it has copies of the application and appraisal, but not of the note or bond. The prayer of the bill is for the recovery from Buchanan and Crabbs of the money loaned, for the foreclosure of the deed of trust, for the setting up of the lost instruments by the establishment of copies, for a recovery from Swabey and Jenkins on their bond of the amount of the loan, and for a decree against Petty, Thomas, and Hutsell, "on account of their fraudulent representations and actions," for the amount of said loan.

The defendant Hutsell appeared, and demurred to the bill, and set down the following causes of demurrer: (1) That it appears from the complainant's own showing, in and by said bill, that it is not entitled to the relief prayed by the bill against this defendant. (2) That the citizenship of the parties to said bill is not properly set forth or stated, it appearing from the allegations of the bill that the plaintiff is, under the laws of the state of Tennessee, a citizen of said state, and not of the state in which it was incorporated. (3) That it appears from the plaintiff's own showing that it was chartered under the laws of a foreign state, and that it has attempted to do business in the state of Tennessee, and has done business therein, yet it nowhere appears or is alleged that the plaintiff has complied with the acts of the general assembly of Tennessee, with respect to foreign corporations transacting business in said state, being the act of 1891, c. 122. (4) That said bill is multifarious, in joining several distinct and separate causes of action in one and the same suit. (5) That there is a misjoinder of parties defendant in said bill. (6) That said bill seeks to enforce several separate and distinct liabilities against this defendant. (7) That there are no sufficient allegations in said bill to charge this defendant, in this court; but, if the plaintiff has any remedy, it is by action at law for damage. The court below sustained the demurrer, founding its opinion upon the seventh cause assigned therein. The bill was dismissed, and the complainant appeals.

T. M. Burkett, W. B. Miller, and F. L. Mansfield, for appellant.
Pritchard & Sizer, for W. H. Hutsell, appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS,
District Judge.

Having stated the case as above, SEVERENS, District Judge, delivered the opinion of the court.

Although the demurrer was sustained in the circuit court upon the one ground stated in the opinion of that court, the question for us is whether it should have been sustained for any of the causes therein shown. There can be no doubt that, upon the facts stated in the bill, the appellee, Hutsell, was guilty of a gross fraud upon the complainant, and that an action at law would lie to recover the damages occasioned thereby. It was held by the court below that that was an adequate remedy, and hence that a suit in equity could not be maintained; citing *Ambler v. Choteau*, 107 U. S. 586, 591, 1 Sup. Ct. 556, and *Buzard v. Houston*, 119 U. S. 347, 354, 7 Sup. Ct. 249. The only ground we can see for thus joining Hutsell, and the cause of action against him, in this litigation, is that the security of the note and mortgage of Buchanan and Crabbs may first be liquidated in order to ascertain the extent of the damages arising from Hutsell's alleged fraud. But the value of the security could be ascertained for the same purpose in a suit at law with equal facility. No discovery is here prayed, and answer under oath is waived. The case is therefore, as against Hutsell, a mere graft of a strictly legal cause of action upon a bill in equity, the primary purpose of which is to foreclose a mortgage. We do not think the legal controversy can be properly litigated in such a suit. 1 *Beach*, Mod. Eq. Prac. § 117; *Fougeres v. Murbarger*, 44 Fed. 292; *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. 814. It is quite true that fraud is a ground upon which a court of equity is accustomed to afford relief, and this in a great variety of circumstances. But, in doing so, it respects the rule that its jurisdiction should not be exercised where there is an adequate remedy at law. That is the present case. No preventive relief is prayed, and nothing corrective other than a mere judgment for damages upon a transaction which is passed and confirmed. *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249.

In the case of *Smith v. Bourbon Co.*, 127 U. S. 105, 8 Sup. Ct. 1043, a judgment creditor, upon the return unsatisfied of his execution against his insolvent debtor, filed his bill against the debtor, a railroad company, and the county of Bourbon, from which, as was alleged, there were certain bonds due, but not yet delivered to the defendant railroad company. The object of the bill was to compel the railroad company to assign to complainant its claim for the bonds, and to compel the county to deliver the bonds to complainant in satisfaction of his judgment. It was held that the relief prayed for against the railroad company might be granted, and that it might be compelled to assign its claim to complainant with

the right to sue for the bonds in the name of the company, but that the relief prayed for against the county was without the jurisdiction of the court, being of a legal nature and enforceable by mandamus, and the bill was dismissed as to that defendant. Near to this question is that raised by the cause of demurrer assigned, upon the ground that the bill is multifarious. The relief prayed is specific. The objects of the bill are that the mortgage may be foreclosed; that the application for loan, the appraisal, the note, and bond, which are alleged to have been lost, may be set up and established; "that judgment be declared on said bond" against Swabey and Jenkins; and that Petty, Thomas, and Hutsell be declared liable to complainant for their fraudulent representations.

Here are several independent causes of action, each of which is sufficient in itself to support a separate suit. Some of the defendants are concerned with some of the causes of action, and not with others, while others of the defendants are not concerned with those which involve the former. Besides this, as to some of the causes of action, the defendants therein are entitled to have the issues tried by a jury, of which right they would be deprived if the complainant were permitted to draw them all into a court of equity. That is the predicament of the defendant Hutsell. The rule against such practice is well established. *Campbell v. Mackay*, 1 Mylne & C. 603; *Brown v. Deposit Co.*, 128 U. S. 403, 9 Sup. Ct. 127; *Newland v. Rogers*, 3 Barb. Ch. 432; *Association v. Denton* (recently decided in this court) 65 Fed. 569; 1 Daniell, Ch. Prac. 335. In the case of *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, much relied on by the complainant, no objection was taken to the bill until the case was brought to the hearing, and much stress is laid upon this circumstance in the opinion. The defendant Tyler was an officer in the corporation, and had been the efficient agent in perpetrating the fraud complained of. The bill prayed for a discovery, and Tyler was a necessary party for the obtaining of such relief. Here no discovery was sought by the bill, and the objection was taken seasonably and in the proper mode. We are of the opinion that there is in this bill such misjoinder of causes and parties as to render it subject to the objection of multifariousness.

The complainant claims that its right to come into equity is supported by the fact that it has lost certain instruments which it deems necessary to have set up and established as the basis of its recovery. The "instrument," so called, on which it charges Hutsell, and which is alleged to be lost, is not any instrument of title to corporeal property, nor a bond or note, nor, indeed, a contract in writing inter partes, whereby an obligation was assumed, but a mere piece of written evidence upon which, with other proof, the complainant seeks to charge the defendant with a tort. This is not an instrument such as a court of equity undertakes to establish on an allegation of its loss. The jurisdiction of equity in this class of cases has been extended beyond the cases of instruments under seal, of which profert could not be made at common law, and includes those of lost notes and other writings obligatory, in which the court may require the complainant to give an indemnity to the

defendant against vexation by any other person who may afterwards come with the supposed lost instrument, claiming under an assignment. Some of the authorities manifest an unwillingness to go beyond the cases of negotiable instruments. It is not necessary for us to decide precisely where the limit should be fixed. It is sufficient to say that there is, in this case, no ground which has been suggested as the basis of relief in such cases, upon which the court could take action. 2 Pom. Eq. Jur. §§ 831, 832; 1 Story, Eq. Jur. §§ 81-88. Upon proper application to the court below, it is quite likely that the court on sustaining the demurrer might have given complainant leave to trim down the bill as respects parties and subjects, so that it would have been allowed to proceed for its proper purpose. But it has chosen to stand by its bill, and bring the case here on appeal. In our opinion, the decree below was right in sustaining the demurrer, and in dismissing the bill; but we think that should have been done without prejudice, the case having been disposed of on demurrer, and not on the merits. *Durant v. Essex Co.*, 7 Wall. 107, 113; *Cattle Co. v. Frank*, 148 U. S. 603, 612, 13 Sup. Ct. 691. For that reason, the case must be remanded to the court below, with instructions to modify its decree by adding a provision that the dismissal of the bill be without prejudice to any other remedy to which the complainant may be entitled.

CLARK v. CENTRAL RAILROAD & BANKING CO. OF GEORGIA.
CENTRAL RAILROAD & BANKING CO. OF GEORGIA v. FARMERS'
LOAN & TRUST CO. OF NEW YORK. FARMERS' LOAN & TRUST
CO OF NEW YORK v. CENTRAL RAILROAD & BANKING CO. OF
GEORGIA.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1895.)

No. 319.

1. RAILROAD RECEIVERSHIPS—PAYMENT FOR SUPPLIES.

The C. Ry. Co., in June, 1891, was leased to the R. Ry. Co., which went into possession, and operated the C. Ry. Co. lines until March, 1892, when a receiver of the C. Ry. Co. was appointed, and took possession of its property. After the lease, and before the receivership, a contract was made for a supply of coal to the C. Ry. Co., under which coal was delivered both within six months before and after the receivership, some of which was used before the receivership, some was on hand when the receiver was appointed, and was taken and used by him, and some was delivered to and used by him. *Held* that, without regard to who made the contract, the coal having been furnished for and used in the operation of the C. Ry. Co.'s lines, for the purpose of carrying on its business, the receivers should be directed to pay not only for that which had been delivered to them, but for that which had previously been delivered to the road and used, either before or after the receivership.

2. SAME—PAYMENT FROM CORPUS OF ESTATE.

It appeared that before the receivership there had been a diversion of income for the payment of interest on bonds, and that the receiver expended for betterments, out of the income, a sum larger than the claim of the sellers of the coal. *Held*, that payment for the coal should be made out of the corpus of the property, if the income was insufficient.

Appeal from the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

This was a bill by Rowena M. Clark against the Central Railroad & Banking Company of Georgia, and dependent bills by the Central Railroad & Banking Company against the Farmers' Loan & Trust Company, and by the Farmers' Loan & Trust Company against the Central Railroad & Banking Company, all of which were consolidated, and a receivership of the property of the Central Railroad & Banking Company, in the first suit, extended to the three. The Virginia & Alabama Coal Company and the Sloss Iron & Steel Company intervened, seeking payment by the receiver for certain coal supplied to the railroad. The circuit court made a decree allowing the claim in part. The interveners appeal.

This is a suit brought by intervention for coal furnished by the interveners, the Virginia & Alabama Coal Company and the Sloss Iron & Steel Company, for the operation of the Central Railroad & Banking Company of Georgia while being operated by the Richmond & Danville Railroad Company. All the coal charged for as furnished before the appointment of receivers for the Central Railroad Company was furnished within less than six months prior to such appointment. The Central Railroad was leased to the Georgia Pacific Railroad Company; the Georgia Pacific was leased to the Richmond & Danville Railroad Company; and the latter company, under color of this lease, was operating the Central Railroad lines. On June 1, 1891, the Central was leased to the Georgia Pacific Railroad Company; and on the same day the Richmond & Danville (to which the Georgia Pacific was already leased) went into the possession of the Central, and operated the same till March 4, 1892, at which date the receivers of the Central were appointed. The lease transferred not only the main lines of the Central, but various lines which it controlled by lease and by stock ownership. It further provided that the lessees should take possession of the leased property as a running road, taking such cash and credits as were then due, and, on the other hand, obligating the lessees to pay the current debts of the lessor company for supplies, etc. The lease also provided that the lessee should pay the interest on the bonds and debentures of the Central and of the lines upon which the Central had guaranteed interest on bonds, and also dividends on the stock of the Central. It appears from the agreed statement of facts that the semiannual interest on the \$5,000,000 of mortgage bonds of the Central was paid in January, 1892 (the order appointing the receiver being dated March 4, 1892). It is also an agreed fact that during the receivership the Central expended for betterments on its railroad lines, from the income of the roads during the receivership, a sum much larger than the entire claim of the interveners. To set aside the lease, Mrs. Rowena M. Clark, a stockholder, brought her bill against the Central Railroad, under which a receiver was appointed March 4, 1892. The Richmond & Danville and Georgia Pacific Companies disclaimed any rights under the lease, and no issue was raised in relation thereto such as to require decision as to the validity or invalidity of the lease, and such question has not been determined. Shortly afterwards the Central Railroad filed a dependent bill, under which the same receivership was continued, and under which it was also extended to the Port Royal & Augusta Railroad and the Port Royal & Western Carolina Railroad. The Farmers' Loan & Trust Company, the trustee for the mortgage bondholders of the Central Railroad, afterwards filed its dependent bill in said cases, under which the same receivership was continued. All these cases were afterwards consolidated. On July 13, 1891, a contract was made with the Virginia Company for the purchase of a year's supply of coal to operate the Central lines. The contract stipulated for 90 cents per ton of 2,000 pounds, to be delivered on cars at the mines, and to be shipped at times and in quantities to suit. In pursuance of this contract the Virginia Company between September 16, 1891, and March 4, 1892, shipped to the division superintendents (Curran at Macon, Dill at Savannah, and Epperson at Augusta) coal to the amount (per contract

price of 90 cents per ton) of \$26,607.44. The Sloss Company, under the same contract, by the consent of both parties, supplied coal to the amount of \$14,359.38, but at an agreed price of 95 cents a ton. All bills were made out in the name of the Central Company. The price at which the Central Railroad got the coal was 7 or 8 cents per ton less than the market price at that time. It appears that, while much of the coal was used in the operation of the Central Railroad prior to the receivership, a large part of the coal delivered was in its bins at the time of the appointment of the receivers on March 4, 1892, and went into their possession and was used by them, and that some of the coal was received after that time, and likewise went into the possession of the receivers. An agreement of counsel is found in the record as follows: "It is agreed that the coal described in the exhibit to the intervention by amounts and dates of shipment was delivered by the intervenor to the railroad lines of the Central Railroad and Banking Company of Georgia, which was being operated by the Richmond and Danville Railroad Company till the 4th of March last, at the dates and in the amounts shown by said exhibits." It, however, appears that some of the coal delivered to the Central Railroad was used by several other railroads known as the Port Royal & Augusta, the Port Royal & Eastern Carolina, and the Charlotte, Columbia & Augusta Railroads. The master's report finds that coal of the Virginia Company, worth \$13,735.89, was used prior to the receivership; that coal worth \$6,700.50 was in the bins at the time of the appointment of the receiver, and that coal worth \$6,171.30 was received by the receiver after his appointment, and that, of the coal of the Sloss Company, coal worth \$10,320.17 was used prior to the appointment of the receiver; that coal worth \$3,818 was in the bins March 4, 1892, and that coal worth \$776 arrived after the appointment of the receivers. The circuit court held the Central Railroad and the receivers liable only to the extent of the coal which was delivered after March 4, 1892 (holding them liable at the contract price), and rendered a decree accordingly. From that decree the interveners appeal.

Walter B. Hill, for appellants.

Marion Erwin, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge, after stating the case as above, delivered the opinion of the court.

From what appears in the record we are satisfied that the debts claimed by the interveners for coal delivered prior to the appointment of the receivers were current debts for operating expenses of the Central Railroad lines, made in the ordinary course of business, to be paid out of the current earnings. The coal was purchased in the name of the Central Railroad. It was delivered on its lines, and was furnished for their operation, and, with the exception of a small amount, was used by them. There was evidence that the contract for the purchase of the coal was made by the Central Railroad, and the master so found. The circuit court, however, differed with and overruled the master in such finding.

In our view of the case, it makes no difference whether the contract for the purchase of the coal was made by the Central Railroad or by the Richmond & Danville Railroad. The coal was delivered on the lines of the Central Railroad, and was furnished for and used in their operation. The Richmond & Danville Railroad Company had the possession of the Central Railroad lines, was operating them, collecting their revenues, and was under the obligation to pay out of their earnings the current expenses and the interest on

their bonds. But whether that possession was lawful or otherwise, or whatever the relations between the two railroads may have been, we think that the Central Railroad was liable for the necessary supplies furnished and used for the purpose of keeping its road in successful operation, and carrying on its business as a common carrier. Such debts are preferential, and the persons to whom they are due are entitled to have the income of the receivership used in payment of them as the railroad company would have been bound in equity and good conscience to use it if no change in the possession of the property had been made. *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675; *Fosdick v. Schall*, 99 U. S. 235. In this case the equities are especially favorable to the interveners, for it appears that there was a diversion of the income for the payment of interest on bonds of the Central Railroad in January, 1892, some two months before the receivers were appointed; and it also appears that the receiver expended from the income for improvements on the railroad property a sum much larger than the claims of the interveners. Our opinion is that the receivers are liable not only for the coal which they received after their appointment from unloaded cars, but that they are equally liable for the coal which was in the bins at the date of their appointment, and which they took possession of and used in the operation of the Central Railroad lines, and that, as representatives of the Central Railroad & Banking Company of Georgia, they are also liable for the coal delivered to and used by the Central Railroad lines prior to their appointment, and which was then unpaid for. For that portion of the coal used at Augusta by the three railroads there, as shown by the evidence, the Central Railroad and the receivers are liable, except as to that used by the Charlotte, Columbia & Augusta Railroad. It appears that the other roads mentioned were under the control of the Central Railroad, and were a part of its system. The Charlotte, Columbia & Augusta Railroad was not. It does not appear that the court in appointing the receivers made any provision for the payment of the interveners' claims, but, as there is evidence in the record showing that current earnings, before the receivers were appointed, were diverted to paying interest on the bonded debt, and that after their appointment they made large permanent improvements on the railroad property, the interveners should be allowed payment of their claims from the corpus of the property, should the earnings in the hands of the receivers be insufficient to pay them. The interveners are only allowed the price stipulated for, and which they expected to receive when the coal was delivered, and which is in fact the price claimed in their petition of intervention. In our opinion, the view which the circuit court took of this case was an erroneous one, and the decree must be reversed, and the case is remanded to the circuit court with instructions to enter a decree in favor of the interveners for the amounts respectively due them for coal delivered to the lines under the control, and forming a part of the system, of the Central Railroad & Banking Company of Georgia, as shown by the evidence in this case, including the coal furnished

before the appointment of the receivers, and that found in the bins at the time of such appointment, and of which the receivers took possession, as well as the coal delivered to the receivers after their appointment, the amount due being determined by the contract price, and an order that they recover from the Central Railroad & Banking Company of Georgia and the receivers of the same such sums thus found to be due. No decree will be entered in favor of the interveners for the payment of that portion of the coal which was used by the Charlotte, Columbia & Augusta Railroad Company. Reversed and remanded.

WOOD v. PAINE et al.

(Circuit Court, D. Rhode Island. March 29, 1895.)

No. 2,501.

1. WILLS—ACTION TO CONSTRUCT—JURISDICTION OF FEDERAL COURTS.

A will having been established by competent authority, the federal courts have jurisdiction to determine its interpretation, in an action between citizens of different states.

2. CHARITABLE DEVISE—DESIGNATION OF BENEFICIARIES—WANT OF TRUSTEE.

A devise to the town council of Coventry, R. I., in trust for the support of the poor of said town, is not void for uncertainty as to the beneficiaries, or incapacity of the trustee to take,—town councils in Rhode Island being unincorporated bodies,—as a court of chancery will not permit a charitable trust to fail for want of a trustee, or because its particular purposes are uncertain.

Bill in equity by Horace B. Wood against George T. Paine and others for the construction of a will, and for further relief. Defendants demurred to the bill.

Dexter B. Potter, for complainant.

Thomas C. Greene, for respondent Paine.

Ezra K. Parker, for respondents Capwell and others.

CARPENTER, District Judge. This is a bill in equity filed by Horace B. Wood, a citizen of the state of Michigan, against George T. Paine, Searles Capwell, Albert D. Burnham, Josiah Andrews, Daniel H. Freeman, and George A. Field, citizens of the state of Rhode Island, and alleges as follows:

"That one Horatio N. Waterman, at the time of his decease, resided in East Greenwich, county of Kent, said state of Rhode Island, and was a citizen of said state. That he died on or about the 16th day of June, A. D. 1891, leaving an instrument in writing which purported to be his last will and testament, and which was admitted to probate in the probate court in said town of East Greenwich; and, an appeal therefrom having been taken to the supreme court of said state, said will was sustained by a verdict of a jury, and a final decree was entered in said court again admitting said will to probate, but no construction was put upon any of the several clauses of said will, nor was your orator a party to said proceedings. That a new trial was afterwards petitioned for, but the petition was dismissed, and all legal proceedings in said matter are now ended in the state courts. That in and by said will, a copy of which is hereto annexed as Exhibit A, and made a part hereof, said Horatio N. Waterman gave in specific legacies the sum of sixteen thousand dollars to divers persons. His farm, in the town of Coventry, with buildings, improvements, growing crops, and farming utensils, he gave to two nieces, together

with all of his furniture, crockery, wearing apparel, beds, bedding, watches, and jewelry; and to another legatee he gave all of his tools, utensils, and tool chests. That he then directed his executor, after paying all debts, expenses, bequests, and devises, including his own compensation, to invest all the rest and residue of his estate in first mortgages on real estate, in United States, state, or city bonds, in bank stocks, or in other good and safe income-producing securities, and then, under the direction of the supreme court of Rhode Island, to convey said invested fund to the town council of the town of Coventry, to be held by them and their successors forever, in trust, the income thereof to be annually expended, under their direction, in the support of the poor of his native town of Coventry; but this last provision has not yet been executed. That said town council is not an incorporated body, but the members thereof are annually elected under the statutory provisions of said state, the present members being as follows, viz.: Searles Capwell, Albert D. Burnham, Josiah Andrews, Daniel H. Freeman, and George A. Field. And your orator is informed and believes, and therefore avers, that the amount of the estate of said Waterman now in the hands of said defendant as executor, and that would go to said town council under the sixth clause of said will (including the testator's homestead estate in said East Greenwich), is about the sum of seventy-five thousand dollars, and of that sum, as heir at law of said Horatio N. Waterman, your orator would be entitled to more than six thousand dollars. That said clause of said will is inoperative and void, and that all of the heirs at law of said Waterman are as such heirs entitled to all of the estate left by him, and not specifically devised in other clauses of said will than the fifth and sixth clauses thereof."

The bill prays that the said sixth clause may be declared to be null and void, and that the respondent Paine, who is executor of the will, may be decreed to pay to the complainant his portion of that part of the estate of the said Horatio N. Waterman which would otherwise go to the town council of Coventry under the sixth clause.

The sixth clause of the will is in the following words:

"Sixth. I direct that my executor shall, after paying all debts, expenses, bequests, and devises, including his own compensation, invest all the rest and residue of my estate in first mortgages on real estate, in United States, state, or city bonds, in bank stocks, or in other good and safe income-producing securities, and shall then, under direction of the supreme court of Rhode Island, convey said invested fund to the town council of the town of Coventry, R. I., to be held by them and their successors forever, in trust, the income thereof to be annually expended, under their direction, in the support of the poor of my native town of Coventry."

General demurrers to the bill have been filed by the respondent Paine and by the respondents Capwell and others. The contention of the complainant is that the sixth clause of the will is void—First, because town councils in Rhode Island are not corporations, and therefore there is no trustee who can take; and, secondly, that the devise for the support of the poor of Coventry is void, because there is no defined beneficiary.

The will having been established by authority competent for that purpose, there seems to be no doubt of the jurisdiction of this court to determine questions as to the interpretation thereof in this case, in which the complainant is a citizen of Michigan, and all the respondents are citizens of Rhode Island. Compare *In re Cilley*, 58 Fed. 977. Since the testator had his domicile in Rhode Island, and the land devised is situate in that state, it follows that the validity of the devise which is here brought in question is to be determined by the law of the state of Rhode

Island. *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336. The origin and judicial history, as well as the true foundation, nature, and extent, of the doctrine of charitable uses in the law of Rhode Island, and of the jurisdiction of the supreme court of that state in relation thereto, may be found stated in *Pell v. Mercer*, 14 R. I. 412, which was decided in 1884. The decisions of the supreme court of Rhode Island made since that time, relating to the questions here at issue, are *Rhode Island Hospital Trust Co. v. Olney*, 14 R. I. 449; *Almy v. Jones*, 17 R. I. 265, 21 Atl. 616; *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906; *Palmer v. Bank*, 17 R. I. 627, 24 Atl. 109; *Petition of Van Horne*, Index NN, 14, 28 Atl. 343. All these cases are in entire accord, and they, therefore, state the law of Rhode Island on this question. In order fully to define the broad basis on which the doctrine of charitable uses and the jurisdiction of the courts of that state now stand, it would be necessary to quote all the observations on these points which appear in the very learned and very clear opinion in *Pell v. Mercer*. I think it amply sufficient for the present purpose to observe that indefiniteness in the purposes and objects of a charitable bequest are by no means a ground from which the invalidity of the bequest may be argued, and that any defect in the persons to take the trust estate or to execute the trusts will be supplied by the plenary jurisdiction of the court. "Though indefinite," says Mr. Chief Justice Durfee, "it is upheld. If it is designed to be perpetual, it is perpetuated. It is a matter of public policy to conserve it from failure. * * * A court of chancery * * * does not permit the trust to fail because its particular purposes are uncertain, but furthers the general intent of the donor, by defining them." From these, and from many other observations in the cases above cited, it seems clear that charitable bequests are looked on with the highest favor under the law of Rhode Island. If there were doubt whether the particular bequest here in question could be sustained under that law, then in that case it seems to me that I ought not to retain this bill. The law of the state is to be here ascertained as a fact, and the decisions of the state court should receive their full effect and meaning, and not be reduced in effect by distinction and interpretation. But, on the other hand, it seems to me clear that the bequest here in dispute comes within the law of the state. The demurrer must therefore be sustained.

CHATTANOOGA, R. & C. R. CO. et al. v. EVANS.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1895.)

No. 203.

1. RAILROAD COMPANIES—POWER TO SELL ROAD — STATE STATUTES CONCERNING FOREIGN CORPORATIONS.

A state statute, declaring it unlawful for any foreign corporation to own or acquire property in the state, or do any business there, without first filing a copy of its charter in the office of the secretary of state, and

an abstract thereof in each county in which it desires to do business (Act Tenn. March 26, 1891), does not take it out of the power of a railroad company previously owning property, and authorized to do business in the state, to make a valid sale of all such property, without first complying with the provisions of the statute.

2. SAME—RIGHT OF FOREIGN RAILROAD COMPANY TO DO BUSINESS IN A STATE.

The Tennessee statute of March 23, 1887, by its first section, authorized foreign railroad companies to extend their roads into the state a distance not exceeding five miles, for the purpose of reaching a terminal point or depot. The second section authorized such corporations to acquire a right of way to such terminal point by purchase, gift, or condemnation. Section 3 gave them power to purchase real estate necessary for the erection of depots, shops, yards, etc., and concluded with the proviso that "they shall first apply for and receive a charter in this state." *Held*, that the proviso should be construed as applying only to the section in which it was found, and that a railroad company was authorized under the previous sections to acquire a right of way, and construct its road thereon, without first securing a charter from the state.

3. SAME.

A statute declaring it unlawful for any foreign corporation to acquire property in the state, without first complying with certain prescribed conditions, and declaring a penalty against any one violating this provision (Act Tenn. March 26, 1891), does not invalidate a purchase made without compliance therewith, but merely subjects the offender to the punishment prescribed.

4. CORPORATIONS—INSOLVENCY—POWER TO SELL ASSETS—RIGHTS OF CREDITORS.

The property of a corporation is not a trust fund for its creditors in any such sense that its mere insolvency, while still a going concern, will prevent it from making a bona fide sale of all its property, which will be valid as against mere contract creditors.

5. RAILROAD COMPANIES—LIEN FOR LABOR AND MATERIALS.

The Tennessee statute of 1877, providing, among other things, that no railroad company shall have power to create any lien on its property which shall be valid as against judgments and decrees "for timber furnished and work and labor done on, or for damage to persons and property in the operation of, its railroad in this state," does not include material furnished and work done in the creditor's machine shops upon locomotives; or railroad supplies, such as tools, spikes, hardware, etc.; or damages resulting from detention of freight shipped over the line, unless such damage was occasioned by an actual injury to the property, and unless the same occurred within the state.

6. SAME.

The above statute does not apply to a bona fide sale of the railroad property, as distinguished from an attempt to create a lien thereon.

7. SAME—SALE IN FRAUD OF CREDITORS.

A sale of the entire property of an insolvent railroad company, under an arrangement whereby the entire purchase price is distributed among the stockholders, is fraudulent and void, as against unsecured creditors, when such creditors are known to exist by both parties to the sale.

8. SAME—KNOWLEDGE OF GRANTEE.

A corporation which purchases all the property of a railroad company, knowing that such company is insolvent, under an arrangement by which a large part of the purchase price will be placed beyond the reach of creditors, if there are any, is under a duty to inquire as to the existence of unsecured creditors, and is chargeable with all knowledge which such an inquiry would disclose.

9. SAME—RIGHTS OF UNSECURED CREDITORS.

An insolvent railroad company sold its entire property to another railroad company for bonds of the latter company, which were guarantied by a banking corporation. The contract of sale provided that the larger part of these bonds should be distributed to holders of stock and income bonds of the selling company, and that, in consideration for the guaranty, the

said stock and income bonds were to be delivered to the banking corporation, and held as its property. *Held* that, as against unsecured creditors of the selling company, the income bonds must be considered as paid and canceled.

10. REPLEVIN OF ATTACHED PROPERTY—REPLEVIN BOND—LIABILITY OF SURETIES.

Under the Tennessee statute (Mill. & V. Code, § 4250), the defendant, in an attachment suit, is authorized to replevy the property upon giving bond, either in double the amount of plaintiff's demand, conditioned to pay the same, or in double the value of the property attached, conditioned to pay such value, in the event of being cast in the suit. *Held*, that where a bond was given which did not clearly show whether it was given for double the amount of the demand or double the value of the property, but which was conditioned "to be satisfied by delivery of the property or its value," the condition as thus expressed must control, and a personal decree for the amount of the recovery could not be entered against the sureties.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This was a bill by H. Clay Evans against the Chattanooga, Rome & Columbus Railroad Company and others, to subject certain railroad property to the payment of a judgment. The circuit court found in favor of the complainant's claim, and, the property having been attached and then replevied by defendants, a decree was pronounced against all the parties to the replevin bond, from which decree they have appealed.

The Chattanooga, Rome & Columbus Railroad Company is a corporation of the state of Georgia. Its road was constructed in 1887, and included about 157 miles of railroad, extending from Carrolton, in the state of Georgia, to Chattanooga, in the state of Tennessee. Only about five miles of its entire line is within the state of Tennessee, the remainder being within the state of Georgia. The Savannah & Western Railroad Company is another Georgia corporation, owning and operating a line of railroad in that state. In May, 1891, the first-named railroad sold and conveyed its entire line of railroad, and all of its equipments and assets of every kind, to the latter company. This sale by the one company to the other was fully authorized by the charter of each of the contracting companies. The complainant Evans is a judgment creditor of the selling company, with an execution returned nulla bona. His original bill was filed in the Tennessee chancery court, for the purpose of subjecting so much of the property of the Chattanooga, Rome & Columbus Railroad Company as was situated within the state of Tennessee. The entire property of the selling company was at the time of sale subject to two mortgages, the Central Trust Company of New York being the trustee in each. The first mortgage was to secure 2,240 5 per cent. gold bonds, of the denomination of \$1,000 each; and the second included the same property, as well as the income of the mortgagor company. This latter mortgage was to secure "income bonds," aggregating \$1,400,000. Both these mortgages had been duly executed before Evans became a creditor. The object of his bill was to subject the Tennessee property to the satisfaction of his debt, notwithstanding these mortgages and the conveyance of the equity of redemption to the Savannah & Western Railroad Company. His contention, briefly stated, was as follows: (1) That his judgment was for work and labor done on the property of the Chattanooga, Rome & Columbus Railroad, and that under the statute law of the state no mortgage made by a railroad in that state was valid as against an execution upon such a judgment. (2) That both the selling and buying railroad companies were nonresidents of the state of Tennessee; that neither was incorporated under the law of Tennessee, and neither was authorized to buy, sell, own, or operate a railroad in that state, neither having registered its charter as required by the law of that state; that the deed made by the debtor company was absolutely void for noncompliance with the requisite conditions authorizing nonresident corpora-

tions to do business in that state. (3) That the sale to the Savannah & Western Railroad Company was made with the purpose and intent of hindering, delaying, and defrauding the general creditors of the selling company, and that this purpose was known and participated in by the buying corporation. (4) That the selling company was wholly insolvent at the time of the sale, and that its property was therefore a trust fund for the equal benefit of all its creditors, and that a sale which deprived it of all its assets, and made no provision for its general creditors, was fraudulent in law and fact. Evans' bill was filed for the benefit of himself and all other creditors who might choose to intervene and become parties. An attachment was prayed and granted, which was levied, not only on the railroad situated within the state, but upon locomotive engines, cars, machinery, tools, office furniture, etc., found within the jurisdiction. The property thus attached was replevied, under a provision found in the Tennessee Code, by the purchasing company and its lessee, the Richmond & Danville Railroad Company, and by the Central Trust Company, trustee, under the two mortgages heretofore mentioned. Subsequently the suit was removed from the state court into the United States circuit court for the Eastern district of Tennessee by two of the defendant corporations. Upon a final hearing the circuit court held that the attached property was subject to the claim of Evans, as well as to the claims of two other creditors who had become parties by intervention, and a decree was pronounced against all the parties to the replevin bonds for the full amount of the claims adjudged. From this decree all the defendants have appealed and assigned errors.

J. H. Barr and Alex. C. King, for appellants.

R. P. Woodward, Clark & Brown, and Charles R. Evans, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

The decree of the circuit court seems to have been rested upon two propositions: First. That the sale and transfer of the Chattanooga, Rome & Columbus Railroad Company was fraudulent and void as to the creditors of that company, and the property conveyed subject to attachment. Second. That the obligation of the several replevy bonds executed to secure the discharge of the attached property from the custody of the court was such that the obligors therein were absolutely liable for the amount of the claim of each attaching creditor, and that this liability could not be discharged by the return of the replevied property. Those bonds were conditioned to pay off the claims of the several attaching creditors, or return the replevied property to the custody of the court, in case it should be determined that the property for which these bonds were a substitute should be held subject to attachment. Entertaining the opinion that the liability of the obligors in those bonds may be discharged by the performance of either alternative, it has become necessary to determine the rights of the appellees in case the property shall be returned. This involves a series of difficult and important questions, which will be considered in the following order: (1) Was the deed of May 1, 1891, conveying all the assets of the Chattanooga, Rome & Columbus Railroad Company, so obnoxious to the statute law of Tennessee concerning foreign corporations as to be absolutely void, for any

and all purposes? (2) Have the complainants, by reason of the character of their several claims, any such equity or lien as entitles them to a preference over the two mortgages mentioned, or to follow the corporate property into the hands of a bona fide purchaser for value? (3) Was the deed of May 1, 1891, voidable for fraud by the creditors of the grantor corporation?

First. What is the effect of the Tennessee statute of March 26, 1891, upon the conveyance of May 1, 1891, to the Savannah & Western Railroad Company? The insistence of appellees is that the deed then made by the Chattanooga, Rome & Columbus Railroad Company is absolutely void as to so much of said road as was within the state of Tennessee, and that the title to the Tennessee portion remained in the grantor company. The second and third sections of that act are as follows:

"Sec. 2. Be it further enacted, that each and every corporation created or organized under or by virtue of any government other than the state, for any purpose whatever, desiring to own property or carry on business in this state of any kind or character, shall first file in the office of the secretary of state a copy of its charter, and cause an abstract of same to be recorded in the office of the register in each county in which the corporation desires to carry on its business or to acquire or own property, as now required by section 2, of chapter 31, of Acts of 1877.

"Sec. 3. Be it further enacted, that it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or acquire any property in this state without having first complied with the provisions of this act; and a violation of this statute shall subject the offender to a fine of not less than \$100 or more than \$500, at the discretion of the jury trying the case."

That the grantor company was lawfully doing business in the state, and had power to convey to one capable of acceptance, is not seriously resisted. It had acquired by gift or grant a right of way, and had constructed and operated its road for several years before the passage of the act of 1891. When that act was passed it certainly had the option to abandon business in the state, or, by complying with its requirement, obtain the necessary authority to continue doing business. If not permitted to "own or acquire any property," it was clearly not the intent to prohibit a sale of that which it lawfully had, especially if made for the purpose of discontinuing business. Such a construction would operate to deprive the corporation of its property without due process of law, and would be a practical confiscation. That it was lawfully in the state was clearly recognized by the act of March 14, 1890, which recognizes it as a Georgia corporation owning and operating a railroad from Chattanooga to the Georgia state line, and empowered the city of Chattanooga to ratify a subscription to its corporate stock theretofore irregularly made, on condition that the amount thereof should be expended within the city in acquiring depot facilities, shops, etc. Independently of this, we think that the state had licensed the construction of this road by the act of March 23, 1887. That act reads thus:

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that any railroad corporation created by the laws of any other state, shall be authorized and empowered to extend its railroad into this state a distance of not exceeding five miles from the point of its entrance into this state, for

the purpose of reaching a terminal point, or a general or a union depot, in or in the vicinity of any city, town, or village in this state.

"Sec. 2. Be it further enacted, that such corporations may acquire the right of way for their railroads from the line of this state to their terminal points or depots, in this state, by purchase, or by gift, or by condemnation, according to the laws of this state, as provided in sections 1550-1573, inclusive, of the Code of Tennessee (Milliken & Vertrees).

"Sec. 3. Be it further enacted, that such corporation shall have the power and right to purchase, hold, use, and enjoy all real estate necessary for the erection and maintenance of their depots, shops, yards, sidetracks, turnouts, and switches, both along the route and at their terminal points in this state: provided, they shall first apply for and receive a charter in this state."

The proviso appended to the third section should be limited to the powers granted by that section. To apply it to the two first sections would be repugnant to their purpose and intent, and such a construction would be inadmissible, unless no other construction was possible. *Savings Bank v. U. S.*, 19 Wall. 227-236. A proviso to a particular section does not apply to others, unless plainly intended. *Suth. St. Const.* § 223; *U. S. v. Babbit*, 1 Black, 55. The grantor corporation had acquired a mere right of way, and seems to have owned no depot or yard or shops or other terminal facilities at Chattanooga. But it is argued that, if it be conceded that the grantor had power to convey, the grantee had no power to take, own, or acquire, not having complied with the provisions of the act of 1891. That a state has the right to prescribe terms upon which a corporation of another state or country may carry on business within its borders is well settled. *Bank v. Earle*, 13 Pet. 519; *Insurance Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93. That there are limitations upon this power is equally well settled, for it cannot impose as a condition that such nonresident corporation shall not resort to the courts of the United States. *Insurance Co. v. Morse*, 20 Wall. 445; *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931. Neither would a statute be valid which imposed any condition conflicting with the constitution or laws of the United States. A limitation upon the right of a corporation of another state to carry on commerce between the states would be an infringement upon the exclusive control of congress over commerce among the states. *Paul v. Virginia*, 8 Wall. 168; *Manufacturing Co. v. Ferguson*, 113 U. S. 734, 5 Sup. Ct. 739. The agreed statement of facts upon which this case was heard sets out that "the only business that was done by the C., R. & C. R. R. Co. within the state, and that done by the Savannah & Western R. R. Co. after its purchase of said road, and by the Richmond & Danville R. R. Co. in operating said road, was that of interstate commerce or traffic, consisting in the carrying of passengers, baggage, freights, and the United States mails from the state of Georgia and other states into the state of Tennessee, and vice versa." It has been earnestly argued that any law of the state imposing any conditions, not strictly of a police character, upon a nonresident corporation, engaged exclusively in interstate commerce, by which it was prohibited from acquiring the necessary facilities to conduct such commerce, would

be inhibited as an interference with interstate commerce. We do not think it necessary to determine this question, being of opinion that the conveyance of this road to the grantee company was operative to pass such title as the grantor company had. The Tennessee act does undoubtedly make unlawful the acquisition of property within the state by any nonresident corporation until it first acquires the right to do business in that state in the mode prescribed by the local law. Assuming, therefore, that when the Savannah & Western Railroad Company acquired this property it violated the law of the state, yet it does not follow that the title remained in the grantor company notwithstanding its conveyance. Neither does it follow that the grantor, or its assignee or creditors, could institute a proceeding to recover the title. The Tennessee statute subjects the corporation violating the statute to a fine. It nowhere declares that the conveyance by which the offending corporation acquired the property shall be inoperative to pass the title out of the grantor. The prohibition upon the acquisition of property found in this statute is substantially the same as that in a Colorado statute construed in *Fritts v. Palmer*, 132 U. S. 282-289, 10 Sup. Ct. 93. The suit in that case was by a subsequent grantee, who took a quitclaim deed after his grantor had made deed to a nonresident corporation. The Colorado statute prohibited the acquirement of real estate within the state by any nonresident corporation until it had first acquired the right to do business in the state in the mode prescribed by the statute. It did not declare that titles taken in violation of the law should be wholly and absolutely void, nor that the title should remain in the grantor. It did, however, impose a severe penalty for its violation. The court held that the title passed by the deed to the corporation, and could not be recovered by the grantor or one standing in his shoes, saying:

"The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that state. It is not for the judiciary, at the instance or for the benefit of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others. If Groshon, the grantor of the Comstock Mining Company, had himself brought this action, the injustice of his claim would be conceded. But the present plaintiff, who asserts title under a quitclaim deed from Groshon made after the property had passed, by the sale under the deed of trust, from the mining company, cannot, in law, occupy any better position than the original grantor would have done if he had himself brought this action. If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the state, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested."

This case was followed in *Seymour v. Gold Mines*, 153 U. S. 523, 14 Sup. Ct. 847. The principle upon which these cases rest has been repeatedly announced by the supreme court. *Smith v.*

Sheeley, 12 Wall. 358; *Bank v. Matthews*, 98 U. S. 627; *Bank v. Whitney*, 103 U. S. 103; *Swope v. Leffingwell*, 105 U. S. 3; *Reynolds v. Bank*, 112 U. S. 412, 5 Sup. Ct. 213. The construction we have adopted finds support in *Mill Co. v. Bartlett* (N. D.) 54 N. W. 544; *Carlow v. C. Aultman & Co.*, 28 Neb. 672, 44 N. W. 873; *Fisk v. Patton*, 7 Utah, 399, 27 Pac. 1; *Wright v. Lee* (S. D.) 51 N. W. 706; 55 N. W. 931. It is based upon the abhorrence which equity has of the harshness of a construction, uncalled for by any express requirement of the statute, which would operate to effect a forfeiture. That the state only can take advantage of the want of capacity in a corporation to take and hold land is well settled. *Barrow v. Turnpike Co.*, 9 Humph. 303; *Runyan v. Coster's Lessee*, 14 Pet. 122-131; *Davis v. Railroad Co.*, 131 Mass. 273; *Mor. Priv. Corp.* § 665; *Jones v. Habersham*, 107 U. S. 181, 2 Sup. Ct. 336; *Hickory Farm Oil Co. v. Buffalo, etc., R. Co.*, 32 Fed. 22; *Heiskell v. Lodge*, 87 Tenn. 668, 11 S. W. 825. In the case last cited the court recognized the obvious distinction between a contract executed and one executory, saying:

"There is a distinction between the case where a corporation has received and is holding property in excess of the limitations in its charter and the case where its rights have not vested and it is not in possession. In the first case no one but the state can raise the question or enforce a forfeiture."

The case of *Lumber Co. v. Thomas*, 92 Tenn. 593, 22 S. W. 743, is supposed by counsel for appellees to be in antagonism with the view we have indicated as to the effect of the act of 1891 upon the deed in question here. We do not concur in this view. That was a suit by a nonresident corporation doing business in the state without having complied with the act. The court refused to aid the plaintiff or to enforce the contract into which it had entered. It is true that the court did use some very broad language in regard to contracts by such corporations who had not complied with the local law. But what was there said was in regard to an effort to obtain the affirmative aid of the court in the enforcement of a contract prohibited by the statute. A very broad distinction exists between an executed and an executory agreement. The statute has declared no forfeiture, and we are not disposed to aid in bringing about so inequitable a result. "A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture." *Bank v. Matthews*, 98 U. S. 621.

Second. The mere fact of insolvency did not operate to fasten any such specific lien upon the property of the Chattanooga, Rome & Columbus Railroad Company as to enable general and unsecured creditors to follow the property into the hands of preferred creditors to whom it was assigned. For a stronger reason, such creditors cannot reach corporate assets conveyed to a bona fide purchaser. The Chattanooga, Rome & Columbus Railroad Company was embarrassed, and its debts exceeded its assets; but it was a going corporation, and might bona fide assign its property for the benefit of preferred creditors, or make a sale to a purchaser in good faith and for value. Whatever a natural person might do an embarrassed but going corporation could do, unless prevented by some

provision of its charter or inhibition found in the local law of the state. Neither will a condition of insolvency prevent the creditors of a going corporation from securing priority by attachment or levy of execution or other due course of law. *First Nat. Bank v. North Alabama Lumber & Manuf'g Co.*, 91 Tenn. 12, 18 S. W. 400. In case of an absolute sale of all the property of an embarrassed corporation, the purchase price, with respect to creditors, will stand as a substitute for the property conveyed, and the creditors' rights may be enforced against that price. *Mor. Priv. Corp.* §§ 784, 789, 791; *First Nat. Bank v. North Alabama Lumber & Manuf'g Co.*, 91 Tenn. 12, 18 S. W. 400.

It is as true in regard to a corporation as it is in the case of a natural person that any transfer of its property without authority of law and in fraud of existing creditors is void as against them. But a simple contract creditor has no such lien upon the property of an embarrassed corporation as will enable him to set aside an assignment or a sale made in good faith and in accordance with law. There is a sense in which it is often said that the property of a corporation is held in trust for the payment of its debts. But no direct trust or lien attaches to the property of a corporation in favor of its simple contract creditors. Speaking of the doctrine sought to be invoked here, Mr. Justice Field, in *Fogg v. Blair*, 133 U. S. 541, 10 Sup. Ct. 338, said:

"That doctrine only means that the property must first be appropriated to the payment of the debts of the company, before any portion can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In respect to the same doctrine, Mr. Justice Brewer, in the later case of *Hollins v. Iron Co.*, said:

"The same idea of equitable lien and trust exists to some extent in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is therefore sometimes said, not inaptly, to be held in trust for the partnership creditors, or that they have an equitable lien on such property; yet all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust." 150 U. S. 385, 14 Sup. Ct. 127.

The insistence of the appellees that their claims constituted a lien upon the property of the grantor company superior to the lien of the mortgages, though the latter were prior in time to the origin of their several debts, and superior to the deed of sale, is based upon a provision found in an act of the general assembly of Tennessee passed in 1877. The section of that act which bears upon the question in hand is in these words:

"That no railroad company shall have power under this act, or any of the laws of this state, to give or create any mortgage or other kind of lien on its railroad property in this state, which shall be valid and binding against
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judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of, its railroad in this state."

The Tennessee supreme court has construed this act as operating as a limitation upon the power of railroad companies to give a mortgage or create a lien upon their property situated in the state, which should be valid as against claims of the character mentioned in the act. *Frazier v. Railway Co.*, 88 Tenn. 138, 12 S. W. 537. Such claims do not constitute liens by virtue of the act. The act has no other effect than to postpone mortgages and other liens created by act of the railroad company to claims of the character mentioned. A bona fide sale would not be a mortgage or lien, within the terms of the act, and the title of such a purchaser would be unaffected by the act. If the Savannah & Western is a bona fide purchaser, it may set up the deed under which it holds as an answer to a claim, though clearly within the preferential class defined by the statute. We are, however, of opinion that none of the claims asserted by appellees are entitled to the benefit of this provision. The claim of Evans is for material furnished and work and labor done in his machine shops upon locomotive engines. The act only refers to work and labor done "on" the railroad in Tennessee. Work done on an engine may be work done for a railroad, but is not work and labor done "on" the railroad. The claim of James & Co. is for general railroad supplies, such as tools, spikes, hardware, etc. The act does not prefer any claim for materials other than "timbers furnished." The claim of Kratzenstein was for damages in detention of freight shipped over its line of railway. There is no evidence as to the character of the damages sustained. If the goods perished or were injured in transit through this state, Kratzenstein would seem to be within the saving of the statute, as having a claim for "damages done * * * to property in this state." There are two objections to this claim: First. It is not shown that Kratzenstein's property was damaged in the operation of the railway. If his loss was not due to an actual injury to his property, then he has not made out a case of "injury to property," within the meaning of the act of 1877. Second. It is not shown that any injury was done his property in the operation of the road within this state. If his damages were sustained at some point on the line, but in another state, the claim is not within the act. Kratzenstein alleges that his loss was "for a delay at Chattanooga." The answer only admits that his judgment was for damages for "detention on some part of its line of railroad." There is no evidence as to where he sustained his loss, or as to whether his damages were to the goods in shipment, or for a decline in the market, or loss of a profitable contract by reason of delay. One who seeks to avail himself of a proviso limiting the operation of a general power must bring himself clearly within the exception. For the reasons stated, none of the claims of appellees are entitled to preference over the mortgages, by reason of anything in the statute above cited. All other questions aside, the mortgages would be entitled to be first satisfied, and only the

surplus could be subjected by creditors of the class to which appellees belong.

Third. This brings us to the question of the bona fides of the conveyance of May 1, 1891. As we have already stated, that sale included every particle of the tangible property of the debtor corporation. If that sale was made in good faith and for a valuable consideration, the creditors unprovided for, and having no liens, are without recourse, and no other decree would be admissible than one reversing the decree of the circuit court and dismissing the bill. The consideration for the sale, as stated in the deed, was substantially as follows:

(1) The assumption by the Savannah & Western Railroad Company of the principal and interest of the 2,240 first mortgage gold bonds, secured by the trust deed of September 1, 1887, to the Central Trust Company of New York, said bonds being of the denomination of \$1,000 each.

(2) A covenant by which the purchasing company agreed

—“To pay or cause to be paid to the said party of the first part the sum of four hundred thousand dollars (\$400,000) of the first consolidated mortgage bonds of the said party of the second part, duly guaranteed by the Central Railroad & Banking Company of Georgia, the same to be paid to the said party of the first part by and through the said the Central Railroad & Banking Company of Georgia, for the use and benefit of the holders of the income bonds and of the stock of the said party of the first part. Two hundred and ninety-five thousand dollars (\$295,000) of which said bonds are acknowledged to have been paid to and for the holders of the three-fourths ($\frac{3}{4}$) of said stock and income bonds, which have been delivered and transferred in accordance with the terms of this indenture to the said the Central Railroad & Banking Company of Georgia, the receipts of which said two hundred and ninety-five thousand dollars (\$295,000) of said bonds is hereby acknowledged, and the remaining one hundred and five thousand dollars (\$105,000) of said Savannah & Western bonds as follows: Three (3) of said first consolidated mortgage bonds to be paid upon delivery to the said Central Railroad & Banking Company of Georgia of twenty of said income bonds, or upon the delivery of four hundred (400) shares of said stock, which said income bonds and stock it is expressly agreed by the said party of the first part shall be delivered, assigned, and transferred to said the Central Railroad & Banking Company of Georgia, and become and be held by it as its property, with all the rights of any other income bond or stock holder, except the right to demand or receive any part of said Savannah & Western consolidated first mortgage bonds in consideration for the guaranty placed by the said the Central Railroad & Banking Company of Georgia upon the said Savannah & Western consolidated first mortgage bonds, and the receipt or receipts of any holder of any of said income bonds or stock of said party of the first part presenting the same to the said Central Railroad & Banking Company of Georgia shall be a full and sufficient voucher and evidence of payment of such portion of said Savannah & Western first mortgage bonds as may have been delivered to such bond or stock holder, and as such a full and sufficient receipt, evidencing the payment of so much of the purchase price above covenanted to be paid. The said party of the second part in no way obligates or binds itself to pay either the principal or the interest of the income bond issued by said party of the first part, dated September 2, 1887, and secured by a deed of trust to the Central Trust Company of New York, except as hereinbefore provided; and said deed of trust is to have no other or further operation than such lien as it may have by the operation of such deed to secure the principal of said bonds subordinate to the lien of said first mortgage hereinbefore set out; and the said party of the first part, for itself and its successors, doth hereby covenant that it hath good and sufficient title to the railroad property, rights, and franchises herein and hereby conveyed, and the right to convey the same, and that the same are unincum-

bered save as herein specified, and that it and its successors will and do by these presents warrant and defend the same, and every part thereof, to the said party of the second part, its successors and assigns, against the claims of all persons whatsoever; and the said party of the first part, for itself, its successors and assigns, doth hereby covenant, grant, and agree to and with said party of the second part, its successors and assigns, that said party of the first part, its successors and assigns, shall and will at any time, and from time to time hereafter, upon request make, do, execute, and deliver all such further and other acts, deeds, and things as shall be reasonably advised, devised, or required to effectuate the intention of these presents to secure and confirm to the said party of the second part, its successors or assigns, all and singular, the property and estate, real and personal, and rights, privileges, and franchises hereinbefore described and intended to be granted, and so as to render the same, and all portions thereof, available to the said party of the second part, according to the intent and purposes herein expressed."

In aid of the interpretation of this deed, the resolution of the board of directors of the selling company was introduced as evidence. That resolution was in these words:

"Mr. W. W. Brooks offered the following resolution: 'Resolved, that this company will sell to the Savannah & Western Railroad Company its railroad, including all branches, rolling stock, depot facilities, and all property of every character, its rights and franchises, and assign, transfer, and set over to it its contracts with the United States Express Company, the Western Union Telegraph Company, the Southern Railway News Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, and all other contracts for building side tracks, for shipping ores or other commodities, or which bind any persons to furnish freight, lands, or facilities of any kind to the Chattanooga, Rome & Columbus Railroad Company, for four hundred thousand dollars (\$400,000) of the Savannah & Western Railroad Company first consolidated mortgage bonds, guaranteed by the Central Railroad & Banking Company of Georgia, to be paid out to the holders of the income bonds and stock of the Chattanooga, Rome & Columbus Railroad Company, at the rate of three (3) Savannah & Western bonds for twenty (20) income bonds or four hundred (400) shares of stock, said income bonds and stock not to be extinguished, but to become the property, with all the rights now existing, of the Central Railroad & Banking Company of Georgia, in consideration of the guaranty on said Savannah & Western Railroad Company bonds. Said Savannah & Western Railroad Company also to assume the payment of the principal and interest of the first mortgage bonds of this company, and the president and secretary are hereby authorized to execute and deliver an agreement to sell said stock, property, and franchises; also a deed, with covenants of warranty, to the said the Savannah & Western Railroad Company, conveying to it the above railroad property, rights, contracts, and franchises,'—which resolution was unanimously adopted."

The answer of the respondent companies alleged that, as a part consideration, the said Savannah & Western Railroad Company paid off the said income or second mortgage bonds. There was no other material proof as to the consideration paid or to be paid than afforded by the deed and resolution above recited. It may be that, as between the Savannah & Western and the Chattanooga, Rome & Columbus Railroad Companies, there was some secret trust or unexplained arrangement by which, as between them, the income bonds were to be regarded as paid. The answer, in which both of those corporations join, asserts that the payment of the income bonds was a part of the consideration for the sale. However this may be,—and as to this no evidence was offered,—the deed does not bear out the answer; for it is therein expressly recited that the \$400,000 of the consolidated bonds of the Savannah & Western were to be paid "by and through the said Central," etc.,

"for the use and benefit of the holders of the income bonds and of the stock of the said party of the first part." The then holders of those bonds and of the shares of stock were to receive the Savannah & Western bonds in exchange upon the terms set out in the deed. The deed further recites that the bonds and stock were to be delivered to the said Central Company, "and become and be held by it as its property, with all the rights of any other income bond or stock holder, except the right to demand or receive any part of said Savannah & Western consolidated first mortgage bonds in consideration of the guaranty placed by the said Central," etc., "upon the said Savannah & Western consolidated first mortgage bonds." The deed further provided that, while the Savannah & Western did not assume or obligate itself to pay either the principal or interest of said bonds, the lien of the second mortgage was to continue. The suggestion that the Savannah & Western bonds, to be delivered in exchange for income bonds and stock, were bonds owned by the Central Company, is not borne out by any fair inference drawn from the deed. The resolution authorizing the sale, provided for a sale to the Savannah & Western upon condition that the purchaser would assume and pay the first mortgage bonds, and upon the further consideration of \$400,000 of its mortgage bonds, to "be paid out to the holders of the income bonds and stock," in the ratio heretofore stated. That resolution also provided that "the income bonds and stock should not be extinguished, but to become the property, with all the rights now existing, of the Central," etc., "in consideration of the guaranty on said Savannah & Western Railway Company's bonds."

If, as suggested, the Central Company bought these bonds and shares with its own property, why make any reference to it at all? If it paid out its own bonds, then that was a good consideration. Yet the directors' resolution and the deed recite that the consideration upon which it was to become the owner of the income bonds and stock was its guaranty of the Savannah & Western bonds to be paid out for them. The single expression of the deed that these Savannah & Western bonds were "to be paid to the party of the first part by and through the Central," etc., does lend some color to the suggestion that the bonds were bonds owned by the Central Company. The transaction is shrouded in mystery, but it was a mystery which could have been fully explained by the parties to the deed. This they have not chosen to do, though the circumstances are clearly such as to call for an explanation. In the light of the evidence afforded by the deed, we can but infer that, as a part consideration for the sale of the entire property of the grantor company, it, "the party of the first part," was to receive \$400,000 in the bonds of the buying company. These bonds were to be strengthened by the indorsement of the Central Company, which, as a consideration for this indorsement, was to become the owner of the income bonds and capital stock. This guaranty of the Savannah & Western bonds was an element of value contracted for by the selling corporation, the benefit of which was to inure to the holders of the bonds and stock. Thus the interest and right of

redemption which the selling corporation had in its entire corporate assets were to be transferred for \$400,000 of the guaranteed bonds of the buying company. These bonds were a corporate asset, and should have been held by the officers and directors of the Chattanooga, Rome & Columbus Railroad Company, as a substitute for the property sold and subject first to the demands of creditors. Instead of this, the contracting parties entered into an arrangement by which every dollar of that purchase price was diverted from creditors, and distributed between those creditors then holding income bonds and its shareholders. This distribution did not operate to pay a dollar of corporate debts. The income bonds, according to the scheme, were to continue obligations of the selling corporation and a lien on its property. It was a matter of no importance to the Chattanooga, Rome & Columbus Railroad Company whether the income bonds should be held by those who then owned them or should become the property of the Central Railroad & Banking Company. In either case, according to the device, they were to remain obligations of the debtor company. The device was doubly fraudulent, in that so much of this price as was not to be used in enabling the Central Company to acquire the income bonds was to be distributed among the shareholders, not for the purpose of extinguishing the shares, but as a consideration inducing the then shareholders to part with their shares to the Central Company. Any device by which the assets of an insolvent corporation are to be parceled out between shareholders, leaving creditors unpaid, is a fraud of which creditors affected may complain. That such creditors may follow the purchase money thus wrongfully paid into the hands of stockholders is very clear. That shareholders have only a right to the surplus, after all debts are paid, is familiar law. *Railroad Co. v. Howard*, 7 Wall. 392.

Creditors of an insolvent corporation may ignore a sale of corporate property if the transaction was tainted with fraud, and both buyer and seller participated in the fraudulent purpose. The effect of fraud upon an assignment or sale of corporate property is identical with its effect upon a like transaction between natural persons. *Vance v. Coke Co.*, 92 Tenn. 47, 20 S. W. 424, is a case somewhat like this in many of its features. The suggestion that the sale included, not only the corporate property, but the shares of stock, and that as the shares belonged to the shareholders it was not a fraud on creditors that they should receive their just proportion of the gross price to be paid, has absolutely no basis. The shares were manifestly worthless. The price paid for them was really a part of the price paid for the corporate property, and this fact was not even concealed. For their assent to the sale they demanded and received a part of the consideration to be paid for the corporate property.

The case of *Railroad Co. v. Howard*, heretofore cited, is an interesting and instructive case, in which an arrangement for the sale of the property of an insolvent railroad was negotiated between the bondholders and stockholders, the latter to receive a dividend upon their shares. Unsecured creditors intervened, and obtained

satisfaction of their debts out of the proceeds of sale set apart for the stockholders, notwithstanding an objection was interposed of a like character to that we have here to meet. In that case, as in this, it was apparent that the price to be paid for stock was really a part of the purchase price of the corporate property. This brings us to the question as to how far the Savannah & Western Railroad Company was affected by a knowledge of the misapplication of corporate assets intended by the selling corporation. It may be, for the purposes of this case, conceded that a purchaser of corporate property would not in all cases be chargeable with a participation in the fraudulent misapplication of corporate assets from the mere fact that a part of the purchase price was to be paid to the stockholders, or on their account. After the payment of debts, the shareholders are entitled to the surplus. Where a purchaser has no knowledge of the insolvency of a corporation, and there is nothing in the transaction calculated to put him on his guard, he would, in most cases, be perfectly safe in buying, though it appeared that the purchase price, or a part, was to be distributed among the shareholders. But in the case before us the Savannah & Western Railroad Company knew that it was dealing with an insolvent corporation. This was manifest from the terms upon which the second mortgage bonds were to be obtained. It also knew that, although all parties regarded the income bonds as very inadequately secured, yet shareholders were to participate in the distribution of the purchase price, and that the Central Railroad & Banking Company, for some unexplained reason, was to become the owner of the income bonds and shares to be exchanged for its bonds. It is said that it did not know that the selling company was indebted to creditors other than the mortgage creditors, and that, therefore, it had a right to assume that no fraud was intended by the distribution to be made of the bonds it was to pay as part of the purchase price. There is no affirmative evidence as to its knowledge or want of knowledge. The bill directly charged it with having knowledge that the selling corporation owed "a large amount to other creditors," unprovided for. It answers this in a most vague and unsatisfactory way by denying that the Chattanooga, Rome & Columbus Railroad Company "owed any large amount," or that it had any knowledge thereof. This method of making an issue upon the adjective "large," instead of fully stating its knowledge or want of knowledge, is most suspicious, and really does not amount to a denial of knowledge. Again, it did know, and this is fully shown by the circular letter signed by its president, that it was obtaining all the assets of every kind and character which belonged to an insolvent corporation. With all this knowledge, it entered into an agreement by which a large part of the purchase price, which, as to creditors, was a substitute for the property sold, was to be placed beyond the reach of its creditors, if any it had. Under such circumstances, we think it was put upon inquiry, and chargeable with knowledge of all such an inquiry would have disclosed concerning the existence of other creditors. If properly chargeable with the knowledge that there were other creditors unsecured and

unprovided for, then it must be taken to have participated in the fraudulent designs and purposes of the grantor. The decree of the circuit court upon this point must be affirmed.

This brings us to the question of the decree which should be rendered. But for the fact that the property attached has been replevied, under sections 4250 and 4255 of the Revised Statutes of Tennessee, by Milliken & Vertrees, there would be little difficulty. The complainants could sell only such interest as the debtor company had in the property attached. That would be its right or equity of redemption in so much of the property as was attached subject to the two outstanding mortgages. The second mortgage, on the facts we have stated, should be regarded as satisfied as to attacking creditors, in so far as the bonds thereunder secured are still held by the Central Railroad & Banking Company of Georgia, or by one not a purchaser for value and without notice. The circumstances under which it obtained the income bonds are such as should estop it from setting them up as unpaid subsisting obligations as against complainants. The assets of the Chattanooga, Rome & Columbus Railroad Company having been used in obtaining them, they should be treated as canceled obligations, as between it and other creditors of the debtor company. Before this cause was removed from the state chancery court, the Savannah & Western Railroad Company, the Central Railroad & Banking Company of Georgia, the Richmond & Danville Railroad Company, and the Central Trust Company of New York joined in the execution of a bond in order to avail themselves of the privilege extended by section 4250, Revision of Milliken & Vertrees. That section reads as follows:

"4250. The defendant to an attachment suit may always replevy the property attached by giving bond, with good security, payable to the plaintiff, in double the amount of the plaintiff's demands, or at defendant's option, in double the value of the property attached, conditioned to pay the debt, interest and costs, or the value of the property attached, with interest, as the case may be, in the event he shall be cast in the suit."

Section 4255 is in these words:

"4255. The court may enter up judgment or decree upon the bond, in the event of recovery by the plaintiff, against the defendant and his sureties for the penalty of the bond, to be satisfied by delivery of the property or its value, or payment of the recovery, as the case may be."

The bond executed to the complainant Evans, a like bond having been executed to other attaching creditors who became parties by intervention, was in these words:

"State of Tennessee, Chancery Court of Hamilton County.

"Know all men by these presents, that we, the Savannah & Western Railroad Company, the Central Railroad & Banking Company of Georgia, the Richmond & Danville Railroad Company, the Central Trust Company, principals, and A. N. Sloan, C. A. Lyerly, and Barry & McAdoo, sureties, are held and firmly bound unto H. Clay Evans in the sum of nine thousand dollars, to the payment of which, well and truly to be made and done, we bind ourselves jointly and severally, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 20th day of January, one thousand eight hundred and ninety-two. The condition of the

above obligation is such that whereas, on the 18th day of January, 1892, the sheriff of Hamilton county, Tennessee, levied an attachment issued by the chancery court of Hamilton county at suit of complainant in the above-named suit upon the following property described as in the return of said writ, to wit: On the line of railway, side tracks, terminal facilities, depot grounds, shops, and rights of way of Chattanooga, Rome & Columbus Railway, or of the S. & W. Railway, extending from Chattanooga, Tennessee, on the line between the state of Georgia and Tennessee; also the following: One ticket case, 2 folding desks, 1 rule bill, 1 stove, 1 letter press and stand in the office of the R. & D. R. R. Co. at 830 Broad St., Chattanooga; also engine or locomotive marked 'C., R. & C. R. R., No. 2'; Engine No. 1,564, Engine No. 1,442, both of which engines are engines formerly marked 'C., R. & C. R. R.'; also coaches 1,176 and 1,177, formerly marked 'C., R. & C. R. R. Co.'; also all the bolts, fixtures, tools, and machinery in the old C., R. & C. R. R. shops, located just north of Montgomery Ave., Chattanooga, Tenn. And whereas, said property so levied on has this day been replevied, and same delivered to said principal obligors: Now, if said principal obligors herein shall pay the debt, interest, and costs of complainant, if the court shall adjudge the same against them or either of them, or shall adjudge the property attached and herein replevied is subject to the payment of same, they shall either pay said debt, interest, and costs or return said property, then this obligation shall be void and of no effect; otherwise to remain in full force and effect."

The circuit court rendered a decree against each bond thus executed for the amount of the debt of the creditor or creditors to whom it was executed, and did not direct that the decree might be discharged by a return of the property attached. This is assigned as error, inasmuch as the bonds provide that the obligors shall "either pay said debt or return said property." The statutory provisions above set out have been construed by the Tennessee supreme court as operating to discharge the property from the lien of the attachment and from the custody of the court, and rendering it subject to levy of other attachments or executions, and that the bond is substituted for the property replevied. *Barry v. Frayser*, 10 Heisk. 217. These provisions have been construed as providing for two distinct classes of bonds. In the case cited above, Judge Freeman, for the court, in construing the liability of the obligors upon such bonds, said:

"By the first section, though it is not very clearly expressed, the defendant has his option, when he replevies the property, to give his bond either in double the amount of the plaintiff's decree, or in double the value of the property attached, conditioned to pay the debt, interest, and costs, if given for double the amount of plaintiff's demand, but, if for the value of the property, conditioned to pay the value of the property attached, with interest, as the case may be, in the event of his being cast in the suit. If the bond is given for double the value of the property, then the court may render judgment or decree against the defendant for the penalty of the bond, to be discharged or satisfied by delivery of the property or its value. In the event the bond is given for double the amount of plaintiff's demand, then the decree is for the penalty of the bond, to be satisfied by payment of the debt, but not exceeding the penalty of the bond."

The bond in this case does not clearly show that it was given in double the value of the attached property. If it did, the proper judgment would be for the penalty of the bond, "to be satisfied by delivery of the property or its value." Neither does it clearly appear that it was given for double the amount of plaintiff's demand, inasmuch as it is recited that the bond might be satisfied

by the payment of that demand or by the "return of the property." The debt of Evans was for \$4,311.09, with interest from November 19, 1891, to January 16, 1892. The bond is for a sum considerably in excess of double this claim. Presumptively five miles of railway, together with two engines and other equipments, were worth much more than the amount of this bond. Yet the bond contains the condition that it may be discharged by a return of the property, a condition which applies only to a bond for double the value of the property attached. It is not strictly in compliance with either provision for a bond. The condition that it may be discharged upon return of the property is one which cannot be disregarded. The bond is in the alternative, and may be discharged by the performance of either one of the alternative conditions. *Dumont v. U. S.*, 98 U. S. 142.

An irregular bond was construed in *Kuhn v. Spellacy*, 3 Lea, 278. Its condition was to return the property. Judge McFarland, one of the ablest judges of the Tennessee court, said:

"The bond is not strictly a statutory bond; that is, it is not, in terms, either in double the amount of the plaintiff's demand, conditioned to pay the same, or in double the value of the property attached, conditioned to pay its value, in the event he be cast in the suit, as provided by section 3509; but, its condition being to account for the property, it should be regarded as falling under the latter class,—that is, a bond in double the value of the property attached, conditioned to pay its value and interest in the event the defendant be cast in the suit. The proper judgment on this bond, as prescribed by section 3514, was a judgment for the penalty of the bond, which may be satisfied by the delivery of the property or its value." *Kuhn v. Spellacy*, 3 Lea, 280.

This case was followed in *Ward v. Kent*, 6 Lea, 131. *Green v. Lanier*, 5 Heisk. 662, and *Barry v. Frayser*, 10 Heisk. 217, are also in point as to the proper judgment on such a bond.

Following these Tennessee cases, construing a Tennessee statute, we hold that this bond must be regarded as a bond of the second class, and that its penalty is for double the value of the property attached. The proper decree is for the penalty of the bond, to be discharged upon the delivery of the property replevied. Inasmuch as the value is not specifically stated in the bond, it may, as was done in *Kuhn v. Spellacy*, *supra*, no reference having been asked below, be assumed that the value was one-half the penalty of the bond, or \$4,500. By the payment of that sum, with interest from date of the bond, the decree may be discharged. The decree actually rendered was for a less sum than this. The appellants cannot, therefore, complain. *Ward v. Kent*, *supra*.

It was intimated in *Kuhn v. Spellacy*, *supra*, that it was perhaps unnecessary to recite in the decree that it might be satisfied by a return of the property, as the right accrues under the statute itself. However this might be, if this proceeding was in the state court, it is clearly right that the decree should be so modified as to permit the appellants to satisfy the decree by returning the property replevied. This they may do, provided the property shall be placed in the custody and possession of the circuit court within 30 days after that court shall modify the decree as hereby directed.

In all other respects the decree of the circuit court is affirmed. The costs of this appeal will be equally divided between appellants and appellees, in the event the attached property be returned, but, if not so restored, the appellants will pay all costs of appeal.

BUILDING & LOAN ASS'N OF DAKOTA v. LOGAN et ux.

(Circuit Court of Appeals, Fifth Circuit. January 29, 1895.)

No. 334.

1. PRACTICE—CROSS APPEALS.

Cross appeals must be prosecuted like other appeals, and an assignment of error by an appellee cannot be considered unless an appeal has been regularly taken by him.

2. HOMESTEAD—EXTENT OF CLAIM—TEXAS CONSTITUTION.

The constitution of Texas (article 16, § 51) provides that "the homestead in a city * * * shall consist of lot or lots * * * used for the purpose of a home or as a place to exercise the calling or business of the head of a family." J., a married man and head of a family, was in possession of a lot of land, and carried on a laundry business thereon. The principal part of the buildings on the premises stood on the north 35 feet of the lot, but portions extended onto the south 40 feet, on which was also a spring from which water was obtained for use in J.'s business. The south 40 feet was not otherwise used, except for storing wood and coal, but the whole lot was inclosed with a fence. *Held*, that J.'s homestead included the whole lot, and that the homestead claim was not released, as to the south 40 feet, by tearing down the parts of the buildings standing on it, for the purpose of erecting a new building, which was at once erected, and used in connection with the old.

3. SAME—CONTRACT TO CHARGE HOMESTEAD FOR IMPROVEMENTS.

Under Const. Tex. art. 16, § 50, providing that a homestead is exempt from forced sale except for purchase money, taxes, or work and material for improvements thereon "contracted for in writing, with the consent of the wife, given in the same manner as is required in making a sale and conveyance of the homestead," it is not sufficient, in order to charge the homestead with the lien of a mortgage given to secure a loan for the purpose of making improvements, that the wife should join in the execution of the mortgage, but she must also join in the actual contract for the improvements.

4. CONTRACTS—LAW OF PLACE—USURY.

A bond executed and delivered in one state, but made payable in another, is governed, as to the objection of usury, by the laws of the latter state, unless such place of payment was fixed for the purpose of evading the usury laws.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This was a suit by the Building & Loan Association of Dakota against William J. Logan and Minnie Logan to foreclose a lien by a deed of trust. The circuit court rejected the claim of lien, but rendered a personal judgment against the defendants. Complainant appeals. Modified and affirmed.

James W. Brown and C. W. Starling, for appellant.

A. T. Watts and J. C. Muse, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

BRUCE, District Judge. This suit was instituted by appellant, a South Dakota corporation, against appellee, a citizen of the state of Texas, to foreclose a lien by deed of trust executed by defendants William J. and Minnie Logan on a lot or parcel of land in the town of Dallas, Tex. The defenses interposed are usury to the debt and homestead to the lien asserted, which complainant seeks to foreclose upon the property. There is also a question as to the claim of a vendor's lien upon the property, evidenced by an outstanding note for purchase money of the property at the time the deed of trust was executed. It is claimed, by way of cross assignment of error by respondents, that the court below erred in allowing this claim against the property, and subrogating the complainant to the vendor's lien as claimed. The record, however, though it shows a cross assignment of error, nowhere shows the taking of an appeal by the respondents from the decree of the court. The prayer for appeal is by the complainant on the 10th day of July, 1894, and was on that date allowed with security in the sum of \$250. So that the question of the decree of the court for the \$1,000 note is not before us on this appeal. *Clark v. Killian*, 103 U. S. 766, in which the court declines to consider errors assigned by appellee; and *Farrar v. Churchill*, 135 U. S. 610, 10 Sup. Ct. 771, where the court holds that cross appeals must be prosecuted like other appeals, and says, when a cross appeal is allowed by a justice of this court, the petition and order of allowance must be filed in the court below, in order to the due taking of the cross appeal under the statute.

Upon the question of homestead, the constitution of Texas (article 16, § 51), among other things not material to this cause, provides that:

"The homestead in a city, town or village, shall consist of lot or lots, not to exceed in value \$5,000, at the time of their designation as the homestead, without reference to the value of any improvements thereon; provided, that the same shall be used for the purposes of a home or as a place to exercise the calling or business of the head of a family."

The evidence shows that at the time of the execution of the deed of trust, February 15, 1890, and before and after that date, the respondent William J. Logan was in the possession, use, and occupation of the lot or parcel of land, continuously carrying on a laundry business there; that he was a married man, and the head of a family. The petition for foreclosure was amended after the commencement of the suit, and the south 40 feet of the lot, fronting on Poydras street only, was claimed as subject to the lien under the trust deed. Complainant's proposition is that the north portion of the lot was claimed by Logan as his homestead, and declared by him and his wife in writing to be such, and that the south 40 feet was not claimed as such homestead, so that the respondents are now estopped from setting up that defense. The fact is, however, that the premises were in actual use and occupation, as heretofore stated. They were examined by an agent and attorney of complainant before the mortgage was executed, who must have seen, if he made an examination with care, that the

buildings or the wings of the frame building which stood on the north 35 feet of the lot were upon the south 40 feet, with a spring of water upon it, used by respondent in his laundry business; and, while the other portion of the south 40 feet of the lot was not in actual use for any purpose at the time, yet it had been used for storing coal and wood for the business, and had at that time a board fence inclosing it with the other part of the lot.

It is not the question as to what Logan agreed to do in a matter of this kind; the question is, what was done in point of fact to divest this property of its homestead character, and release it from such claim? It requires not only Logan's agreement, which he might make one day and retract the next, not even a release on paper, though signed by his wife as well as by him, but what acts were done and performed which released the lot from the claim and use of a homestead. If it is said the removal of the wings of the frame building afterwards operated to release the south portion of the lot from the homestead claim, the answer to that is that the removal of these structures was to make way for the erection of the new building, which new building was, before it was finished, occupied and used in connection with the old one in carrying on the respondents' laundry business; so that we do not find that the homestead claim was ever released.

But it is claimed that this loan was made for the improvement of the property, and, under the constitution of the state of Texas, the property is not protected from forced sales upon this character of claim. The constitutional provision is article 16, § 50:

"The homestead of a family shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead. * * *

Without reference now to the stock feature of the transaction, it was a loan of money from the complainant to the respondent Logan, and the testimony does not show what amount of the loan actually went into the improvement and building erected thereon; but, if that was shown, the transaction would not be within the language of the constitution, which requires that the wife shall be a party, not merely to the deed of trust to secure the loan of money, but that she shall be a party to the contract under which the improvements are made,—in other words, that her formal consent must be had to the character and quality of the improvements to be made thereon; otherwise she would be liable to be improved out of her homestead, as it is called, and the purpose of the constitutional provision be defeated.

The next question is that the contract sued on is usurious, and that, under the law of Texas, all payments of interest thereon are to be applied upon the principal. It is to be observed, however, that the suit is upon a bond conditioned for the payment of money, and that the question of its being a lien upon real estate in the state of Texas is, in the view we take of it, now out of the case.

The complainant is a building and loan association, organized and acting under the laws of the state of South Dakota; and its methods and rates, its premiums and interest exacted, are all regulated by the laws of that state, which, as we understand, permit exactly the contract sued on in this case. See Laws Dak. 1885, p. 56 et seq.; Laws Dak. 1887, p. 81 et seq. The bond and deed of trust sued on, construed in reference to these laws and the by-laws of the corporation, found in the record, are in all respects regular and lawful. Section 6, p. 58, of the Laws of 1885, particularly provides that "no premiums, fines or interest on such premiums that may accrue to the said corporation, according to the provisions of this act, shall be deemed usurious, and the same may be collected as debts of like amount are now by law collected in this territory." The bond in this case is expressly made payable in Aberdeen, in South Dakota, and the deed of trust is to the same purport.

In *Sturdivant v. Bank*, 9 C. C. A. 256, 60 Fed. 730, this court held that a note executed and delivered in one state, and payable in another, is governed, as to the admissibility of defenses against an indorsee, by the law of the latter state, even when sued on in the state where it was executed; citing authorities, among which is the case of *Miller v. Tiffany*, 1 Wall. 298, which holds that:

"A person contracting for the payment of interest may contract to pay it either at the rate of the 'place of contract,' or at that of the 'place of performance,' as one or the other may be agreed on by himself and the creditor; and the fact that the rate of the place at which it is agreed that it shall be paid is higher than the rate in the other place will not expose the transaction to the imputation of usury, unless the place agreed on was fixed for the purpose of obtaining the higher rate, and to evade the penalty of a usurious contract at the other place."

As it appears that the complainant, a Dakota corporation, was acting within its charter, and, as the record shows, in accordance with its by-laws, and as there is no evidence whatever in the record tending to show that the place fixed for the payment of the bond in this case was for the purpose of obtaining any higher than the usual rate, or to evade the penalty of a usurious contract in Texas, it would seem that these authorities are fully applicable, and dispose of the question of usury in this case.

Counsel for appellant, in their very able brief presented to this court, say they do not contend that the laws of South Dakota have any extraterritorial force; but they submit that such laws govern the appellant's affairs in their system of accounting, and they also submit that section 1 of article 9 of appellant's by-laws, as follows: "Should a member whose property is mortgaged, or whose shares are pledged to the association, desire to release the same by prepayment of his indebtedness before maturity, he may, on application to the board of directors, be allowed to do so, and the directors shall give him an equitable rebate on the premium paid by such member,"—regardless of any other reason, makes the loan one which is not usurious, and one to which this court may apply the rules of equity in relation to this class of contracts. We quote further:

"How, then, shall a court of equity determine the amount due on this contract? Six per cent. on the amount loaned, being the legal rate in Texas, and being the contract rate made by the parties, and being recognized as a fair rate, is certainly a proper rate to apply. Is the borrower entitled to the application of any credit upon his loan for the amount paid upon his dues? Ordinarily no, as the lender has failed to comply with the conditions governing the withdrawal of his stock. In this case, however, the appellant waives any such formalities, and concedes that the borrower is entitled to a credit equal to the withdrawal value of such stock, and contends that this is the extent of the credit to which he is entitled. This value can be ascertained from the provisions of the stock certificate."

If the contract is not usurious,—and we hold that it is not,—the above method of ascertaining the amount due is not unfair to the debtor, and we are disposed to adopt it.

The remaining question is as to insurance paid by complainant. As the deed of trust specifically provides that the premises shall be kept insured, and, in case of default made by the mortgagor, the same should be performed by the appellant, and all expenses incurred in so doing should be paid by the mortgagor, with interest at the rate of 12 per cent. per annum from the date the same was incurred or paid, and as the record shows that thereunder the appellant has paid the sum of \$745.69 insurance, we are of opinion that the court below erred in not including that amount, with interest, in the personal judgment rendered against William J. Logan.

The decree of the circuit court appealed from is reversed in so far as it declares the bond sued on usurious, and in so far as it restricts the judgment in favor of the Building & Loan Association of Dakota against William J. Logan to the sum of \$4,361.50; and the cause is remanded, with instructions to the court below to enter a judgment in favor of the Building & Loan Association of Dakota against William J. Logan for the sum of \$7,500, together with interest thereon at the rate of 6 per centum per annum from January 1, 1892, together with the sum of \$745.69, paid for insurance, with interest thereon at the rate of 12 per centum per annum from the respective dates upon which the payments were made, aggregating a sum of \$9,805.50, less the withdrawal value of said shares of stock, said value being \$1,606; the same aggregating, after deducting the aforesaid credits, the sum of \$8,199.50, the same to bear interest at the rate of 6 per centum per annum from date of filing mandate. The decree of the court below is affirmed, except as above reversed and modified, with costs in this court, and the court below against appellee, William J. Logan.

COLES v. NORTHRUP.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1895.)

No. 340.

EQUITY—JURISDICTION—TRIAL OF TITLE TO LAND.

A receiver of the property of the P. Co., appointed in an equity suit, filed a petition for an order requiring one C.—who was alleged in the petition to be occupying, as tenant, certain real estate of the P. Co.—to deliver pos-

session of such real estate to the receiver. C. was notified of the petition, and filed a plea to the jurisdiction; alleging that, for more than the statutory period of limitation, he had held the land adversely, under claim of title. The plea was traversed, and, upon the hearing, evidence was given tending to show title in C. by adverse possession. *Held*, that C. was entitled to a trial by jury of the issue of title, and the court had no jurisdiction, in the equity suit, to determine such issue.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

This suit was commenced in the circuit court by the following petition:

"Your petitioner, W. H. Northrup, humbly represents: (1) That, as shown by the records of this court, he has heretofore been appointed receiver in the case of D. W. Thom et al. v. Pensacola Terminal Company, and, as such receiver, authorized and directed to take possession of all the property, real and personal, of the defendant. (2) That, at the time of the said order, C. M. Boulden and Graham Gordon, respectively vice-president and president of said company, held in trust for the said defendant the east half of the tract of land in the county of Escambia, state of Florida, known as the 'John Donaldson tract,' and being section 51, T. 2 S., R. 30 W., of which said tract, with the exception hereinafter mentioned, your petitioner, under said order, took possession. (3) That at the time of said order one John Coles occupied a portion of the said east half of said tract, as the tenant of the said Gordon and Boulden, trustees as aforesaid; the said Coles having obtained possession of the said property from his father, one Samuel Coles, who was a tenant, by a written indenture of lease, of J. C. Petterson, who was the remote grantor of the said Gordon and Boulden, trustees as aforesaid, and had also been a tenant under a written indenture of lease of E. B. La Fice, executor of R. A. Watson, deceased, grantor of said J. C. Petterson. (4) That your petitioner has demanded the possession of the said John Coles, and that the said Coles has refused to deliver the possession thereof to your petitioner, as of right he ought to do. Wherefore, your petitioner prays that the said John Coles may be required, by an order of this court, to deliver up the said possession of the said property to your petitioner, in order that it may be administered by him under the order appointing him as aforesaid. And your petitioner will ever pray, etc.

W. H. Northrup, Receiver."

And thereupon the following notice appears to have been served:

"In the United States Circuit Court, Northern District of Florida, at Pensacola.

"In the Matter of the Petition of W. H. Northrup, Receiver in the Case of D. W. Thom et al. v. Pensacola Terminal Company.

"You will please take notice that we have filed a petition in the above court to recover possession from you of that portion of the east half of section 51, T. 2 S., R. 30 W., known as the 'John Donaldson Tract,' in Escambia county, Florida, now occupied by you, and that a hearing of said petition, and of each answer as you may then have filed, will be had before the Hon. Chas. Swayne, judge of said court, on November 5, A. D. 1894, or as soon thereafter as the same can be heard.

"Blount & Blount, Sols. for Petitioner.

"To John Coles, Esq., Defendant."

The appellant filed sworn plea as follows:

"In the Matter of the Petition of W. H. Northrup, Receiver of the Pensacola Terminal Company, v. John Coles.

"The Plea of the Above-Named Respondent to the Petition of the Above-Named Petitioner.

"The respondent, John Coles, by protestation, not confessing or acknowledging all or in any part of the matters or things in the said petition contained and mentioned to be true, in such manner and form as the same are therein set forth and alleged, pleads thereto, and, for plea to the whole peti-

tion, says that respondent did not obtain possession of said property in said petition described from his (respondent's) father, Samuel Coles, as alleged in said petition, but that respondent entered into possession of said premises under claim of title, exclusive of any other rights, founding such claim upon a written instrument of the date of October 29, 1877, as being a conveyance of the premises in question, and that respondent has been in continued occupation and possession of said premises included in said instrument for a period of time longer than seven years before the filing of said petition, to wit, for a period of more than sixteen years. Wherefore, and relying upon the above facts, which said respondent avers to be true, respondent says that a court of equity has no jurisdiction to hear, try, and determine this cause. Wherefore, the respondent prays the judgment of this honorable court whether he ought to be compelled to make any other or further answer to said petition, and respectfully prays to be hence dismissed with his reasonable costs in this behalf most wrongfully expended."

This plea was traversed, and thereupon the cause was heard before the chancellor. John Coles testified as follows:

"My name is John Coles. I bought this place from Matthew Burke about sixteen years ago, and gave him, as well as I can remember, about \$40 for the place. He was living there at the time. I cannot read or write. Matthew Burke gave me this paper when I bought the place [producing following paper]:

"\$35.00.

Pensacola, Florida, Oct. 29th, 1877.

"This is to certify that I, Matthew Burke, and my wife, Sarah Burke, did sell and deliver to John Coles one place on the Big Bayou, said place being the place upon which the said John Coles now lives. We, Matthew and Sarah Burke, release all of our right and claim to said place, and all it contains, in consideration of half payment of all demands.

his
 "Matthew X Burke.
 mark
 her
 "Sarah X Burke."
 mark

"Matthew Burke is dead. I have lived on this place for sixteen or seventeen years. Since the date of this paper, I have claimed it as my own, and have never paid rent to any one, and never recognized any one as my landlord. My father and mother lived there with me. My father never lived there before I did. I brought him there. Matthew Burke lived there before I did."

Cross-examination: "I have been married about five years, and am about 41 years old. My father lived with me. I have been away from home at work several times for a month, and once or twice as long as two months at a time,—usually, only a week at a time. This was my home all of the time, and, when away at work, I always left my clothes there. My father died about three years ago. He was ninety-odd years old when he died. He lived with me. Once, when I came back home and told my father that I had heard that he had signed a lease to this place to Mr. Fisher, he said that he had signed some kind of a paper. He said that he understood that it was something about taxes. He had no authority to sign a lease to this place. I claim it as my own. I signed a lease to the place across the road from this place where I live, and paid Mr. Fisher a dollar on it. I bought out the improvements from Prince Jones, who had leased it, and I went up to Mr. Fisher's office, and signed a lease to the place, and paid Mr. Fisher a dollar on that lease on the Prince Jones place. When I bought from Matthew Burke, he said he sold me his claim. He said that the place was his. I do not recollect, when I went to pay Mr. Fisher the dollar for rent on the Prince Jones place, that he put into it a receipt to my father, and that I told him that this was for my place,—the Prince Jones place,—and not for my father's place. I do not remember going up to Mr. Fisher's office with my father to pay the rent on this place."

Redirect: "The place I bought from Matthew Burke, now in controversy, has been inclosed for fifteen or sixteen years, and I have been living on it all the time. I live there now."

In support of his plea he also produced the evidence of three other witnesses, and rested his case. Contrary evidence was offered, tending to show that the property belonged to the Pensacola Terminal Company, and that one Solomon Coles, father of John Coles, had in July, 1886, and again in July, 1888, signed leases of the property in question, and that John Coles was present when said leases were signed. After hearing the evidence, the judge rendered a decree that the receiver was entitled to the possession of the property, that John Coles was holding possession as tenant of the receiver, and that John Coles should deliver possession upon demand. Coles appealed.

John S. Beard, for appellant.

W. A. Blount and A. C. Blount, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. The appellant contends that on the issue whether he held the property in question as owner in his own right, or as a tenant of the receiver, he was entitled to a trial by jury, and we think he was. He was a stranger to the equity case in which the receiver was appointed. He claimed as owner for 17 years under writings that more or less supported his claim; and, as to him, the proceeding to dispossess him of the property was, to all intents and purposes, a suit in ejectment. The decree appealed from is reversed. The cause is remanded, with instructions to dismiss the petition of the receiver, but without prejudice to his right, under the direction of the court, to institute proper proceedings at law to recover the property in controversy.

LASHER et al. v. McCREERY et al.

(Circuit Court, D. West Virginia. February 25, 1895.)

1. TAXATION—FORFEITURE OF LANDS—FAILURE TO ENTER ON COMMISSIONER'S BOOKS.

The omission of a tract of land from the books of the commissioner of the revenue for only two years (1843 and 1844), and the failure afterwards to charge up the back taxes for said years, did not work a forfeiture of said land to the state under the act of the legislature of West Virginia of 1869 (chapter 125).

2. SAME.

There can be no forfeiture, under said act of 1869, for nonentry on the commissioner's books, unless the land was left off said books each year for five successive years, and the omission of the land from said books for any less number of years than five did not work a forfeiture under said act.

3. SAME—PROCEEDINGS AGAINST REMOTE GRANTOR.

Robert Morris owned a tract of land containing 480,000 acres, in Virginia, and in 1797 he conveyed it away. In 1843 it was sold by the commissioners of delinquent and forfeited lands in the name of Henry Cramond, a remote grantee of the said Morris. In 1853, Michael Bouvier, to whom it had passed by mesne conveyances from the purchaser at said sale, divided it into six separate parcels, all of which he afterwards conveyed to others, except one parcel of 8,400 acres. So far as appears, the several parcels were assessed to their respective owners, one of said parcels, con-

taining 36,750 acres, having been regularly assessed to the grantee of said Bouvier, and those claiming under him, from the time of its conveyance by Bouvier to the present time, but was returned delinquent for the non-payment of the taxes of 1869, and sold by the sheriff in 1871, and purchased for the state. In 1882 the commissioner of school lands instituted proceedings against the original tract of 480,000 acres as forfeited in the name of Robert Morris for nonentry on the land books, and in said proceedings portions of the 36,750-acre parcel were sold. *Held*, that said proceedings were coram non judice, and a decree declaring a forfeiture in said proceedings, and the said sales of portions of said 36,750-acre parcel by said commissioner in said proceedings, were illegal and void.

4. SAME—PRESUMPTIONS FROM LAPSE OF TIME.

Where a tract of land was sold in 1843 by the commissioners of delinquent and forfeited lands, and no claim appears to have been made to said land afterwards by the person in whose name it was forfeited prior to said sale, or any one claiming under him, it will be presumed, in a proceeding involving the title to said land, instituted in 1890, that the proceedings which resulted in the said sale were regular, and that a new title began from the time of said sale by said commissioners.

5. SAME—DELINQUENT TAX SALE—IRREGULARITIES.

Under the Code of 1863 of West Virginia the sheriff was required, within 10 days after a delinquent tax sale, to return to the county clerk's office a list of the real estate purchased for the state at such sale, and, unless it affirmatively appear that such list was so returned within said period of 10 days, the said sale will be *held* to be irregular and void.

6. LACHES—EQUITABLE CONSIDERATIONS

The defense of laches, being equitable in its character, will not be allowed to deprive a rightful owner of his land, unless the principles of equity require it to be done.

7. SAME.

Laches cannot be imputed to one who was ignorant of his rights, and for that reason failed to assert them.

8. SAME—TAX SALE.

Where wild and unimproved lands were sold in 1882, by the commissioner of school lands, in proceedings which were illegal and void, and the purchaser never took possession of said lands, nor made any improvements on them, or change in their condition, and the former owners continued to pay taxes regularly on said lands after such sale, and in 1890 brought a suit to set aside said sale, alleging that they were ignorant of said sale until a short time before said suit was brought; and it appearing that during nearly the whole of the time covered by the delay in bringing said suit on account of certain decisions of the appellate court of the state it was generally believed and understood by the legal profession and others that there was no remedy for the former owner in such case until a decision by the United States court pointed out such remedy, and said suit was brought soon after said last-mentioned decision,—*held*, that there was not such laches on the part of the former owners in bringing said suit as would constitute a defense to said suit.

9. SAME.

The decision in the case of *Wakeman v. Thompson*, reported in 40 Fed. 375, 32 W. Va. (Appendix, p. 1), adhered to.

This was bill by Francis Lasher and others, trustees, against John W. McCreery and others, to remove a cloud upon the title to real estate by annulling certain deeds made by the commissioner of school lands in Wyoming county, W. Va.

Couch, Flournoy & Price, for plaintiffs.

W. E. Chilton, E. S. Miller, and Johnson, Watts & Ashby, for defendants.

Before GOFF, Circuit Judge, and JACKSON, District Judge.

JACKSON, District Judge. The bill alleges that the tract of land in controversy in this case is a portion of two grants of land issued by the commonwealth of Virginia in 1795 to Robert Morris, one for 320,000 acres and the other for 480,000 acres. The evidence discloses a chain of title from the grantee down to Henry Cramond, who acquired the lands by deed from the heirs of Thomas Astley on the 10th day of December, 1840. It appears that the two tracts of land became forfeited in the name of Henry Cramond to the state of Virginia for the nonpayment of taxes thereon prior to the year 1842, and that the lands so forfeited and embraced in the two grants were sold in 1843, at which sale William Cramond became the purchaser; that subsequently Michael Bouvier, by various mesne conveyances, acquired the title to them, and, having had a resurvey made of them, he divided all of his lands into six tracts, one of which was 36,750 acres,—the subject-matter of this controversy. It is disclosed that the plaintiffs acquired the legal title to 36,750 acres by proper conveyances from the grantee in the patent down to the date of his deed in 1882. It also appears that the lands were charged with taxes to John Herman on the assessor's books for Tazewell county, Va., for the year 1847 to the year 1861, inclusive, and were paid; that, owing to the Civil War, there were no taxes charged against these lands until the year 1865, when they were charged to Michael Bouvier, in McDowell county, with taxes for the years 1865–1868, both inclusive. In the year 1869 this tract was consolidated with a tract of 8,400 acres, one of the six divisions before referred to, and entered on the assessor's books of McDowell county as a tract of 45,150 acres, charged with taxes, returned delinquent for their nonpayment that year, and sold by the sheriff of the county in October, 1871, and purchased by the state. After the year 1869 the lands appear on the land books of Wyoming county in the name of Patterson and others, who were the owners of the tract from 1870 to 1874, inclusive, when they appear in the name of Francis Lasher from 1875 to 1890, inclusive,—the year the plaintiffs brought this action. And in this connection it is to be observed these two large tracts of land, lying both in McDowell and Wyoming counties, appear to have been assessed sometimes in one county and then in the other.

It is apparent from this history of the title to the land in controversy that, with one exception, from the time it was purchased by William Cramond, at the sale made by the commissioner of forfeited and delinquent lands in 1843, it has been charged on the land books in the names of its various owners, and the taxes paid. It is, however, of little or no moment at this time to investigate the history of this title prior to the delinquent sale in 1843. We must, at this late day, presume that the proceedings which resulted in the sale of the land were regular, and that a new title began at that time, which has been transmitted by regular conveyances to the plaintiffs in this action. It follows from what we have said that the title to the land in controversy is in the plaintiffs to this action, unless they have lost it, since they acquired it, by neglect, or in some way permitted it to pass from them.

This brings us to the consideration of the questions raised by the defense to defeat this action. And here it is to be observed that the purpose of this bill is to remove a cloud upon the title of the plaintiffs by securing a decree to annul and set aside the deeds made under the proceedings instituted by the commissioner of school lands in Wyoming county in 1881 under the act of 1873, under which the defendants claim. The answer of the defendants to this position of the plaintiffs is that the land was forfeited under the act of 1869 as amended in 1872-73 for nonentry upon the commissioner's books of Tazewell county for the years 1843 and 1844.

The contention of the defendants, first, is that, if the land was omitted from the proper assessor's book for the year 1832, or any year thereafter, and the owner failed to have the back taxes charged for five successive years thereon, and such further omission continued for one year after the passage of the act, the land became forfeited; or, if the land had been omitted for any year prior to the passage of the act, including and after 1832, or shall not have been charged thereon for five successive years after the passage of the act, then, in either case, such failure operated to forfeit the land. I cannot concur in this construction of the act. It is, to my mind, a forced construction to cover the facts of this case. As we have before seen, the land in controversy was omitted from the assessor's book in 1843 and 1844, and the omission was but for two years; but it appears on all the land books in the names of the various owners from 1847 down to the institution of this suit, with that single exception. What, then, was the duty of the owner of the land under the act of 1869, when it was omitted from the assessor's books? Simply to cause them to be entered on the proper assessor's book, and charge them with the state taxes thereon not charged to the owner for the year 1832, or "any year thereafter,"—that is, 1832, or any year "heretofore"; that is, prior to the passage of the act, and subsequent to the year 1832, or "any year hereafter"; that is, for any year after the passage of the act,—which have not been released or paid, and which were properly chargeable to the land. This clause of the statute clearly points out to the owner what was required of him. The purpose of the next clause is to punish the party for his neglect or failure to comply with his duty "for five successive years." What duty? Clearly, the duty to enter his lands as required by the statute, and charge them with the back taxes. And if he fails to do this for five successive years, the penalty for his neglect is the forfeiture of his land. And for what is this penalty imposed? Is it the neglect to enter the lands for one year, or the failure to have them charged thereon for five successive years? Certainly, the legislature did not intend that the statute should be construed to deprive an owner of his lands for the omission of a single year to enter them on the land books, and retain the taxes paid both before and after the passage of the act. No such injustice could be imputed to the legislature. Such a construction of the statute would be not only unjust, but might be the means of inflicting great wrong upon an innocent owner. We must assume that the legislature, in passing this statute, acted

justly and wisely, and in a spirit of liberality to the delinquent landowner, when it declared that before the owner could be deprived of his land he must neglect to enter it, not for one, two, three, or four years, but for five successive years. The language employed seems to me to be too plain to admit of any other construction. The law is well settled that in construing a statute we must ascertain, if possible, the intent of the legislature in enacting it, and to so construe it as to give effect to its intention. Looking for the true meaning of this statute, and what justly was its object and purpose, we think the legislature meant that the owner of any tract of land omitted from the proper assessor's book for a period of less than five successive years should not be deprived of his land by reason of such omission, and that it did not work a forfeiture.

Before leaving this branch of the case, it might be well to allude to the act of 1869, and ascertain its purpose. I do not care to review the several acts of 1830, 1831, 1832, 1835, and 1836, relating to delinquent lands, more than to say that prior to the act of 1835 there was no law authorizing the forfeiture of lands for the failure of the owner to enter them on the land books, and have them assessed with back taxes, so that the state could get her taxes from such delinquent lands. The act of 1869, known as the "Huffman Act," was passed with the view to remedy this evil. By that act it was intended to put lands delinquent for the nonpayment of taxes and those that were delinquent for nonentry on the commissioner's books upon the same footing, and for this purpose the year 1832 was fixed as the time in the statute when they would stand upon a common footing. If I am right in the construction of this statute, was the tract of land in question liable to forfeiture when the proceedings were instituted by the commissioner for that purpose? To answer this question we must ascertain against what land the proceedings were had, and if they were taken against the tract of land in controversy. It appears from the papers in this cause that the action of the commissioner was taken against the 480,000 acre tract and the 320,000 acre tract granted to Robert Morris. It does not appear that any proceedings were had directly against the land in controversy, but, if affected by the proceedings, it is only by reason of the fact that it was originally a portion of one of these two tracts or of both of them. At the threshold of this investigation we are met with the fact that Robert Morris had conveyed all of his interest in the two tracts long before the institution of these proceedings; in fact the plaintiffs claim under a deed made by Robert Morris to William Cramond in 1797, more than 80 years before the commissioner instituted his proceedings. This statement of facts puts at rest the right of the state, through her commissioner of school lands, to move against these lands. The title to them had passed out of Morris, and he was no longer chargeable with them for taxes on them after their alienation by him. From all that appears in this case, the lands in the name of others had all been charged with taxes and paid. It does appear that, so far as the tract in controversy is concerned, the plaintiffs, and those under whom they claim, have been assessed with and paid

all the taxes on their lands from 1847 down to the institution of this suit, except 1869, and three years during the war, when no taxes were assessed against the land. What right, then, had the commissioner to proceed against the Morris lands? I answer, none whatever. The lands in the name of Morris having been long before transferred to others, they were not liable to entry in his name, nor had the state any legal claim against them for taxes assessed in his name. The action of the commissioner was based upon facts supposed to exist, but for which in reality there was no foundation, and, as a consequence, was illegal, and of no binding effect upon those who claimed the lands under those who had acquired title thereto more than 80 years before. We must therefore hold that these proceedings were *coram non judice*, and that the decree of the court declaring a forfeiture was void. But it is claimed that this land was forfeited by reason of the purchase for the state at the sale of 1871 for the taxes of the year 1869, and an effort is made to distinguish this case from *Wakeman v. Thompson*,¹ 32 W. Va. (Appendix, p. 1). Briefly, to state the position of the defendants, it is claimed that the statute makes a distinction when the purchaser is the state instead of an individual, in this: that it is not required of the sheriff "to return the list of sales with a certificate of his oath attached, which must be returned to the (recorder) now clerk of the county within ten days after the sale." To sustain this position, section 31, c. 31, p. 197, Code 1868, is relied on:

(31) "When any real estate is offered for sale as aforesaid, and no person present bids the amount to be satisfied to the state from the sale, the sheriff or collector shall purchase the same on behalf of the state for the taxes thereon, and the interest and damages on the same, and shall make out a list thereof, under the following caption: 'List of real estate within the county of —, sold in the month (or months) of —, eighteen hundred and —, for the nonpayment of taxes thereon for the year (or years) —, and purchased for the state of West Virginia.' Underneath shall be the several columns mentioned in the tenth section, with a like caption to each column, omitting, however, the column headed 'Name of Purchaser.' The officer making out the said list shall make oath that it contains a true account of all the real estate within his county purchased by him for the state during the year —, and return the list, with a certificate of the oath attached, to the recorder of the county within ten days after such sale, who shall, within twenty days after such return, make an accurate copy thereof in a well bound book, and transmit the original to the auditor."

It is true that the caption provided for in this section differs somewhat from that required by section 12 when the sale is made to an individual. It is claimed by the defendants that under this section all that is required is for the return to show the month and year when the sale was made to the state. While this is true as to the caption, still that is not all that is required to be done. The succeeding paragraph, as we have seen, uses the following language:

"The officer making out said list should make oath that it contains a true account of all the real estate within his county purchased by him for the state during the year and return the list with a certified copy of the oath attached to the recorder (clerk) of the county within ten days after such sale who shall

¹ See this case, 40 Fed. 375, sub nom. *De Forest v. Thompson*.—[Ed.]

within twenty days after such return make an accurate copy thereof in a well bound book and transmit the original to the auditor."

When you compare this clause of section 31 with section 14 of this act, it will be found that, while they are not the same in phraseology, they are the same in substance. In both sections the list is required to be filed within 10 days after such sale. This must be done, and it should appear that the mandatory requirement of the statute was complied with, otherwise this provision of the statute would be useless. The effort to distinguish this case from the case of *Wakeman v. Thompson*, *supra*, must fail. One of the five irregularities set up in that case was "that the sheriff failed to return his list of lands sold as delinquent for taxes within ten days after the sale and purchase by him for the state," who was the purchaser in that case as well as in the one under consideration. In a well-considered opinion of this court it held "that the neglect of the officer to comply" with that requirement of the statute was "such an irregularity as tends to prejudice the rights of the owner whose lands have been sold." It is true that neither the clerk nor sheriff is required by the express terms of the statute to note the day, but it is nevertheless true that the sheriff is required to return his list within 10 days, which fact must be established before the former owner could be divested of his title, and it passed to the state. It does not follow, because the state became the purchaser at this sale, that the statute should not be as fully complied with as in a case of a sale to a citizen. The irregularity complained of in this case is not that the sheriff or clerk failed to note the time of filing his list, but it is the fact that it does not in any way appear that he did file his list in 10 days. The court said in the *Wakeman Case*:

"That the former owner had a right to call at the recorder's office after the sale of his lands, and demand the production of the sheriff's report for his examination. If he discovered that there was no evidence when the report was filed, he could rest upon his rights, for the statute required the list to be filed within ten days after the sale. It must in some way affirmatively appear, and not be left to the presumption, that the sheriff had discharged his duty, which ordinarily, in this class of cases, would be a violent one."

We adhere to the ruling of the court in the *Wakeman Case*, and hold that the irregularity complained of in this case falls within the previous rulings of this court upon this question, and is fully sustained by the supreme court of West Virginia. *Barton's Heirs v. Gilchrist*, 19 W. Va. 223; *Simpson v. Edmiston*, 23 W. Va. 675; *McCallister v. Cottrille*, 24 W. Va. 173; *Wakeman v. Thompson*, *supra*, p. 1.

We come now to consider the defense of laches set up by the defendants to defeat the plaintiffs in this action. This is an equitable defense, and is often resorted to when the party who sets it up has no defense in law, and for this reason courts should be very cautious in applying this doctrine to defeat a rightful owner of the land who from neglect which may be the result of the want of proper information refrains from an assertion of his rights until the presumption of abandonment arises from his course of conduct. I am aware of the tendency in the courts of this day to recognize the defense with

growing favor as both meritorious and valid. "Laches," says Mr. Justice Brown in *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, "proceed on the assumption that the party to whom they are imputed has knowledge of his rights, and ample opportunity to establish them in the proper form; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that, because of the change in condition or relation during this period of delay, it would be an injustice to the latter to permit him to assert them." In a well-considered oral opinion in the case of *Halstead v. Grinnan* this court held that laches could not be imputed to one who was ignorant of his rights, and for that reason failed to assert them. This case was affirmed by the supreme court (152 U. S. 412, 14 Sup. Ct. 641), in which case the court says: "There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend." Applying the principles as laid down in the cases just cited to the facts in this case, can we hold that the plaintiffs have slept so long upon their rights as to render their claim to this land inequitable and unjust as against the defendants' claim of title? We think not. There is no fixed and unalterable rule applicable to all cases where laches is relied on to defeat a recovery. Each case must stand or fall upon the facts that surround it. In this case it is claimed that the plaintiffs have been guilty of laches, because the land in controversy was sold in 1882 by the commissioner of school lands, and that the plaintiffs took no steps to relieve themselves from the embarrassment arising from that sale until they brought this action, in 1890, a period of eight years. But there is no evidence that the plaintiffs had abandoned their claim of title or their rightful title to these lands during that period. On the contrary, they continued to pay the taxes regularly assessed to the state, which was an undoubted assertion of their right to the land. In this connection it is to be noted that the plaintiffs were ignorant of the proceedings had in McDowell county. But, if they were not, under the construction given by the courts of West Virginia of the statutes under which the proceedings were had, there was no remedy by appeal, as that remedy had been refused by the supreme court of West Virginia in two cases considered by it. After these cases had been decided, the case of *Wakeman v. Thompson* was instituted in this court, with a view to ascertain if there was not some way to correct the irregular action of state officers in selling lands in this state to satisfy delinquent taxes. That case was pending for several years, covering the time that the defendants rely on in this proceeding as laches to defeat the recovery in this action. It was finally disposed of in 1889, which decision seems to have shed some new light upon the proceedings of the commissioners of "school lands," and opened the way for owners to protect their rights to their lands. The profession, after this decision, began to look into the rights of their clients, which were in a state of suspension after the decisions of the supreme court of West Virginia, and this suit was instituted shortly after that decision, to get rid of the cloud upon the plain-

tiffs' title to this land. During this time the plaintiffs allege they were in the dark, and light only came through the case of *Wakeman v. Thompson*. In this connection it must be borne in mind that the defendants knew the title under which they claimed the land. They knew that the plaintiffs, and those under whom they claimed to have derived their title, had paid all the taxes charged and assessed against this land for nearly a century, with the single exception in 1869. They knew that the lands were in a state of nature, with little, if any, improvement made upon them. With a knowledge of these facts, they purchased the land at the tax sale, at a very inconsiderable price, most likely as a speculation. I do not overlook the very able and exhaustive argument submitted on this point by Judge Johnson, of counsel for defendants. I confess I was at first impressed with his views, but, after more mature consideration, I reached the conclusion that the facts in this case were very different from most of the cases where the doctrine has been applied, especially in the *Dingess Case*,¹ decided by my learned brother in this court, and approved by the appellate court. In that case the record disclosed almost a total abandonment of the lands. No taxes had been paid for many years, and no assertion of right to the lands upon the part of those claiming against *Dingess*. It is one thing to sleep on your rights, but it is quite another thing when you wake up in a reasonable time, and take active steps to protect your rights. In this case the entire period was only eight years, arising out of the fact that the profession had not discovered a remedy until Judge Ferguson, in his bill in the *Wakeman Case*, became a pioneer to open the way that shed new light upon litigation of this character. Nor will it do to say that ignorance of the law is no excuse. The law as announced in *McClure v. Maitland*, 24 W. Va. 561, and in *McClure v. Mauperture*, 29 W. Va. 633, 2 S. E. 761, had been accepted by the profession as final upon the rights of parties where proceedings had been had by the school commissioner, and the lands were sold. This would seem to be a reasonable excuse, not only for ignorance of the law, but for the delay in bringing this suit. By analogy, a man is not supposed to have been neglectful or abandoned his land until entry is barred by the statute of limitations. There was no bar to a right of recovery when this suit was commenced. I must therefore hold, as the taxes have been regularly paid for well-nigh a century, with the single exception referred to, that this fact is not only an evidence, but must be held as an assertion of right, as opposed to abandonment, coupled with the additional fact that the lands are in a state of nature, so far as the record discloses, and that no development or improvement has been made by the defendants prior to the institution of this suit, and that it would be unjust and inequitable to apply the doctrine of laches, and to refuse the plaintiffs' prayer in their bill to vacate the numerous tax deeds and remove the cloud upon their title.

The defendants deny the jurisdiction of this court to grant relief in this case, for the reason, as they claim, the remedy of the plain-

¹ 56 Fed. 171.

tiffs is at law. I do not concur in this position. The plaintiffs in this action have a regular chain of title, unbroken, from the commonwealth of Virginia. It is well settled that, in the absence of an actual adverse holding, the possession will be presumed to be with the holder of the elder title to the land. And in this instance there was no actual adverse holding which could operate to destroy the possession of these plaintiffs. But, even if that was so, still I am of the opinion that the proper jurisdiction in this case is in a court of equity. The primary, and I may say the vital, purpose of this bill is to remove an alleged cloud upon the plaintiffs' title to this land, and at the same time to group all the defendants together, claiming from the same source, in one suit, and save a multiplicity of suits. This court, in *Wakeman v. Thompson*, held that the jurisdiction of a court of equity can be invoked upon the familiar ground that by suing in equity, and bringing all the defendants before the court in one action, they can avoid a multiplicity of suits. *Wake-man v. Thompson*, *supra*; 1 Pom. Eq. Jur. p. 245; *Boyce v. Grundy*, 3 Pet. 215; *Oelricks v. Spain*, 15 Wall. 211. Numerous other authorities could be cited to sanction this position, but it is deemed unnecessary. It follows from all that I have said that the plaintiffs are entitled to relief, and a decree will be drawn to conform with this opinion.

I am authorized to announce that Judge GOFF fully concurs in this opinion.

MCCLELLAN et al. v. PYEATT et al.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1895.)

No. 513.

1. STATUTE OF FRAUDS—WHEN IN FORCE IN INDIAN TERRITORY.

Act Cong. May 2, 1890, which put in force in the Indian Territory, among other laws, the statute of frauds, making void conveyances to defraud creditors, has no retrospective effect, and, before the passage of said act, it was competent for an insolvent debtor to give away his property, and deprive his creditors, who had not obtained liens, of the opportunity to collect their claims from such property.

2. TRUSTS—FOLLOWING TRUST PROPERTY—INDIAN TERRITORY.

One M., a citizen of the Cherokee Nation, mortgaged certain cattle to the plaintiffs. Subsequently he used a part of the cattle so mortgaged to purchase the improvements on certain land, which he then conveyed to his wife. *Held*, that M. was a trustee of the cattle for plaintiffs, and they had the right to follow the proceeds of the trust property in the hands of M.'s wife; and that, under the act of March 1, 1889, creating the United States court in the Indian Territory, that court had power to enforce such right.

Appeal from the United States Court in the Indian Territory.

This was a suit by Henry C. Pyeatt and James C. Kirby against William P. McClellan and Rachel McClellan to subject certain property to the payment of a judgment against the defendants. The circuit court made a decree in favor of the complainants. Defendants appeal.

In this case Rachel McClellan and William P. McClellan, her husband, appeal from a decree rendered by the United States court in the Indian Territory that subjected the improvements which the appellant Rachel claimed to own, and which were situated upon two farms upon lands of the Cherokee Nation, to the payment of a judgment against her husband in favor of Henry C. Pyeatt and James C. Kirby, the appellees. The facts upon which this decree rests are as follows: Rachel McClellan is a Cherokee Indian, and a citizen of the Cherokee Nation by blood. William P. McClellan intermarried with her in 1879, and thereby became an adopted citizen of the Cherokee Nation. From 1879 until after the rendition of the judgment in favor of the appellees, William P. McClellan and his wife occupied a farm of about 600 acres upon the lands of the Cherokee Nation. During this time he made large and valuable improvements upon this tract of land. For convenience this farm will be called the "McClellan Place." In 1884, William P. McClellan purchased a large number of cattle of Henry C. Pyeatt and James C. Kirby, the appellees. On December 16, 1884, he gave to the appellees a mortgage upon about 1,200 cattle, a part of which had been purchased of the mortgagees, to secure the payment of certain promissory notes given by him for the purchase price of these cattle. In 1885 he purchased of one Dick Prather the improvements upon a tract of about 800 acres of the lands of the Cherokee Nation, and paid him for these improvements with 100 of the mortgaged cattle. For convenience this farm will be called the "Prather Place." On October 3, 1889, the appellees recovered a judgment against William P. McClellan upon the debt secured by the mortgage upon the cattle for the sum of \$7,598.07. On November 18, 1889, McClellan conveyed the McClellan place and the Prather place to his wife, Rachel McClellan, in consideration that she would pay out of the proceeds of the places \$1,850, which he owed to two of his creditors. The appellees obtained a return of nulla bona upon an execution issued upon their judgment against McClellan, and then brought the bill in this case to subject these improvements to the payment of their judgment. The court below decreed that the conveyance to Rachel McClellan was fraudulent and utterly void, and subjected both of the farms and the improvements thereon, with the exception of 160 acres of the McClellan place, which was occupied as a homestead, to the payment of the judgment in favor of the appellees.

George E. Nelson (W. M. Cravens, on the brief), for appellants.
John H. Rogers, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Has the act of congress of May 2, 1890, which put in force in the Indian Territory the statute of frauds, a retrospective effect? This is the crucial question in this case. On November 18, 1889, when the conveyance in question from McClellan to his wife was made, there was no statute relative to fraudulent conveyances corresponding to 13 Eliz. c. 5, in force in the Indian Territory. By the act of May 2, 1890 (26 Stat. 94, c. 182, § 31, 1 Supp. Rev. St. 733), congress provided "that certain general laws of the state of Arkansas * * * are hereby extended over and put in force in the Indian Territory." One of these general laws was the provision of section 3374, c. 68, Mansf. Dig., that "every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action * * * made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures,

debts or demands, as against creditors and purchasers prior and subsequent shall be void." The same section of the act of May 2, 1890, which puts this statute in force in the Indian Territory, provides that "upon a return of nulla bona, upon an execution upon any judgment against an adopted citizen of any Indian tribe, or against any person residing in the Indian country and not a citizen thereof, if the judgment debtor shall be the owner of any improvements upon real estate within the Indian Territory, in excess of one hundred and sixty acres occupied as a homestead, such improvements may be subjected to the payment of such judgment by a decree of the court in which such judgment was rendered."

It is under these provisions of this act of congress that the bill in this case was filed and the decree was rendered. On May 2, 1890, then, for the first time in the Indian Territory, the law declares that a voluntary conveyance by a debtor to delay or defraud his creditors "shall be void." In the absence of such a statute, it was perfectly competent for an insolvent debtor to give his property to his wife or to his friend, and thus to deprive his creditors of an opportunity to enforce the collection of their claims from any of his property upon which they had fastened no liens. The debtor's right of disposition was unrestricted in this respect, and it was undoubtedly the frauds that this condition of the law permitted that originally induced the enactment of the statute of 13 Eliz. in England, and the adoption of the provisions of that statute in the various states of this nation. The conveyance of these improvements by McClellan to his wife, then, five months before this statute was put in force in the Indian Territory, was valid when it was made, and it conveyed to his wife all the title to them that McClellan had. Did the subsequent enactment of this statute retroact upon this prior conveyance, divest the title Rachel McClellan had lawfully acquired, and subject these improvements to the same liability, to be applied to the payment of the judgment against her husband to which they would have been subject if the deed to her had never been made? The maintenance of the decree in this case requires an affirmative answer to this question, for that decree rests upon this statute of Arkansas, put in force in the Indian Territory by this act of congress. To sustain it we must hold that the passage and approval of the act of congress made a valid title to improvements worth thousands of dollars voidable without notice to, or hearing from, their owner, and in effect transferred the right to them in an instant of time from one individual to others by the mere fiat of the legislative department of the government. The unconstitutionality of a law that would have such an effect and the manifest injustice of such a result forbid any such interpretation of this act of congress. The language of the act itself likewise forbids it. The act provides that the laws of Arkansas there specified "are hereby extended over and put in force in the Indian Territory," and the language of the Arkansas statute is that every fraudulent conveyance "shall be void." The words of the act of congress and of the statute relate to the present and the future, not to the past, and there

are no words in the act or the statute that indicate any intention to give either of them a retrospective effect. "Courts uniformly refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Chew Heong v. U. S.*, 112 U. S. 536, 559, 5 Sup. Ct. 255; *U. S. v. Heth*, 3 Cranch, 398, 413; *Murray v. Gibson*, 15 How. 421, 423; *McEwen v. Den*, 24 How. 242, 244; *Harvey v. Tyler*, 2 Wall. 328, 347; *Sohn v. Waterson*, 17 Wall. 596, 599; *Twenty Per Cent. Cases*, 20 Wall. 179, 187.

The result is that section 31 of the act of congress of May 2, 1890, which puts the statute of frauds of the state of Arkansas in force in the Indian Territory, had no retrospective effect, and did not avoid or affect the conveyances made before its enactment. This conclusion necessitates a reversal of the decree, a dismissal of the bill, so far as it relates to the McClellan place, and a decree that the possession of that place, and of all the rents, issues, and profits of it, that have been obtained by the receiver in this suit, with lawful interest thereon, be returned to the appellant Rachel McClellan, because the deed to her was not affected by the subsequent act of May 2, 1890, and the decree, so far as it subjects the McClellan place to the payment of the judgment of the appellees, rests entirely upon the erroneous assumption that that act avoided the conveyance in question.

The claim of the appellees to subject the improvements upon the Prather place to the payment of their judgment, however, rests upon two grounds: First, that the conveyance to Mrs. McClellan became voidable by virtue of the act of May 2, 1890; and, second, that McClellan purchased these improvements with cattle which he held as their trustee, and that Mrs. McClellan took these improvements charged with that trust. We have already held that their claim to this property cannot be maintained upon the first ground. Can it be sustained upon the second? The 100 cattle with which McClellan bought the improvements upon the Prather place were mortgaged to the appellees to secure the very debt now evidenced by their judgment. McClellan held those cattle under that mortgage, as their trustee, to secure their debt, and to apply the proceeds of the cattle, when sold, to its payment. He bought the improvements on the Prather place with these cattle without the consent of his cestuis que trustent. These improvements were the proceeds of the sale of the cattle, and, at the option of the mortgagees, they stood charged with the same trust as did the cattle themselves. The transfer to Mrs. McClellan was a conveyance of trust property by a trustee, without consideration, and this conveyance left the improvements charged, in her hands, with the same trust to which they were subject in the possession of her husband.

Where a trustee violates or abuses his trust, the cestui que trust has the option to follow the trust property, or that which is substituted for it, and he may subject the latter, in the hands of a

voluntary grantee or purchaser with notice, to the discharge of the trust originally imposed upon the trust property. *May v. Le Claire*, 11 Wall. 217, 236; *Perry, Trusts*, § 217. Under this principle of the law the improvements upon the Prather place, in the hands of Mrs. McClellan, stood charged with the original trust, which the appellees had a right to enforce against them. Under the act of March 1, 1889, which created the United States court in the Indian Territory (25 Stat. c. 333, § 6), that court was empowered to grant such relief in equity, in cases within its jurisdiction, as was consonant with the established rules and practice of courts of chancery, and this authority was confirmed to it by the subsequent act of May 2, 1890. That court, therefore, had jurisdiction to enforce express or implied trusts in the absence of the statute of fraudulent conveyances. *Thompson v. Rainwater*, 49 Fed. 406, 1 C. C. A. 304. A decree may accordingly be rendered in this case by the court below, directing the sale of the improvements upon the Prather place to pay the debt to secure which the cattle that purchased these improvements were mortgaged. The decree below is accordingly reversed, with costs, and the case remanded, with directions to the court below to enter a decree not inconsistent with the views expressed in this opinion.

BOSTON SAFE-DEPOSIT & TRUST CO. v. CHAMBERLAIN (two cases).

(Circuit Court of Appeals, Fourth Circuit. February 13, 1895.)

Nos. 90 and 104.

1. RECEIVERS—COMPENSATION.

A receiver of a railroad 172 miles long, operated by him at a loss of \$50,000 a year, the gross annual revenue being but \$200,000, received as compensation \$6,000 a year while operating the road, and was also compensated for services as receiver of the railroad system of which the road formed a minor part, and as special master to sell the road. *Held*, that for services rendered during seven months after such sale in winding up his receivership, he should not be allowed compensation at the same rate, but that a gross sum of \$1,750 was sufficient.

2. SAME—COUNSEL FEES.

The receiver's counsel, for services during the first eight months of the receivership, was allowed \$4,000. During the subsequent two years his services were in great part advice and consultations with reference to the usual questions arising in a railroad receivership, and, though constant and frequent, not such as to prevent his attending to a general practice. *Held*, that compensation therefor should be by an annual allowance, rather than by an itemized account, and, under the circumstances, should not exceed \$3,000 a year.

Appeals from the Circuit Court of the United States for the District of South Carolina.

These were suits by the Finance Company of Pennsylvania and others against the Charleston, Cincinnati & Chicago Railroad Company and others, and by the Boston Safe-Deposit & Trust Company against the same, for foreclosure of mortgages and the appointment of a receiver. Daniel H. Chamberlain was appointed receiver, and Augustine T. Smythe was appointed his counsel. On the set-

tlement of the affairs of the receivership, orders were made, fixing the amount of compensation allowed to the receiver and to his counsel. The Boston Safe-Deposit & Trust Company appealed from both orders.

J. P. K. Bryan, for appellant.

A. M. Lee, for appellee.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

MORRIS, District Judge. These two appeals involve the reasonableness of the allowances made to the receiver and to his counsel in the matter of the receivership of the Charleston, Cincinnati & Chicago Railroad. The property consisted of 172 miles of railroad between Marion, in North Carolina, and Camden, in South Carolina, and was operated in connection with the South Carolina Railroad, of which Mr. Chamberlain was also the receiver under decree of the same court. From the cases in the circuit courts of this circuit arising out of the foreclosure suits and the litigation with respect to both of these railway properties, facts are known to the judges who have heard the cases now under consideration which do not appear in the records; but we have not felt that we should attempt to divest ourselves of that knowledge in considering these appeals, which involve solely the reasonableness of the allowances made to the receiver and his counsel.

By the appeal in No. 104 are brought before us the objections of the trustee for the bondholders to the allowances to the receiver. Mr. Chamberlain succeeded the temporary receiver, and entered upon his duties about the 1st of March, 1891, and operated this railroad, in connection with the South Carolina Railroad, until he surrendered possession to the purchaser, October 1, 1893,—a period of two years and seven months. For his services during this period he was paid by order of the court at the rate of \$6,000 a year. The property was sold May 2, 1893, but, the purchaser not fully complying with the terms of sale, possession was retained until October 1, 1893, and the receiver's compensation continued until that date. Thereafter the receiver, upon the ground that he had been obliged from time to time to pay off the receiver's certificates and other obligations out of the moneys which had come to his hands as the special master appointed to make the sale, and because he had, for want of sufficient funds, been unable to close his accounts as receiver, petitioned the court to be allowed compensation at the same rate, viz. \$500 per month for seven additional months,—being the period from October 1, 1893, to May 8, 1894, the date of his final discharge, and the exoneration of his sureties. It is this allowance of \$500 per month for these seven months, amounting to \$3,500, which the trustee of the bondholders contends was unreasonable, and has appealed from.

We think it should be taken into consideration that this railroad was but a minor part of a system operated by the same receiver, and that, although ably managed by him, its annual gross revenue

was but \$200,000, and its deficit \$50,000 a year. If the receiver had been insufficiently paid for his services while operating the road, there would be reason for increasing that compensation by a liberal allowance for such services as he was called upon to perform after surrendering the road and while settling up the receiver's obligations and his accounts; but it is known to the court that he was at the same time receiver of the South Carolina Railroad, and was appointed the special master to sell this railroad, for both of which services he was compensated. There are many reasons, we think, why his compensation for the period during which he was winding up the affairs of his receivership in this case, after the duties and responsibilities of his practical management had ceased, should be moderate. We are satisfied that a gross sum of \$1,750 for his compensation after October 1, 1893, is sufficient, and that more is unreasonable.

By the appeal in No. 90 there is brought before us the allowances to the receiver's counsel. Upon the appointment of the receiver, A. T. Smythe, Esq., of the Charleston bar, was appointed his counsel. For professional services rendered by him to the receiver from March, 1891, to November, 1891, he was allowed \$4,000. For services rendered from November, 1891, to March, 1893, a period of 16 months, the receiver's counsel filed an itemized account, and also an itemized account for services after March, 1893, up to December, 1893, a period of 8 months. For these services the receiver's counsel was allowed \$9,000, making, with the \$4,000 previously allowed, \$13,000 allowed to the receiver's counsel during a period of 2 years and 7 months. An examination of the items of services shows that they were not for matters of large importance affecting the receiver or the property, but were in great part advice and consultations with reference to the usual questions arising in connection with a railroad receivership. The principal matters of consultation and advice were with regard to contested assessments of the railroad property for taxes, but in this matter several railroads in the state had joined together, and had employed special counsel to conduct the litigation growing out of it. The allowance of \$4,000 for counsel fees during the first eight months of the receivership is not now questioned, and it may be presumed that during that period, at the commencement of his duties, the receiver had new questions and difficulties, which required more constantly the advice and services of counsel; but for the subsequent two years the items of service, although constant and frequent, disclose no such demand upon the time of counsel as would prevent his attending to the usual claims of a general practice. All the parties to the case were represented by counsel, and the duties of the receiver's counsel had reference solely to the receivership. For such services to a receiver, a fair and just method to compensate counsel is by an annual allowance, rather than attempt to value each item of service. We have been unable to escape the conclusion that, valued as such services usually are under similar circumstances, in connection with a railroad of minor importance, operated as part of a system, and not earning its running expenses, more

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than \$3,000 a year for the receiver's counsel is unreasonable. In our opinion, a fair and just allowance should not exceed \$6,000, in addition to the \$4,000 already paid. We have not reached the conclusion that we must reduce these allowances without reluctance, for the reason that in such cases what is a fair compensation is so much a matter of judicial discretion; but we think it is important that the circuit courts of appeals should endeavor in their respective circuits to bring about as much uniformity in such allowances as the cases will admit of. Such services, under some peculiar circumstances, or by agreement of the parties before the court, or upon ex parte applications, have often been, in many courts of this country, so extravagantly compensated that we think there has been a tendency to establish a standard of compensation in matters connected with railroad foreclosures which is unreasonably liberal as compared with similar services in any other employment or with respect to any other subject-matter.

Decrees reversed, and proceedings remanded, with directions to modify the decree in No. 104 so as to award \$1,750 to the receiver, and in No. 90 so as to award \$6,000 to the receiver's counsel; each party to pay his own costs in this court, and one-half of the costs of printing the record.

SETTLE et al. v. HARGADINE-McKITTRICK DRY-GOODS CO.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1894.)

No. 322.

PARTNERSHIP—POWER OF ONE PARTNER TO MORTGAGE.

It is within the power of one member of a partnership, acting in good faith, to make a valid chattel mortgage of all the partnership property, to secure partnership indebtedness.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This was a suit by the Hargadine-McKittrick Dry-Goods Company against George M. Settle and others to set aside a chattel mortgage. The circuit court gave judgment for the plaintiff. Defendants bring error.

H. D. McDonald and E. S. Connor, for plaintiffs in error.

James G. Dudley, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

McCORMICK, Circuit Judge. The only question necessary to be considered in this case is whether one partner can execute a valid chattel mortgage on all of the partnership property to secure partnership indebtedness. This case was tried in the circuit court without a jury, and the judge to whom it was submitted answered the question just stated as follows:

"I find, as a matter of law, that as W. J. Ritchie had no express authority from his partner, J. A. Carter, to execute the instrument of writing in evi-

dence in this cause, under the law of partnerships, where each partner acts as agent of the other partner within the scope of the partnership business; he had no implied authority or power to execute such instrument, and, without the assent of his partner, to transfer and convey all of the partnership property, of every description, placing same in the possession of a third party as trustee, to dispose of same absolutely, and out of the proceeds to pay certain preferred creditors, thereby immediately putting an end to the partnership, and breaking up the partnership business."

The property conveyed in the mortgage was personal property, to wit:

"All of our stock of goods, consisting of dry goods, boots, shoes, clothing, hats, caps, notions, etc., also all the counters, shelving, and other fixtures, in the storehouse now occupied by us, also one iron safe; all of said goods being situated in the storehouse belonging to Mrs. Eliza Gibson, on the east side of the public square, in Paris, Lamar county, Texas, now occupied by us as a dry-goods and clothing store; and we hereby also transfer and assign to the said Geo. M. Settle, as trustee, all the notes and accounts now due to us, also one bale of cotton at J. B. Anderson's gin. This conveyance is intended as a chattel mortgage to secure the payment in full of all the above-named debts; and we hereby deliver the immediate possession of all said above-named personal property to the said Geo. M. Settle, and he is hereby authorized and empowered to take the same into his possession, and proceed to sell the same at public or private sale, by retail, in lots, or in bulk, as to him may seem best, within three months from this date, and the proceeds of the same to apply to the payment of all the above-named debts, after paying all the expenses of executing this trust, including a commission of five per cent. to himself, as compensation for his services, and a reasonable amount for attorney's fees and counsel, and the residue, if any, he shall hold subject to our order. And the said Geo. M. Settle is hereby authorized and empowered to collect and to sell all of said notes and accounts at public sale or private sale, with or without notice, and to transfer and assign the same to the purchaser or purchasers thereof, and the proceeds of the said sale to apply to the payment of all of said above-named debts."

This is a chattel mortgage in Texas. It was executed in the name of the firm by one only of its members. The debts secured were partnership debts. There is no suspicion of fraudulent action or intent as to the other partners, or as to unpreferred creditors, beyond the mere fact of preference. We cannot concur in the conclusion of law announced and acted on by the circuit court. We do not deem it useful to review the authorities on the question. To our minds they support but one conclusion. The reasoning in support of the power of one partner to make such a mortgage has, perhaps, never been more clearly and forcibly stated than by Judge Marshall in *Anderson v. Tompkins*, 1 Brock. 456, Fed. Cas. No. 365, and by Judge Shaw in *Tapley v. Butterfield*, 1 Metc. (Mass.) 515. With these all subsequent decisions substantially agree. Any apparent departure is due either to local statutes or to the presence of some element of actual fraud. The statutes and decisions in Texas have not modified the doctrine, and no element of actual fraud is present in this case. As the judgment of the circuit court was evidently based on the erroneous view of the law indicated, we do not notice the other points suggested in the interesting brief submitted for the defendant in error.

The judgment of the circuit court is reversed, and the case remanded to that court, with direction to award a new trial.

SAVAGE v. WORSHAM.

(Circuit Court, S. D. California. April 1, 1895.)

PUBLIC LANDS—HOMESTEAD ENTRIES—BILL TO CONTROL TITLE.

A bill seeking to control title to land patented to defendant under a homestead entry alleged that complainant, in the belief that the land in question was embraced in a homestead entry filed by him, made valuable improvements thereon long prior to defendant's homestead entry; but there was no allegation that complainant had made application to permit him, by reason of the mistake, to cancel his entry in whole or in part, and include therein the land in question. *Held*, that the bill could not be maintained, for it was not enough to show that defendant should not have received the patent, but it must be made to appear that the land should have been awarded to complainant, had the law been properly administered by the land department.

This was a bill in equity by William E. Savage against William G. Worsham, seeking to control title to certain lands.

William E. Savage, in pro. per.

Chapman & Hendrick, for defendant.

ROSS, Circuit Judge. The complainant, by his bill, seeks to control the title to a certain portion of the S. W. $\frac{1}{4}$ of section 22 in township 2 S., of range 11 W. of the San Bernardino base and meridian, situated in Los Angeles county, Cal., which quarter section was conveyed to the defendant by a patent issued by the government pursuant to a homestead entry thereof made by him. The tract to which the complainant claims to be entitled is the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the section mentioned, concerning which the bill alleges that complainant, in the belief that it was a portion of the land embraced in a homestead entry which he had filed on the 23d of March, 1885, had made valuable and substantial improvements long prior to the time when the defendant made his homestead entry. If it be conceded that the bill shows that the entry of the defendant was improperly allowed, and the quarter section, including the 40 acres in controversy, was improperly patented to the defendant by the government, still an insuperable objection to the bill, as presented, is that it does not show that the complainant is entitled to the 40-acre tract. It shows that complainant believed that the 40-acre tract in controversy was included within his own homestead entry, but that, as a matter of fact, it was not. It does not disclose any change in his homestead entry, nor any application on his part to the officers of the land department to permit him, by reason of his mistake, to cancel his entry, in whole or in part, and include therein the 40 acres in question. Certainly, so long as his entry stood, he was not legally entitled to another homestead. A seasonable application on his part to the officers of the land department to cancel his entry in part, and include therein the 40-acre tract in controversy, upon the ground that it had been inadvertently omitted therefrom, might have been granted, and, no doubt, would have been, in the event of a sufficient showing. But, so far as the bill shows, no such application was made by the complainant. Until

his own entry had been so changed as to admit of his acquiring the tract in dispute, he could not be injured by its wrongful disposal to another. Whether the court could award the complainant the relief he seeks, had the officers of the land department refused to permit him to so change his entry as to embrace the 40-acre tract in controversy, need not be determined, for there was no such refusal. Passing over the informalities of the bill, and the many averments of matters of evidence, the case made by it is wholly insufficient to entitle the complainant to a decree. It is not enough for complainant to show that the patentee ought not to have received the patent, but, to maintain his suit, it must be made to appear that the land in question should have been awarded to the complainant, had the law been properly administered by the land department. *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782; *Lee v. Johnston*, 116 U. S. 48, 6 Sup. Ct. 249. Demurrer sustained, with leave to complainant to amend within 10 days, if he shall be so advised.

TOPLIFF v. ATLANTA LAND & IMP. CO.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1895.)

No. 333.

VENDOR AND VENDEE—CONSTRUCTION OF TITLE BOND.

A title bond, given by a company which held the land under a perpetual lease with right to extinguish the same on certain conditions, recited the sale as made "subject to the annual ground rent," and provided that the purchaser should pay such rent pending the discharge of his deferred purchase-money notes, whereupon, all conditions being complied with, the obligor would execute "a good and sufficient title." *Held*, that this meant a title subject to the perpetual lease, and the grantor was not bound after full payment of the purchase money to extinguish the same for the purchaser's benefit, or to pay the ground rent.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

This was a suit in equity by John A. Topliff against the Atlanta Land & Improvement Company to enjoin the prosecution by it of an action of ejectment against him, and to enforce specific performance of a bond to convey title, which complainant held by assignment from Warren B. Crosby, the obligee named therein. By amendment to the bill the Atlanta Land & Annuity Company, Paul A. Seeger, and J. S. Rosenthal were also made parties defendant. The circuit court, by its decree, refused to adopt the construction of the title bond contended for by complainant, and he thereupon took this appeal.

The Atlanta Land & Improvement Company, at the time of making the bond for title, held the land under a perpetual lease from the Atlanta Land & Annuity Company, and the point in dispute in the case was whether, after completing his payments of the purchase money, the assignee of the bond was bound to pay the ground rent, or whether the Atlanta Land & Improvement Company was bound to pay it. The parts of the bond material to this controversy were as follows:

"The condition of the above obligation is such that the above-bound body corporate hath this day sold unto the said Warren B. Crosby a certain lot or parcel of ground and premises lying and being in the city of Atlanta," etc. [Here follows the description.] "Which lot, as above described, the said body corporate hath sold unto the said Warren B. Crosby at and for the sum of thirty-five hundred dollars, subject to the annual ground rent of one hundred and ten dollars, payable semi-annually on the first of April and October, respectively, of each and every year, of which amount the said Warren B. Crosby has this day paid unto the Atlanta Land Improvement Company the sum of fifty dollars, leaving accordingly a balance due, on account of purchase money, of thirty-four hundred and fifty dollars, which said balance of purchase money it has been mutually agreed shall be payable in installments of fifty dollars on the 15th of each and every month, with interest, until the said balance of purchase money is fully and finally satisfied and paid, including interest thereon at the rate of six per cent. per annum. In settlement of which the said Crosby has this day passed over and delivered unto the said Atlanta Land Improvement Company his sixty-nine promissory notes, all of even date, each for the sum of fifty dollars, and payable at intervals of one month, with interest at six per cent., so that the last of said series of notes will become due and payable sixty-nine months from this date, with the right and privilege of anticipating payment before maturity, so as to stop interest. And it is further mutually understood and agreed between the said Warren B. Crosby and the Atlanta Land Improvement Company that, pending the payment of the said balance of purchase money in the manner aforementioned, the said Warren B. Crosby shall and will promptly pay the ground rent on the aforementioned property, as the same shall respectively fall due and become payable," etc. "It being expressly understood that time is of the essence of this agreement, and that the above conditions are conditions precedent," etc. "Now, if the said Warren B. Crosby shall well and truly pay the promissory notes as aforementioned at the times hereinbefore mentioned, and shall continue the payment of the same until the balance of purchase money owing by him shall be fully satisfied and paid, as also the interest thereon at the rate of 6 per cent. per annum, and shall perform the other conditions as above provided for, then the Atlanta Land Improvement Company is bound to execute to the said Warren B. Crosby, his legal representatives or assigns, a good and sufficient title to the above-described lot or parcel of ground and premises," etc.

The cause was tried upon the following agreed state of facts:

For the purpose of a judicial determination of the substantial issue between the parties to the above-stated case, all the facts are hereby admitted to be such that the only question for adjudication is the proper construction of the bond for title now before the court, with respect to the obligee's liability to pay the ground rent after completing payment of the purchase money, it being admitted that the obligee and his assigns paid the ground rent pending payment of the purchase money, and refused to pay the ground rent after having paid all the purchase money. If the court shall be of opinion that said bond for title obliges the Atlanta Land Improvement Company to make to W. B. Crosby, or his assigns, a good title, without liability to the ground rent, the decree should be for the complainant Topliff. But if the court shall be of opinion that said bond for title obliges W. B. Crosby or his assigns to accept a lease for 99 years, conditioned to pay ground rent on the terms specified in the lease from the Atlanta Land & Annuity Company to the Atlanta Land Improvement Company, which lease is before the court, the decree should be for the defendants. Each of the parties saving and reserving the right to except to the decision of the court and to appeal in the mode provided by law.

In the circuit court the following opinion was delivered by Newman, District Judge:

The sole question for determination in this case is the proper construction of the provisions of a bond for title from defendant to W. B. Crosby, complainant's assignor. An agreement between the parties is as follows: [Here fol-

lows agreed statement of facts and copy of Bond for Title, already printed.] It will be perceived that Crosby took the land in question "subject to the annual ground rent of one hundred and ten dollars, payable semiannually on the 1st day of April and October, respectively, of each and every year." He also accepted the bond with the statement therein that the Atlanta Land Improvement Company held the land covered by the bond (as well as other adjoining lands) under a lease from the Atlanta Land & Annuity Company for 99 years. It is conceded in the agreement that Crosby took the land with this knowledge, and that he is chargeable with such knowledge. It is contended, however, as to Crosby's knowledge of the facts that this obligor only held a leasehold interest in the land, that he also had knowledge of certain provisions in this lease by which the improvement company held the land entitling that company to extinguish this lease by complying with certain named conditions, and acquire a right to a fee-simple title. And it is urged that Crosby and his assignee, Topliff, had the right to assume, under all the terms of the bond for title, that this would be done, and that, upon the payment of Crosby or his assignee of the purchase money and the ground rent during the period of the payment of the purchase money, the improvement company would take advantage of its right under the lease, and get from the annuity company a title unincumbered with ground rent, and convey the same to the holder of the bond. It is also claimed on behalf of Topliff that the clause in the bond that, "pending the payment of said balance of purchase money," Crosby shall pay the ground rent, qualifies and explains the preceding general statement that Crosby took "subject to the annual ground rent, etc.," and that the latter clause contains and is the real contract between the parties. It is entirely clear that the latter expression in the bond in no way qualifies or affects the former language. The last clause simply sets out what is (among other things) required of the obligee before he shall become entitled to a deed. It states the conditions precedent to the right to a deed, and in no way determines the kind of deed to which the obligee is entitled. The character of the whole paragraph as to purchase money, insurances, taxes, etc., as well as to ground rent, clearly indicates this. The part of the bond which must determine the kind of "good and sufficient title" to which Crosby or his assignee became entitled on compliance with the bond's condition, is the general provision as to the purchase price,—that is, \$3,500,—subject to the annual ground rent of \$110. The price is \$3,500, subject to the annual ground rent; and clearly, in the absence of restrictive language, that sum, the annual ground rent for which the improvement company was liable to the annuity company. It being a question of price, mere details in the subsequent part of the instrument as to the manner in which the trade should be consummated, are immaterial in determining the price. The conclusion is that Topliff, as assignee of Crosby, is only entitled to a conveyance from the improvement company of the land subject to the payment of the ground rent and that a decree must be entered accordingly.

A. H. Davis, for appellant.

Alex. C. King and Jack J. Spalding, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. As the sole question presented for review in this court is the proper construction of the bond for title, and that given by the circuit court was correct, the judgment appealed from is affirmed.

LOOMIS et al. v. RUNGE.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1895.)

No. 328.

1. STATUTES—SUPPLEMENTAL AND AMENDATORY ACTS—TEXAS CONSTITUTION.

July 11, 1856, the legislature of Texas passed an act changing the time for holding court in C. county to the first Mondays in February and August, a term having previously been held in November. On July 29th the legislature passed an act, entitled "An act supplemental to" the first act, providing that so much of the first act as required the court to be held in C. county on the first Monday of August should not take effect till the following year, that the fall term of the court in 1856 should be held on the first Monday of December, and that all process returnable to the term at any other time should be returnable on that day. *Held*, that such act was fairly described as a supplemental act, and was not an amendatory act, within the provision of the constitution of Texas then in force (article 7, § 25) forbidding the amendment of an act by reference to its title; and that such act extended the life of process, formerly returnable to the November term, until the first Monday of December, 1856.

2. SAME—DESCRIPTION OF OBJECT OF ACT IN TITLE.

Held, further, that the object of the act was sufficiently expressed in its title, within the provision of said constitution (article 7, § 24) that every law shall embrace but one object, and that shall be expressed in its title.

Appeal from the Circuit Court of the United States for the Western District of Texas.

This was a suit by Julie Runge against John A. Loomis, the Ostrander & Loomis Land & Live-Stock Company, and others to quiet and remove clouds upon the title to certain land. The circuit court rendered a decree for complainant. Defendant Loomis appeals. Affirmed.

Franz Fiset and John C. Townes, for appellant.

T. N. Waul, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

BRUCE, District Judge. The bill was brought in the court below by Julie Runge, residing in the city of Hanover, in the empire of Germany, and a subject of the empire of Germany, against John A. Loomis and others named, all citizens of the state of Texas, except the Ostrander & Loomis Land & Live-Stock Company, a corporation under the laws of the state of New Jersey, having its principal office and place of business in Concho county, Tex., of which John A. Loomis is agent and manager. Complainant says in her bill: That she is the widow of Henry Runge, deceased, who died on or about the 17th day of March, 1875, and at the time of his death had a large estate, consisting of lands and personal property, in the state of Texas, all of which was community property of their marriage, owned by decedent and complainant. That said Henry Runge died testate, and devised by his last will, which was probated, his share in the community lands in the state of Texas to the children born of their marriage, who are named in the bill, and from whom it is charged complainant purchased, for

a full price, each of their respective shares in said lands, and in the conveyance of the same by deed the daughters were joined by their respective husbands, who are named; and that the conveyances have been filed for registration in the proper counties where portions of the land lie. That from the year 1846 to the year 1850, and previous to said years, said Henry Runge, deceased, was conducting a mercantile establishment in the county of Calhoun, in the state of Texas. That the German Emigration Company, at that time introducing colonists into the state of Texas, contracted with him to a very large amount for provisions and supplies for said colonists, and also for advances of money to said emigration company, to be used for the transportation of colonists and other necessities of the company. That, the German Emigration Company failing to pay as agreed, Henry Runge instituted suit against the company and its several members, and thereupon on or about the 24th of September, 1850, obtained judgment for the sum of \$6,950.28, with interest at the rate of 8 per cent. per annum from the date of judgment until paid, together with costs of suit. That execution was afterwards issued upon this judgment, levied upon the lands in question, which were sold under the execution November 4, 1856, and deed made by the sheriff to Henry Runge November 5, 1856. Conspiracy and fraud is charged against the defendants. They are charged with trespassing upon the lands, and that they are liable for rent and occupation of same. The prayer is to quiet and remove clouds upon her title to the lands in question, to relieve her from a multiplicity of threatened suits, that she may be decreed to have a full and perfect title to the lands sued for, and for general relief. The answers of such of the defendants as do make answer to the bill and amended bills make general denials; deny the existence of a valid judgment of Henry Runge v. German Emigration Company, through which plaintiff claims to derive title; deny all charges of fraud and conspiracy; and set up a purchase in good faith from widow of M. A. Dooley of the lands in controversy, founded upon a deed of one H. Wilkie to Dooley, dated October 15, 1851, conveying 100 premium certificates, for 320 acres of land each, for the consideration of \$1,600. The assignments of error reduce the matter which is contained in a voluminous record to a somewhat narrow compass. The appeal is by the defendant John A. Loomis alone; and the errors complained of in the court below are the admission in evidence of the pluries execution issued by the clerk of the district court of Calhoun county, Tex., in the case of Henry Runge v. German Emigration Company, on April 8, 1856, with the return of the sheriff in the writ, and the admission in evidence of the deed from the sheriff to Henry Runge for the lands in controversy, and to the construction and effect to be given to an act of the legislature of the state of Texas of July 29, 1856, purporting to be an act supplemental to an act to change the terms of holding courts in the Tenth and Fourteenth judicial districts.

The question is the validity of the sheriff's sale made under execution issued upon judgment of Henry Runge v. German Emi-

gration Company, of date September 24, 1850. It is said the judgment does not support the execution, because there is a variance between it and the judgment as to the persons named comprising the firm of the German Emigration Company. This objection, and others of the same order, suggested rather than insisted on in argument for appellant, whatever of force they might have had in a direct proceeding, are not good, coming, as they do here, in a collateral suit. The judgment here was against the German Emigration Company, and it was the property of the company that was sold, not that of individual members of the company. The cases cited in appellant's brief and argument do not sustain the contention. The next point, and perhaps the one most insisted upon by appellant, is that the sale to Runge under execution was made after the return day of the execution, and after it had expired, and the sale was therefore void. It was issued April 8, 1856, and the return day named therein is the second Monday after the first Monday in September, 1856, that being the first day of the next succeeding term of the court, as the law then was; so that, as claimed, it was *functus officio* before the date of the sale under it, in November, 1856.

The appellee insists that the return day of the execution in question was not as stated in it, for that, after it was issued, and in July, 1856, the legislature of the state of Texas passed an act which extended the return day of this execution to the first Monday in December, 1856, a date subsequent to the sheriff's sale. There were two acts of the legislature of Texas passed in July of this year touching the subject,—the first one, "An act to change the time of holding the district courts in the Tenth and Fourteenth judicial districts," passed July 11, 1856, and "An act supplemental to an act entitled 'An act to change the time of holding court in the Tenth and Fourteenth judicial districts,'" passed July 29, 1856. The first act changed the time for holding the court in Calhoun county to the first Mondays in February and August, and the latter act, called a "supplemental act," provided that "so much of the above entitled act as requires the district court to be held in the county of Calhoun on the first Monday of August and in the county of Victoria on the second Monday after the first Monday of August shall not take effect until the first of January, 1857, and that the fall term of said court, 1856, shall be held in Victoria county on the second Monday of November and may continue in session two weeks and the fall term, 1856, of said court for the county of Calhoun shall be held on the first Monday of December, 1856, * * * and that all process returned to these courts at any other time shall be returnable at the time fixed by this act." The intention and purpose of this latter act is clear, and, if a valid act, extends the life of the execution until after the day of sale. But the appellant's proposition is that this act is void, and can have no such effect; that, while it is called a "supplemental act," it is in reality an amendatory act, and is in violation of the constitution of the state of Texas in force at the time, which provided (section 25, art. 7): "No law shall be revised or amended by

reference to its title but in such case the act revised or section amended shall be re-enacted and published at length." There may be some question as to whether an act of a legislative body is amendatory, or merely supplemental to a former act, in a given case. The word "supplemental" is defined: "That which supplies a deficiency or meets a want." Webst. Dict. Noting the dates of these respective acts of the legislature, it is seen that but a few days could elapse from the passage of the first act until the first Monday in August, when, under its provisions, the court should convene in Calhoun county, and that no provision was made in it for the return of process issuing before its enactment. It presented a case requiring remedy at the hands of the legislature. The legislature, deeming the act defective for these or other reasons, might properly seek to supplement it by providing a term of the court later in the year for Calhoun county, and providing that all process returnable to these courts at any other term shall be returnable at the time fixed by this act. This was a clear case of defective legislation, and, if in some sense amendatory, we do not deem it obnoxious to the constitutional provision, as claimed by the appellant. Nor do we think the cases cited, most of which are from states other than Texas, support appellant's contention. It is insisted, also, that this act is invalid because its object is not expressed in its title, as required by section 24, art. 7, of the constitution, which provides that: "Every law enacted by the legislature shall embrace but one object and that shall be expressed in the title." It is claimed that these sections of the constitution are mandatory, and fatal to the act of July 24, 1856. In *Gunter v. Mortgage Co.*, 82 Tex. 502, 17 S. W. 840, the court, while holding the constitutional provision mandatory, says: "While this is so, such provisions have been liberally construed, and it has been steadily held that a title which is in substance a compliance with the requirement of the constitution is sufficient." In *State v. McCracken*, 42 Tex. 386, the court, speaking of the provision last quoted, supra, says: "In holding this provision to be mandatory, it has been well said that it would be appropriate to give it a vigorous and technical construction." *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321, holds "that the provision that a bill shall not contain more than one subject, which shall be clearly expressed in its title, requires the general or ultimate object to be stated in the bill, and not the details by which the object is to be attained." The title of the act which is supplementary or amendatory, if you will, to the former act, refers distinctly to the title of the former act. We do not think this objection is well taken; that these objections are more specious than sound; and that the act of July 29, 1856, preserved the life of the execution to the first Monday of December, 1856, while the sale was made in November previous; and that complainant is entitled to recover upon the strength of her own title.

In the view taken of the case, we need not consider the evidence relied on by the complainant to sustain the charges of conspiracy and fraud on the part of the defendants, nor the evidence of defend-

ants in the attempt to prove good faith in the purchase under the Dooley title; but we think it proper to say that equity of the case, as shown in the evidence, is for the complainant, in whose favor we have found the legal title. The decree of the court below is affirmed.

SEARS et al. v. MAHONEY et al.

(Circuit Court, E. D. Louisiana. March 1, 1895.)

No. 12,357.

1. CONTRACTORS FOR PUBLIC WORKS—ACT AUG. 13, 1894.

Act Cong. Aug. 13, 1894, providing that any person contracting with the United States for the prosecution of a public work shall, before commencing such work, give a bond to pay all persons supplying him with labor or materials, and that a person supplying labor or materials to the contractor should have a right of action, in the name of the United States, on such bond, has no retroactive effect, and does not authorize a suit upon such a bond given before the passage of the act.

2. MECHANICS' LIENS—LOUISIANA STATUTE.

Whether, under the Louisiana statute, persons furnishing feed for mules used by a contractor in and about the construction of a levee have a lien on such levee or moneys due for building the same, quaere.

On Application for Preliminary Injunction.

O. B. Sansum, for Sears et al.

Jos. W. Carroll, as amicus curiae.

PARLANGE, District Judge. This is a proceeding intended to be justified by the act of congress approved August 13, 1894, entitled "An act for the protection of persons furnishing labor and materials for the construction of public works." The bill of complaint is in the name of the United States, for the use of Sears & Son, a commercial firm domiciled in the city of New Orleans. The bill avers that on December 1, 1893, the United States contracted with John Mahoney that he should construct the Merritt levee; that, among the stipulations of said contract, it was agreed that Mahoney should pay all liabilities for labor and materials incurred in prosecuting said work; that Mahoney agreed to execute a bond in favor of the United States, with proper sureties, for the performance of all the covenants of the contract, and that he did execute such a bond on December 1, 1893, with James Pendergast and Michael Ross as sureties; that on January 1, 1894, Mahoney employed one Carson to perform all the work described in the contract, in the place of him, the said Mahoney, and Carson proceeded with said contract, and carried out the same for Mahoney; that, in doing the work, it became necessary for Carson to employ and work a large number of mules, and to procure feed for them while they were employed and were working about the construction of said levee, and that, at the special request of Carson, feed to the amount of \$829.52 was delivered to Carson by said commercial firm, between September 27, 1894, and December 6, 1894; that all of said feed was used to feed said mules while they were working in construct-

ing said levee; that, by the statutes of Louisiana, said commercial firm has a lien and privilege on said levee, and on all moneys due by the United States for building the same; that, by the effect of said act of congress, said firm has a right of action to be prosecuted in the name of the United States against Mahoney and said two sureties; that Capt. Derby, of the United States corps of engineers in charge in the city of New Orleans, has in his custody a large sum of money, the property of Mahoney, being part of the consideration for building the levee; and that the same will be paid Mahoney, unless he is restrained. Complainants pray for an injunction to issue to Capt. Derby, forbidding him from paying the money, and to Mahoney, forbidding him from receiving the same. Subpoenas are asked for against Mahoney, Pendergast, and Ross, and complainants pray that they be condemned to pay said sum of \$829.52, and that said commercial firm be decreed to have a lien and privilege on the moneys in the hands of Capt. Derby, and that he be ordered to pay said firm said sum of money due it.

It is to be noticed that Sears & Son do not claim any lien or privilege by virtue of the act of congress of August 13, 1894. Their only claim in that respect is under the state law. It is doubtful whether the state law gives a lien in such a case. The state law gives a lien to architects, undertakers, bricklayers, painters, master builders, contractors, subcontractors, journeymen, laborers, cartmen, and other such workmen. Civ. Code, art. 3249 et seq.; Id. art. 2756 et seq. It is clear that Sears & Son do not come within the classes just mentioned. The state law (same articles of Civil Code) also gives a lien to "those who supply the owner or other person employed by the owner, his agent or subcontractor, with materials of any kind for the construction or repair of an edifice or other work, when such materials have been used in the erection or repair of such houses or other works." By the constant jurisprudence of the state, liens and privileges have always been strictly construed; and it is doubtful, to say the least, whether one who supplies feed for mules employed by a contractor, or by a subcontractor (as this case seems to show) is a furnisher of materials used in the erection of a work. I repeat that no lien is claimed under the act of congress; nor does that act seem to have intended to create a lien. It seems to merely give a personal action on the bond "for labor and materials"; and, as stated, it is not clear that Sears & Son furnished either labor or materials.

No claim is made in the complaint that Sears & Son have an equitable lien on the funds alleged to be in the hands of Capt. Derby. The question of lien is important because of the jurisdiction. Here is a suit virtually by Sears & Son, presumably citizens of Louisiana, against citizens of other states. The difficulty would be the same if the suit were considered to be one by the United States. The jurisdiction would seem to depend upon the fund being within the jurisdiction of this court, coupled with a right of Sears & Son in the same. While it would appear that Sears & Son have no lien under the state law, nor under the act of congress, and that the latter simply gives a personal action on the bond,

I pretermitt any decision on those questions, because of a point to which all the other considerations are subordinated, to wit: Have Sears & Son any right of action by virtue of the act of congress of August 13, 1894, on a bond executed on December 1, 1893? The act of congress under consideration clearly provides for the future only. It says that:

"Hereafter any person entering into a formal contract with the United States for * * * the prosecution of any public work, shall be required before commencing such work to execute the usual penal bond with good and sufficient sureties, with the additional obligation that such contractor * * * shall promptly make payment to all persons supplying him labor and materials," etc.

It seems clear that if the act of congress of August 13, 1894, had not been passed, Sears & Son could not have brought an action in the name of the United States on the bond of December 1, 1893, although that bond contained the stipulation that the contractor would pay all liabilities incurred in the prosecution of the work. That stipulation was made for the sole benefit of the United States, to prevent annoyance to the government agents, and, possibly, litigation against the government. If it be true that Sears & Son could not have sued on the bond before the passage of the act of August 13, 1894, I take it that it is clear they cannot sue on that bond now; for it is plain that the act of congress applies only to bonds executed from and after its passage, and was not intended to apply retroactively to bonds previously executed.

I am clear that the action cannot be maintained, and the restraining order will be set aside and annulled, unless Sears & Son, within five days, apply to and obtain from either of the circuit judges an order continuing said order in force.

WALTERS et al. v. WESTERN & A. R. CO. et al. (CAPITAL CITY BANK, Intervener).

(Circuit Court of Appeals, Fifth Circuit. December 18, 1894.)

No. 245.

BILL OF LADING—NEGOTIABILITY—PLEDGE.

E. & Co. were grain brokers in the city of A. Persons from whom they bought grain drew at sight on E. & Co. for the price, and forwarded the drafts for collection, with the bills of lading of the grain attached. E. & Co. arranged with the C. Bank to take up these drafts, and hold them as demand notes against E. & Co., with the bills of lading as security. E. & Co. claimed no control over or right to the bills of lading until they should take them up from the C. Bank. *Held* that, though the payment of the drafts by the C. Bank extinguished them as commercial paper, the bills of lading did not thereby become the property of E. & Co., but the bank became the lawful holder thereof, and entitled to receive from the carrier the goods represented by such bills of lading,—at least, to the extent of the amounts paid on the drafts, with interest.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

This was a suit by William T. Walters and others against the Western & Atlantic Railroad Company, in which receivers of the

defendant's property were appointed. The Capital City Bank intervened, seeking payment of a claim against the railroad company. The matter was referred to a special master, who reported in favor of the bank. Exceptions to this report were overruled (63 Fed. 391), and, from the decree overruling same, complainants appeal.

Julius L. Brown and B. F. Abbott, for appellants.

John C. Reed, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. The record in this case shows that the appellee the Capital City Bank asserts a claim against the Western & Atlantic Railroad Company, apparently in liquidation, for the value of 18 certain car loads of grain, for which the Capital City Bank holds unsatisfied bills of lading, the railroad company having failed to deliver the said grain on demand. The case appears to have been referred in the circuit court to a special master, who took the evidence, and reported in favor of the Capital City Bank. Exceptions were filed to the report, and the whole matter—the evidence, report, and exceptions—was submitted, whereupon the circuit court gave a decree in favor of the Capital City Bank, and against the Western & Atlantic Railroad Company, for \$7,602.84, with interest from September 9, 1893, the same to be paid out of the funds of the said company in the hands of receivers of the court. From this decree Walters and others, complainants in the main case, appealed to this court.

The circumstances under which the claim of the Capital City Bank arises, as we gather from the evidence, are as follows: In the fall and winter of 1889 the Western & Atlantic Railroad Company, a corporation chartered by the state of Georgia, operated a railroad, the eastern terminus of which was Atlanta, Ga.; the Capital City Bank was a corporation doing a banking business in the city of Atlanta; George B. Everett & Co. were brokers dealing in grain, and having their office in the city of Atlanta, Ga.; and Akers & Bros. were a partnership doing a milling business at McIvors station, a short distance out of Atlanta, on the line of the Western & Atlantic Railroad. Akers & Bros. were customers of Everett & Co., and through them, as brokers, from time to time, procured grain for milling purposes, to be delivered at McIvors station; Everett & Co., in turn, ordering the same from western shippers. In the months of October and November, 1889, certain shippers of grain, outside of the state of Georgia, shipped to various points, for carriage by the Western & Atlantic Railroad Company, among others, certain 18 cars loaded with grain consigned to special order, receiving, at the time of shipment, bills of lading particularly describing the cars and contents, and reciting that the goods were consigned to special order. Some of the bills of lading were marked, "Notify Everett & Co., Atlanta, Ga." Others were silent as to the notification of any party. On receiving the bill of lading, each

shipper indorsed the same in blank, and, attaching thereto a sight draft drawn on Everett & Co. for the price of the grain, forwarded the same through the banks for collection. At the time of shipping the grain, an invoice giving the date of shipment, the contents, and number of the car containing the same, was forwarded by the shipper to Everett & Co. On receipt of this invoice, Everett & Co. delivered to Akers & Bros. an invoice of their own, showing car, number, and contents, marking the same "Paid"; at the same time receiving from Akers & Bros. an obligation in writing, of which the following is a sample:

"\$542.26 due.

Atlanta, Ga., Oct. 26th, 1889.

"Forty-eight days after date, we will pay to G. B. Everett & Co., on presentation of bills of lading for cars 18 and 12,624, five hundred and forty-two and ²⁰/₁₀₀ dollars.

"Net ———. Int. ———.

Akers & Bros."

When the drafts drawn by the shippers on Everett & Co., with bills of lading attached, reached Atlanta, the Capital City Bank, under an arrangement with Everett & Co., advanced the money to pay the same, and, by agreement, held the drafts as demand notes against Everett & Co., and retained the bills of lading as security for the same. In relation to these matters, Mr. Everett testifies, and his evidence is undisputed:

"Our shipments were made to McIvors, a station of the W. & A. Railroad, some twenty miles north of here. * * * We had no way of determining the arrival of the goods there. There is no telegraph station there, or post office there; and, in selling Akers & Bros. wheat and grain to be delivered at their mills, we had to take their word for the arrival of goods. And they would put us off from time to time, saying cars were not there,—hadn't yet arrived; and as we had to take care of all the drafts drawn on the grain, promptly, we adopted this plan of making him give us a contract for each car, stating the limit to which we would allow,—the limit of time we would allow for it to arrive, and for him to pay us for it in some way or other. These contracts were usually made. We made him an invoice as soon as we received the invoices from the eastern shipper that gave him notice of the car number, so that when the car arrived he would know who shipped, and so on, and the contents, and quality of the grain. Q. What would be the final result? A. When this time expired, or if he wanted to use these cars mentioned,—the grain mentioned in one of these bills before, either one of them,—he would invariably communicate with us, in Atlanta, to get the bills of lading; and he would give us a check or a plain ordinary note for the same, which we would use in our business, and surrender to him the bill of lading, and then this was destroyed. Q. Well, now, how did you get the bill of lading yourself, when the draft was attached? A. I would have to give a check,—my check,—and pay the draft, or take the money. Q. Now, these bills of lading represented by these papers here,—did you ever get them? A. Never have had them; never have owned them; never. Q. Why not? A. Because Akers & Bros. never have paid me for them,—never have called on me for the bills of lading. In other words, never notified me that they arrived. Q. Why didn't you get the bills of lading? You have never paid for these yourself? A. No, sir; I have never owned them,—never have paid for them. * * * Q. Mr. Everett, what control, if any, did you ever attempt to exercise over these papers in evidence here? A. None whatever, except to try to direct to which bank they should be sent for collection. Q. You have never conceived you had any right to them, then? A. Never. Those bills of lading were treated in the same manner as we are doing business to-day with both the Capital City Bank and Lowry's Bank. They hold them, and they are their property."

On December 13, 1889, Akers & Bros. failed, at which time the Capital City Bank held bills of lading to secure drafts drawn on Everett & Co. for 36 car loads of grain, all of which, after shipment in due course of carriage, came to the possession and control of the Western & Atlantic Railroad Company. With the failure of Akers & Bros., the railroad agency at McIvory station was discontinued, and such cars as were lying at McIvory station, awaiting delivery, were brought into Atlanta. Soon after the failure of Akers & Bros. the Capital City Bank made demand upon the Western & Atlantic Railroad Company for the delivery of the 36 car loads of grain for which the bank held bills of lading. This demand was made upon the general freight agent of the railroad company. The general freight agent answered the demand by causing an investigation to be made, on which investigation it was found that 18 of the 36 cars for which the Capital City Bank held bills of lading had been at various dates, and in the months of October, November, and December, delivered by the agent of the company at McIvory station to Akers & Bros.; the other remaining 18 cars were still in the possession of the railroad company, and were delivered to the Capital City Bank, under the demand made to the general freight agent. On the day of their failure, Akers & Bros. gave a mortgage to the Western & Atlantic Railroad Company, which recited the following purpose:

"Said Western & Atlantic Railroad Company has heretofore delivered to us, at different times, shipments of corn, wheat, oats, and flour, which were consigned to us by various persons; said deliveries being made without requiring the production of the bills of lading or railroad receipts for or connected with such shipments, and certain of such bills of lading and receipts are now outstanding, in the hands of persons who claim that said company is liable to them for making such deliveries, and this conveyance is made to secure said company, and hold it harmless from loss on account of such claim."

About nine months after the failure of Akers & Bros., on October 17, 1892, G. B. Everett, one of the firm of Everett & Co., by his individual note and a deposit of collateral security, secured the Capital City Bank from loss in case the Capital City Bank should fail to recover from the Western & Atlantic Railroad Company the value of the grain covered by the several bills of lading involved in this case. We find no evidence in the record showing, or tending to show, that either the Western & Atlantic Railroad Company or the Capital City Bank had any knowledge of the invoices given by Everett & Co. to Akers & Bros., or of the obligations given by Akers & Bros. to Everett & Co.

On the facts of the case, as recited, the first inquiry to which our attention is directed is as to the title acquired by the Capital City Bank to the bills of lading, and the goods represented by them, when the bank advanced the money to pay off the sight drafts under the agreement with Everett & Co. that the bank should hold the same as demand notes against Everett & Co., and retain the bills of lading as collateral security thereto. Unquestionably, if Everett & Co. had themselves paid the sight drafts, they would thereby have become the lawful holders of the bills of lading, and

have been entitled to demand the contents from the railroad company; and it seems also unquestionable that Everett & Co. could have borrowed an equal amount of money of the bank, and made lawful delivery of the bills of lading, with the consequent right to demand the goods represented thereby as collateral security. No suggestion is made as to any illegality in the transaction by which Everett & Co. procured the bank to pay off the drafts on security of the bills of lading, nor is any suggestion made that thereby a complete contract was not made and executed between Everett & Co. and the bank.

The contention of the appellants, as we understand it, is that as the sight drafts, with bills of lading as collateral, were forwarded to the Atlanta banks for collection, there was no authority in the banks at Atlanta to negotiate the drafts, or make any other use of them than to collect the money, and when the money was collected, no matter from whom, the sight drafts were fully accomplished, and, *ex necessitate*, the bills of lading belonged to Everett & Co.; in other words, that Everett & Co. became the owners and holders of the bills of lading, and entitled to demand from the railroad company the goods represented by such bills just as soon as the sight drafts were paid off, no matter by whose procurement. It may be, and probably is, the law that when the sight drafts were forwarded to the Atlanta banks for collection, and the Capital City Bank advanced the money to pay them, and did pay them, that thereby the sight drafts, as commercial paper, were dead obligations; but we do not think it follows that the bills of lading were thereby accomplished, or that necessarily thereby Everett & Co. became the holders of them, with power of disposal. It rather appears to us that Everett & Co., having the right to pay off the original sight drafts, and thereby become the holders of the bills of lading, had full power to substitute the Capital City Bank to such right. The amended Code of Georgia permits the pledge of goods by the delivery of bills of lading as symbolic of the property pledged. Act Oct. 3, 1887 (Laws Ga. 1887, p. 36). The commercial law, as recognized and declared by the supreme court of the United States, is to the effect that where goods are received by a common carrier for shipment, and a receipt or bill of lading is given therefor, in which it is stipulated that the goods at destination shall be delivered to the order of the consignor, such receipt or bill of lading attached to a draft operates a pledge of the goods mentioned in the receipt or bill of lading as security for the payment of the draft, and that the carrier cannot, except at its peril, deliver the goods represented by such receipt or bill of lading, except upon the production thereof, and the order of the consignor. *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 8 Sup. Ct. 266. To the same purport, see *Boatmen's Sav. Bank v. Western & A. R. Co.*, 81 Ga. 221, 7 S. E. 125. We therefore find, upon the facts of this case, that the Capital City Bank, under the contract with Everett & Co., in pursuance of which the bank paid the sight drafts to which the bills of lading in controversy were attached, became the lawful holder of said bills

of lading, and, as such, entitled to have and receive from the railroad company the contents represented thereby, at least to the extent of fully paying the sum or sums called for by the sight drafts paid off, and lawful interest thereon. And, finding this to be the case, we are, of necessity, compelled to hold that Everett & Co. never acquired the title to the bills of lading, or the grain represented thereby, and therefore it is immaterial to inquire into the nature of the transactions between Everett & Co. and Akers & Bros. The facts, as recited, however, seem to show clearly that, as between those parties, it never was contemplated by either that Akers & Bros. were to become the holders of, and entitled to, any bills of lading prior to paying for the same in the usual course of business, all as testified to by Mr. Everett.

Some question is made by the appellants that, although the Capital City Bank was the lawful holder of the bills of lading, and entitled to demand delivery, yet delivery was not demanded, prior to the suit, of the proper agent of the company. We find in the record a detailed statement of the several agents of the Western & Atlantic Railroad Company, and of their respective duties; but we also find, in this case, that the local agent at McIvors station, who was one of the firm of Akers & Bros., was removed, or otherwise disappeared, as agent at that station, and his place was not supplied. In the absence of the local agent, we are of opinion that a demand upon any agent of the company in general control was sufficient, and that as demand was actually made upon the general freight agent, who, it seems, represented the company so far as the cars in question were on hand, and who made regular delivery of the same, the railroad company ought not to deny his authority.

Stress is also laid by appellants upon the fact that, nine months after the Western & Atlantic Railroad Company made default, George B. Everett, one of the firm of Everett & Co., by his individual obligations, secured the Capital City Bank from loss in the premises; but we are disposed to treat this as cutting no more figure than the fact that on the very day of the failure of Akers & Bros. the Western & Atlantic Railroad Company protected itself, so far as it was able, by mortgage and other security, from loss or damage occasioned by improper delivery of cars of grain, etc., to Akers & Bros. In disposing of this case in the circuit court, the learned judge presiding says:

"The whole question comes back to this: that the railroad company should have required the bills of lading to be given up before delivering the goods, and when they allowed Akers & Bros. to receive these goods without, at the same time, receiving from them the bills of lading, they did so in violation of the rights of this intervener, who seems, in the utmost good faith, to have advanced the money upon the credit of the goods covered by the bills of lading,—of their being in possession of the railroad company. While it is conceded that bills of lading are not negotiable instruments, in the full sense of that term, still they do represent the goods which they cover, and may be taken as security for money advanced while the consignment is in the hands of the railroad company. Among the cases which might be referred to, the following are named, because they are supreme court decisions, and the doctrine they enunciate controlling: *Conard v. Insurance Co.*, 1 Pet.

386; *The Thames*, 14 Wall. 107, and cases therein cited. It is apparent that the bank would have been fully protected if the railroad company had required the bills of lading to be delivered, or had exercised any reasonable degree of diligence in ascertaining the person entitled to receive the goods, before releasing possession."

This view of the case is correct, and the decree appealed from is affirmed, with costs.

MISSOURI PAC. RY. CO. v. HALL.

(Circuit Court of Appeals, Eighth Circuit. February 23, 1895.)

No. 447.

1. CARRIERS—CONTRACT OF SHIPMENT—PAROL EVIDENCE.

In an action to recover damages for an unreasonable delay in transporting cattle under a written contract of shipment, evidence of a conversation had with defendant's shipping agent shortly before execution of the contract is admissible to show notice to the carrier of the plaintiff's intention to sell his cattle on a particular day.

2. SAME—OPINION EVIDENCE—COMPETENCY OF WITNESS.

In an action against a carrier for unreasonable delay in transporting beef cattle, witnesses experienced in handling and shipping cattle may express an opinion as to the extent such cattle would shrink in weight in a given time, under given circumstances, though they have never seen plaintiff's cattle.

3. TRIAL—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

An objection to the opinion of witnesses as to the extent cattle would shrink in weight under given circumstances, as being "incompetent, irrelevant, and immaterial," is too general to raise the question of the competency of the witnesses as experts, or that the questions asked were hypothetical, and did not embrace a correct statement of the facts which the proof tended to establish.

4. CARRIERS—DELAY IN TRANSPORTATION—EVIDENCE—QUESTION FOR JURY.

On an issue as to delay in delivering cattle to a connecting carrier, where it appeared that a specially detailed crew was ready to take the train on through, shortly after its arrival, but through defendant's mistake the cattle were unloaded, and upon being reloaded in the same cars a broken wheel was discovered, which necessitated additional delay, so that the cattle were delivered to the connecting carrier some seven hours after they should have been delivered, and arrived at their destination some five hours too late for that day's market, whether or not such delay was unreasonable, and attributable to defendant's negligence, was a question for the jury.

5. SAME—LIVE-STOCK SHIPMENTS—DELAY—INSTRUCTIONS.

In an action for damages caused by defendant's delay in delivering cattle to a connecting carrier, an instruction that defendant was not liable if the delay was no longer than was necessary to comply with Rev. St. § 4386, requiring carriers of cattle to unload them, at the end of every 28 hours, for feed, water, and 5 hours' rest, excepting only where they are transported in cars provided with facilities for that purpose, was properly refused, as misleading, where the cattle were delayed 11 hours after being en route only 14 hours, and were loaded in cars in which they could be fed and watered without unloading, and, but for such delay, would have arrived on time, even if the connecting carrier had unloaded them for rest.

In Error to the United States Court in the Indian Territory.

Action by J. O. Hall against the Missouri Pacific Railway Company to recover damages for delay in the transportation of cattle. There was a judgment for plaintiff, and defendant brings error.

George E. Dodge, B. S. Johnson, and J. E. Williams, for plaintiff in error.

William T. Hutchings (Stockton S. Fears was with him on brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a suit by James O. Hall, the defendant in error, against the Missouri Pacific Railway Company, the plaintiff in error, to recover damages for an unreasonable delay in transporting 331 head of beef cattle from Nowata, in the Indian Territory, to the city of Chicago, Ill. The plaintiff recovered a judgment, and the defendant company has brought the case to this court, alleging several errors in the proceedings of the trial court. We will first notice certain errors that have been assigned relative to the admission of testimony.

It is urged, in the first instance, that the trial court erred in permitting the plaintiff, James O. Hall, to testify to an interview that he had with the defendant's live-stock agent, Mr. Boline, on the day the cattle were shipped, because, as it is said, the testimony tended to vary the terms of the shipping contract, which was entered into, in writing, shortly after the alleged interview. An inspection of the record shows that the conversation in question occurred on the morning of Saturday, June 20, 1891, and that the trial court held that only so much of the conversation was relevant and admissible as tended to show that the defendant's agent was advised that the shipper desired to have his cattle delivered in Chicago in time for the market of Monday, June 22, 1891. No error was committed in admitting this testimony. It did not vary the terms of the written contract, and was not intended to have that effect. It was admitted, as the record discloses, solely for the purpose of showing that the carrier had notice of the shipper's intention to sell his cattle on a particular day. If the plaintiff gave the defendant company notice that he wished his cattle to arrive in time for the market of a particular day, he might reasonably expect that in view of such information the carrier would be more expeditious in executing the contract of affreightment. The knowledge that a party has, when he enters into an agreement, of the object which the opposite party hopes to accomplish, should be allowed to have some weight in determining whether the party thus informed discharged the obligation which he assumed, with reasonable diligence, and with a due regard for the accomplishment of the purpose which the other party had in view. *Blodgett v. Abbot*, 72 Wis. 516, 40 N. W. 491; *Railway Co. v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760, and 23 S. W. 320; *McGraw v. Railway Co.*, 41 Am. Rep. 701.

It is claimed that the trial court further erred in allowing several witnesses, namely, Winfield Scott, W. C. Powell, and J. O. Hall, to testify as to the shrinkage in the weight of the cattle between June 22, 1891, and June 23, 1891, the day when the cattle were sold, the cattle having arrived on the 22d, but too late to be sold on that day. This objection is urged on the ground that no evidence was offered

to show that these witnesses were experts, or that they had ever seen the plaintiff's cattle; also, on the ground that the questions which elicited the testimony were hypothetical, and that they did not embrace a correct statement of the facts which the proof tended to establish. An inspection of the record clearly shows that two of these witnesses had been engaged for some years in handling and shipping cattle, and that they were doubtless competent to express an opinion as to the extent that beef cattle would shrink in weight in a given time, and under given circumstances. It is also fair to infer, we think, that the third witness followed the same calling, and was likewise competent to testify as an expert. We are also of the opinion that the hypothetical questions propounded to these witnesses contained a fair statement of the facts which the evidence tended to establish, and that this ground of objection was not well taken. There is a further reason, however, why the objection to the testimony in question ought not to prevail in this court. It was objected to solely on the ground that it was "incompetent, irrelevant, and immaterial." If the specific objection to the testimony which counsel urge in this court had been urged in the trial court, it is obvious that the defendant would have had no cause to complain either of the form of the hypothetical question, or of the competency of the witnesses to testify as experts. The objection stated was therefore too general to be of any avail in an appellate court. We would not be understood as deciding that an objection on the ground of "incompetency, irrelevancy, and immateriality" is always too general, but we think that, when counsel intend to rely on the ground that a hypothetical question propounded to an expert witness is based upon an erroneous statement of the evidence, that fact, at least, should be called to the attention of the trial court. We refer to what was said on that subject by this court in *Insurance Co. v. Miller*, 8 C. C. A. 612, 614, 60 Fed. 254.

It is further contended—and this is, perhaps, the most important matter that we have to notice—that the defendant company did transport the cattle, and deliver them to the connecting carrier at Kansas City, without unnecessary delay, and that the court should have so charged the jury. The evidence bearing on this issue tended to show that the cattle were received at Nowata by the defendant company about 1 p. m. on June 20, 1891; that they were loaded on cars with reasonable expedition; that the train left Nowata about 4 p. m. of the same day, and arrived at Kansas City the following morning between 6 and 7 o'clock. It is not claimed that there was unnecessary delay on the part of the carrier prior to the arrival of the train at Kansas City. There was further evidence, however, which tended to show that the Wabash Railway Company, the connecting carrier over whose line the cattle train in question was to be hauled from Kansas City to Chicago, had received notice of the expected arrival of the train, and had detailed an engine and crew to haul the same through to Chicago, and that said engine and crew were ready to start from Kansas City between 8 and 9 o'clock, a. m.; that, through some misunderstanding or oversight on the part of the defendant company's agents at Kansas City,

the cattle were taken to the stock yards immediately on their arrival, where they were unloaded; that they were subsequently reloaded, in the same cars in which they had made the journey from Nowata, when the mistake made in unloading them was discovered; that it was ascertained, after the cattle had been reloaded, that one of the cars in the cattle train had a broken wheel, which discovery necessitated some additional delay, so that the cattle were not in fact received by the Wabash Railway Company until about 1 o'clock p. m.,—some six or seven hours after they should have been delivered; and that they did not arrive in Chicago until about 7 p. m. the next day (Monday), which was four or five hours too late for that day's market. We have given careful attention to all of the evidence bearing on this branch of the case, and have reached the conclusion that it was fairly within the province of the jury to decide whether there was an unreasonable delay at Kansas City, and whether such delay was attributable to a want of proper diligence on the part of the defendant company's agents and employés. Those questions, in our judgment, were properly submitted to the jury, and with the finding of the jury on that issue we cannot interfere.

It is finally insisted that the trial court erred in refusing the following instruction which was asked by the defendant company:

"The court instructs the jury that, by the statutes of the United States (section 4386), railway companies and others transporting cattle are prohibited from keeping them on the cars, without feed, water, and rest, for a longer period than twenty-eight hours, and requires of all such companies or persons that cattle being so transported shall, at least at the end of twenty-eight hours, be unloaded, fed, and watered, and allowed at least five hours for rest, excepting only in cases where the cattle are transported in cars provided, not only with facilities for feeding and water, but also for room to rest. If, therefore, you find from the testimony in this case that plaintiff's cattle were shipped in cars not provided with all these facilities, or were so crowded as not to give opportunity for the cattle to lie down and rest, and that the time required in transportation from Nowata to Chicago would exceed twenty-eight hours, it then becomes imperative that these cattle should be unloaded at some point en route; and if you further find from the testimony that these cattle were not delayed longer in Kansas City than would have been necessary in such unloading, feeding, and resting, as above described, and they did not receive that treatment at any other point en route, in that event the court charges the jury that the delay at Kansas City was not a negligent one, and the defendant was not responsible for such delays, or any damage that may have resulted therefrom, and your verdict should be for the defendant."

Of its own motion, the trial court charged the jury, in substance, that the plaintiff could not recover if the jurors believed that the failure to reach Chicago in time for Monday's market was due to the fact that the cattle were unloaded by the Wabash Railway Company after they came into its custody, and were allowed to rest five hours, in order to comply with the provisions of section 4386 of the Revised Statutes of the United States. It will be observed that the defendant's instruction above quoted was framed upon the assumption that there was evidence from which the jurors might find that the cattle were not in fact delayed at Kansas City any longer than was necessary to comply with the federal statute, section 4386, *supra*. In point of fact, the evidence showed conclu-

sively that the cattle were detained in Kansas City from 7 a. m. until 6 p. m.,—about 11 hours,—while the statute only contemplated a detention of 5 hours. Besides, the cattle had been en route only 14 hours when they reached Kansas City, and they were loaded in cars in which they could be fed and watered without unloading. Nevertheless, through the fault or mistake of some one, they were not delivered to the Wabash Railway Company until about 7 hours after they arrived at Kansas City. It also appears that if they had been turned over to the Wabash Railway Company promptly on arrival, and had been immediately forwarded, they might have reached Chicago before the close of market hours on Monday, even if they had been unloaded for rest for some hours between Kansas City and Chicago. Under the circumstances, we think that the instruction above quoted was well calculated to mislead the jury, and that it was properly refused for that reason, if for no other. The judgment of the lower court will be affirmed.

THIRD NAT. BANK OF CINCINNATI v. HUMPHREYS et al.

(Circuit Court, S. D. Ohio, W. D. April 12, 1895.)

No. 4,591.

1. ACCORD AND SATISFACTION—PERFORMANCE OF CONDITION—PAYMENT.

Plaintiff, the holder of notes, agreed to release defendants from all liability as indorsers thereon, on payment of 25 per cent. of the indebtedness represented by the notes. Defendants were to give notes for that amount, secured by deed of trust; and it was stipulated that plaintiff should hold the original notes; that, on failure of defendants to pay the composition notes at maturity, the amount paid thereon by sales of land under the trust deed should be credited on the original indebtedness, and plaintiff should have the right to enforce full payment of the balance due on the original notes. The composition notes were not paid at maturity, and plaintiff made no agreement to extend them, or to receive them as a discharge of the original notes. *Held*, that plaintiff was not estopped to assert its claim on the original notes by receiving payments from defendants, partly derived from sales of property covered by the trust deed, and crediting them on the composition notes after maturity.

2. ESTOPPEL—ADMISSION IN PLEADINGS—SCOPE AND EFFECT.

Where defendants in an action on a note pleaded part payment by a subsequent indorser, who was not a party, plaintiff, by failing to reply, and allowing credit to be taken therefor, is not estopped to deny such payment in a subsequent action against such indorser.

Action by the Third National Bank of Cincinnati against Ira A. Humphreys and others on promissory notes.

Paxton & Warrington, for plaintiff.

Jones & James and G. Bambach & Son, for defendants.

SAGE, District Judge. The plaintiff sues to recover \$21,564.19, upon 14 promissory notes of the Boyd Manufacturing Company, made in November and December, 1886, and in January and February, 1887, payable at various dates, beginning with March 12, 1887, and ending June 7, 1887, all to the order of C. W. and S. G. Boyd, and by them and Ira A. Humphreys & Son indorsed.

The defense is a plea of accord and satisfaction. It is based upon a contract in writing made by the plaintiff with the defendants on the 6th of April, 1887, after 4 of said notes had become due, and before the maturity of the remaining 10, all wholly unpaid. The contract provided for the release and discharge by the plaintiff of Ira A. Humphreys and A. E. Humphreys, doing business under the firm name and style of Ira A. Humphreys & Son, from their liability on said notes upon their payment of \$6,000, being 25 per cent. of the indebtedness represented thereby.

They were to give their two notes for \$3,000 each, payable, one in 60 days, the other in 12 months, after the date of the contract, with 6 per cent. interest, and to be secured by a trust deed to be made by Eleanor A. Humphreys and Ira A. Humphreys, her husband, and to convey to the plaintiff two tracts of land in West Virginia, one containing about 7 acres, and the other about 300 acres. It was stipulated in the contract that the plaintiff should hold and retain the original notes; that, upon the failure of Ira A. Humphreys & Son to pay the two composition notes "at the maturity of the same," the amount paid thereon or by the sale of the real estate described in the trust deed should be credited upon the original indebtedness, and that the plaintiff should have the right to enforce full payment of the balance due on the original notes. It was further agreed that Humphreys & Son should obtain the consent of the Boyd Manufacturing Company (which had meanwhile become insolvent, and made an assignment) by its assignee, under the order of the probate court of Brown county, Ohio, and of C. W. and S. G. Boyd, that the composition with Ira A. Humphreys & Son should in no way impair the liability of the Boyd Manufacturing Company and its assignee, or of C. W. and S. G. Boyd, upon said original notes. Both notes called for by the contract were dated April 6, 1887. The first matured June 8, 1887, and the second April 9, 1888. The trust deed was executed in accordance with the provisions of the contract under date April 6, 1887, and acknowledged May 2, 1887. It included a power of sale, to be exercised by the trustee at the request of the plaintiff, for the payment of the whole or any part of said notes.

Payments were made as follows: June 17, 1887, 9 days after the maturity of the first note, \$2,000; November 30, 1887, \$250; April 22, 1889, 20 days after the maturity of the second note, \$421.25; April 26, 1889, \$765; and May 27, 1889, \$740,—aggregating \$4,176.25. The payment of \$2,000 was credited by the plaintiff upon the first note. Between the 5th and 9th of November, 1887, one acre of the land embraced in the deed of trust was sold, and the proceeds (\$250) constituted the second payment, credited on the 30th of November, 1887. Between that date and April 22, 1889 (the date of the next following payment), there was frequent correspondence between the bank and defendant Humphreys, in which Humphreys pleaded for forbearance and indulgence, and the bank indicated its disposition to treat him with leniency. Under date February 23d, Humphreys wrote the vice president of the bank that, when certain barges were finished, he could put them to work, and they

would help pay up some of the old score. On the 6th of March, he wrote, requesting that the bank instruct its agent or attorney to make a release of a quarter acre of land included in the trust deed, in consideration of \$100. March 13th the bank wrote to Humphreys, acknowledging the receipt of the letter of the 6th, and stated that instructions had been sent to its agent in accordance therewith. April 19, 1888 (10 days after the second composition note fell due), Humphreys wrote the bank, stating his wish to settle up by the 1st of June, 1888, all of the first note, due June 6, 1887, and the interest on the note for \$3,000, due April 6, 1888, asking the bank to hold the trust on the land, and carry the note of \$3,000 another year, as it was entirely out of his power to pay it in less time. To this letter, the bank, by its vice president, on the 20th of April, 1888, wrote acknowledging its receipt, and, after saying that it had certainly in the past year given evidence of a desire to be easy and not press the defendant to his inconvenience, added:

"We feel that, after the way we have treated you, we have a right to expect you to do all you can in the way of discharging your indebtedness upon the note in question, and we will exercise all the leniency possible in the future, as we have certainly done in the past. We are disposed against any formal extension, as it may prejudice our interests with reference to other parties."

After that date letters passed back and forward, Humphreys stating his efforts, and the bank referring to its course in the business as evidence of its indisposition to distress him, and of its desire to have some payment without further delay. In a letter written by the president of the bank, under date August 25, 1888, he says:

"It is not a case of ultimate security, but to get this matter closed up, and, to do this, there must be some payment made. As in the past, we can give no extension or agreement for extension; our past course being, I should think, all that would be required. Send us some money."

In November, 1888, the defendant had a conversation with the vice president at the bank, in which an arrangement was made for the delivery to the bank by the defendant of two barges, to be sold, and the proceeds applied on the notes. There was also an application by the defendant about the same time for the release of portions of the land conveyed in trust. On December 20, 1888, the vice president of the bank wrote Humphreys, inclosing the statement of his account, including credits and interest on the composition notes to January 1, 1889. He says:

"We will release one-fourth and one-half acre land when we hear that Mr. Brown will attend to it. Please see him, and ask him to answer our letter. We did release some land when you paid the \$250. Of course, we will not make release on account barges, but will surrender the note that will be satisfied, and indorse any residue on the other."

About January 13, 1889, a portion of the property covered by the deed of trust was sold and released, and the proceeds, amounting to \$421.25, received and credited by the bank on the 60-days note, under date April 22d. On April 26, 1889, the sum of \$765, proceeds of the sale of one of the barges, was placed by the bank as

a credit on the 12-months note. On May 27, 1889, the sum of \$740 (proceeds of the sale of the second barge) was placed by the bank as a credit on the 12-months note, and on the same day the bank so advised Humphreys by mail.

Meantime, on the 15th of November, 1888, the bank had brought an action in the court of common pleas in Brown county, Ohio, against the Boyd Manufacturing Company, makers, and C. W. and S. G. Boyd, indorsers, for the amount still due upon the original notes. On the 15th of December, 1888, the defendants answered, alleging the indorsement of the note to Ira A. Humphreys & Son, and by them to the bank, and that Ira A. Humphreys & Son, as such indorsers, had paid to the bank, on the notes sued upon, the sum of \$6,000, which was a credit on said notes as of the date of said payment; also, that the assignee of the Boyd Manufacturing Company had paid on account of one of said notes \$123.75. There was no reply to this answer. Under the Ohio Code of Procedure, the failure to reply to new matter contained in the answer amounts to an admission. Judgment was rendered in favor of the bank for \$18,691.38, with interest from December 18, 1889, upon a finding that that amount was due upon the notes set forth in the petition, allowing all proper credits thereon. Six months after the entry of this judgment, the bank brought an action against the Boyd Manufacturing Company, C. W. Boyd, S. C. Boyd, Ira A. Humphreys, and A. E. Humphreys in the circuit court at Kanawha county, W. Va., upon the notes sued upon in Brown county, Ohio, in the action wherein the judgment was taken. This suit was never pressed, and was dismissed by the bank. In addition to the payments made by the defendants, there was paid on account of the original notes, on the 4th of August, 1888, by the assignee of the Boyd Manufacturing Company, a dividend of $9\frac{9}{10}$ per cent. on \$23,933.62, the amount then due on the original notes, the dividend being \$2,369.43; and on the 5th of July, 1890, a further dividend of one-tenth of 1 per cent. on the same amount, the dividend being \$23.93. On the 29th of January, 1892, this action was brought by the plaintiff in the superior court of Cincinnati. It was removed to this court by the defendants, citizens and residents of the state of Minnesota. No payments were made by the defendants after May 27, 1889.

It is argued for the defendants that the agreement out of which the questions in this case arise is neither a composition agreement nor an accord, but an agreement of settlement and conditional release, because it does not purport to be the discharge of a larger liability determined by the payment of a smaller sum, and because the amount of the defendants' liability as indorsers was, when the agreement was made, unknown and undetermined, nor was it known whether there would be any liability against them excepting on the four notes then past due. Counsel treat the plaintiff's claim as if it were for unliquidated damages. But the liability of the defendants as indorsers was neither unknown nor undetermined. Judgment for the full amount of the notes and interest could have been taken against them at any time after their maturity, subject only to the contingency that a failure

to make due presentment and demand of payment, and to give notice of nonpayment to the defendants as indorsers, would have released them; but that possible contingency, altogether under the control of the plaintiff, was not sufficient to make the liability uncertain and undetermined. Whatever designation may be applied to the agreement, it is an agreement for the release of Humphreys & Son upon the condition precedent that they should pay 25 per cent. of the original indebtedness, according to the tenor and effect of the two notes they were to give. The phrase is not "according to their tenor and effect," but "at maturity," which has the same meaning.

The question then is, whether the receipt by the bank of payments made by Humphreys & Son, and credited upon the two notes after their maturity, estopped the bank from asserting its claim against them upon the original notes. The last payment was made May 27, 1889. From that date until August, 1892, nothing was paid or tendered. The bank made no agreement to extend the time of payment, nor to accept the two notes as a discharge of the original notes. In a letter by the vice president of the bank to the defendant, dated April 20, 1888, the bank stated that it was disposed against any formal extension of the composition notes. The president of the bank, in a letter dated August 25, 1888, makes the statement still more emphatic. But it is urged that the receipt of payments, and entering them as credits on the two notes, was in itself sufficient; that it was an election to substitute them finally for the original notes. I am unable to concur in that proposition. If a creditor makes a contract with the principal to extend the time of payment of a note without the consent of a surety, he discharges the surety, but the mere receipt of sums paid on account of the note after its maturity has no such effect. So, in this case, the receipt of sums on account of the two notes after their maturity had the effect to recognize them as in force at that time, or, in other words, to extend the time stated in the contract to the date of those payments. If Humphreys & Son had then offered to pay the two notes in full, the bank would have been obliged to accept the payment, and release them from further obligation. But they did not pay in full. A period of more than three years passed without any payment whatever. If it were conceded that the receipt of the payment of May 27, 1889, was an extension of the time mentioned in the contract to that date and to a reasonable time thereafter, it would be necessary to conclude that a delay of more than three years was unreasonable, and that the right of the bank to fall back upon the original indebtedness, subject to the payments actually made, was clear.

The general rule is well understood to be in accord with the express terms of the contract made in this instance,—that a composition necessarily involves the fact of payment, as was observed by Willes, J., in *Edwards v. Coombe*, L. R. 7 C. P. 522. To make a composition agreement operate as more than a suspension of the remedy, there must be a performance of the condition; that is,

due payment of the composition. *Edwards v. Hancher*, 1 C. P. Div. 119. In *Re Hatton*, 7 Ch. App. 726, Mellish, L. J., said that, where creditors accept a composition, they may either agree to take the promises of the debtor with or without a surety in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that, if the debtor pays the composition at a certain time and place, the creditors will accept such payment in satisfaction of their debts. He adds that:

"It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But, where they agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him."

The defendant's view seems to be that the stipulation of the contract, reserving to the bank the right to proceed upon the original notes if the composition notes were not paid at maturity, is to be construed as if it were a condition of forfeiture. But that is not the correct view. In *Edwards v. Hancher*, cited above, the composition was under resolutions accepted by the creditors. Lord Coleridge said that the terms of the resolution must be complied with, and that the question was as to the construction of the words of the resolution, the general rule being that, if a creditor takes from his debtor a bill or note of an apparently solvent third person, and the bill or note is not paid at maturity, the original debt revives. The burden then rests upon the defendant to show that it was the intention of the parties under the contract to receive the composition in discharge of the original indebtedness. So, with reference to the payments made after the maturity of the composition notes, the question is whether there was any express modification of the contract whereby those notes were recognized as in discharge of the original indebtedness. Mere leniency on the part of the bank, or the mere acceptance of further payment on account of the composition notes, would only operate to extend the time in favor of the defendant up to the date of receipt and credit of such payments, and probably, in equity, to a reasonable time thereafter. In *Ex parte King* (In re Harper), L. R. 17 Eq. 332, the creditors of two debtors who filed a liquidation petition resolved to accept a composition payable in three installments, respectively at 6, 12, and 18 months after the registration of the resolution. The amount due to one of the debtors was in dispute, and it was agreed that it should be determined by the registrar. This was after the first installment had been paid upon the amount claimed. The creditor took no steps to have the true amount determined until after the third installment fell due. About six months later, the court determined the amount due. The solicitors then had some discussion as to the terms of the order to be drawn up, but, after three weeks' delay, the creditor's solicitor wrote a letter assenting to the order as drawn by the debtor's solicitors, in which letter he said: "When the order is signed, I shall be glad to know if you are prepared to pay the amount of the composition." That was

on the 19th of August. The order was signed by the registrar on the 27th of August. On the 22d of August the debtors proposed to the creditor that they should pay the balance of the composition due to him, not in cash, but partly in bills and partly in cash. The next day the creditor declined this proposal, and on the 25th made a demand for the full amount of the debt. On the 27th of August, the debtors tendered to the creditor the balance of the composition in cash, but he refused to receive it, and on the 29th of August commenced an action to recover the balance of his debt, after deducting the first installment, which he had received. The court held (affirming the decision of the county court judge) that it would be inequitable to allow the creditor to proceed with his action, and that he must be restrained from doing so. The county court judge, in giving judgment, said (as reported in a note to the report of the appealed case) that the result of the cases cited by him seemed to be:

"(4) Where the debtor fails to pay the composition at the time agreed upon, or within a reasonable time after, the court of bankruptcy will not, in general, restrain a creditor suing at law to recover the amount of his original debt; but the court may, nevertheless, in such a case, give relief to the debtor by injunction where something has been done which makes it inequitable that he should enforce his strict legal right, and perhaps, also, in cases of accident or mistake."

The judge said that the suggestion made by the creditor's solicitor, by letter on the 19th of August, that the balance of the composition should be paid after the order was signed, was, he thought, equivalent to saying to the debtors, "Pay the balance of the composition when the order is signed, and our client will be satisfied," and would have a tendency to throw the debtors off their guard; and that, until the sort of consent to postponement given by that letter was clearly and expressly withdrawn, it would have been inequitable that he should take advantage of the omission of the debtors to pay before the order was signed. Vice Chancellor Bacon, in affirming the decision, does little more than to approve and adopt the opinion below. That case clearly recognized: (1) That the only remedy of the debtor was in equity. At law the creditor had a right to his action, notwithstanding the recognition by the creditor of the composition as existing long after the second and third installments were due and unpaid. (2) That the equity to enjoin the creditor's action arose upon the circumstances above detailed, and did not amount to a waiver of the right of the creditor to sue on the original debt upon the failure of the debtors to pay the composition, for (3) the right of the creditor to withdraw any proposition for leniency is expressly recognized. In *Levy v. Burgess*, 64 N. Y. 390, it was held that where, upon failure of one party to perform his contract within the time specified, the time is extended upon a certain condition, performance of the condition was requisite to enable the party to avail himself of the extension. In *Lawson v. Hogan*, 93 N. Y. 39, it was held that, where a fixed time has ceased to be an element in the contract, neither party can put the other in default without some notice or demand of perform-

ance. These are statements of the rule at law. That notice, if necessary in this case, was clearly manifested by the bank bringing its action against the defendant and others on the original notes in West Virginia, in 1890. It is, however, urged that the bank, by receiving and crediting the payments, elected to rely upon the composition notes, and waived any right to sue upon the original notes. The case of *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, is cited in support of this claim. But that case is not in point. There the trustees, having made their election by bringing a suit, were held to be estopped from subsequently attempting to enforce another and inconsistent remedy. Here the only suits brought against these defendants have been upon the original notes. It is so well established as not to require verification by citations that, when a party has once made an election between two or more inconsistent courses of proceeding, he will be estopped to depart from that which he first adopts. But in *Coleman v. Oil Co.*, 51 Pa. St. 74, the supreme court of Pennsylvania intimates that the estoppel is limited to other actions between the same parties. This is, indeed, only recognizing the doctrine of privity as it is always applied in determining the extent of an estoppel. See, also, *Vulcanite Co. v. Caduc*, 144 Mass. 85, 10 N. E. 483. It is also contended that in a suit brought by the bank in the court of common pleas of Brown county, Ohio, against the maker and prior indorsers of the original notes, the defendants pleaded that *Humphreys & Son* had made a payment of \$6,000,—that is to say, had set up the composition notes as a credit upon the original notes,—and that the bank, by failing to reply, admitted the truth of that allegation, and allowed the credit to be taken accordingly, judgment being had for the residue. But the rule of the Ohio Code of Civil Procedure that the failure of the plaintiff to make denial by replying to new matter set up in the answer is a rule of pleading, which does not estop from setting up the truth in any other case not between the same parties. Collaterally, pleas are not to be regarded as admitting what they do not contest. *Whart. Ev.* § 1116a, and cases cited. There is no privity between the maker, indorser, and acceptor of a promissory note. *Freem. Judgm.* § 162, and cases cited. The judgment in the Brown county case, therefore, is not conclusive upon the bank in this case. It follows, upon all these considerations, that the plaintiff is entitled to judgment against the defendant for the amount due upon the original notes; and it is so ordered.

JACKSONVILLE, T. & K. W. RY. CO. v. CHATHAM NAT. BANK.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1895.)

No. 330.

ASSUMPSIT.

In Error to the Circuit Court of the United States for the Northern District of Florida.

This was an action in assumpsit by the Chatham National Bank against the Jacksonville, Tampa & Key West Railway Company, a corporation under the

laws of Florida. The declaration contained 10 counts, some of which were upon notes made by the defendant to Charles C. Deeming, treasurer, and indorsed by him to plaintiff. Other counts alleged that the plaintiff, at the defendant's request, released the Florida Construction Company from indebtedness in amounts specified, and that defendant thereupon promised to pay such indebtedness. The last three counts were the common counts for money paid out and expended, money lent, and on account stated. Various motions and demurrers were passed upon by the circuit court, and numerous amendments were made to the declaration. The defendant ultimately filed pleas to all the counts. To these pleas replications were filed, and, the issues being finally joined, the case was tried before a jury, resulting in a verdict for the plaintiff for \$86,291.41. Defendant made a motion for a new trial, and plaintiff entered a remittitur for \$17,588.37. A new trial was denied, and judgment entered against the defendant for \$68,693.04. Defendant then sued out this writ of error. There were 26 specifications of error. No opinion appears to have been filed by the circuit court upon any of the questions ruled upon.

T. M. Day, Jr., for plaintiff in error.

John Wurts, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. A careful examination of the record in this case shows no error warranting the reversal of the judgment of the circuit court, which judgment appears to be in accordance with, and fully supported by, the evidence. Judgment affirmed.

LADD v. MISSOURI COAL & MINING CO.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1895.)

No. 420.

TRIAL—RECEPTION OF EVIDENCE—OFFER TO PROVE.

On an issue as to the acceptance of a proposed contract for the sale of lands, plaintiff offered to prove a conversation between witness and one M. The offer was not accompanied by any statement as to what the conversation was, or that it was material to the issue, and it did not appear from the record that M. was defendant's agent in the matter of the proposed sale. *Held* insufficient to sustain an exception to the exclusion of the testimony.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Action by William M. Ladd against the Missouri Coal & Mining Company to recover damages for breach of contract. The court directed a verdict for defendant, and plaintiff brings error.

Upton M. Young, for plaintiff in error.

James A. Seddon and Chester B. McLoughlin (James L. Blair and T. J. Rowe, with them on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was commenced in the United States circuit court for the Eastern district of Missouri by William M. Ladd, the plaintiff in error, against the Missouri Coal & Mining Company, the defendant in error, to recover \$34,637 damages for the breach of an alleged contract of

brokerage. At the close of the testimony, by direction of the court, the jury returned a verdict for the defendant, upon which final judgment was rendered, and thereupon the plaintiff sued out this writ of error. The petition alleges that the defendant was the owner of certain lands in Lincoln county, Mo., which are particularly described, and that on or about the 12th day of January, 1892, the defendant entered into a brokerage contract with the plaintiff, by the terms of which the plaintiff was to have the exclusive right to sell these lands until July 1, 1892, for a sum not less than \$60,000, and for his services in making the sale the plaintiff was to have one-half of all he sold the land for above \$60,000, and was to receive \$3,000 commission before beginning to divide with the defendant the excess over \$60,000. It is alleged: That the exclusive right of the plaintiff to sell the lands on the terms mentioned was extended from time to time up to and including the 15th day of November, 1892, and that on the 3d day of November, 1892, the plaintiff sold the lands to Azel F. Hatch on the following terms, namely: \$5,000 to be paid in cash on execution of the contract of sale; \$20,000 to be paid on the 1st day of March, 1893, upon delivery of a good and sufficient warranty deed; and the balance to be paid in four equal annual payments, with interest at 6 per cent. per annum, payable semi-annually, to be secured by notes and trust deed on the lands. That Hatch prepared an agreement embracing the terms of sale agreed upon by the plaintiff and Hatch, which was forwarded by the plaintiff to the defendant for its approval on the 8th of November, 1892, and that the defendant, prior to the 15th of November, 1892, accepted the same, and promised to execute it, but afterwards neglected and refused to do so for an unreasonable length of time, and until Hatch withdrew his offer to purchase. Though the record is somewhat voluminous, the case rests in a small compass. It is not claimed by the learned counsel for the plaintiff in error that the plaintiff at any time found a purchaser for the land on the terms specified at the time the land was put into his hands for sale. The lengthy correspondence carried on between the parties shows that a sale upon any other terms was subject to the defendant's approval. The plaintiff's contention is that he sold the land to Hatch, and that the defendant, by and through its agent, one Murdock, accepted the terms and approved the sale prior to the 15th of November, 1892, the date on which the plaintiff's authority to sell the land terminated. Hatch's proposition to purchase was in writing in the form of an agreement to be signed by the defendant, but which Hatch did not sign. The plaintiff claims that Murdock, acting as agent for the defendant, approved and accepted this agreement, though he did not sign it. Unless the plaintiff can maintain this claim, he has no cause of action, for it is quite clear from the pleadings and evidence that neither this nor any other sale of the property negotiated by the plaintiff was ever accepted by the defendant, or any other person authorized to act for it, prior to the expiration of the plaintiff's authority. The plaintiff relies exclusively on the alleged

sale to Hatch, and insists that he was prepared to prove, and offered to prove, that Murdock did approve and accept for the defendant the terms of sale agreed upon between the plaintiff and Hatch, and that the court erroneously excluded this evidence. Whatever the fact may have been, the record does not support this contention. On this subject the record discloses that while the plaintiff was on the stand as a witness, the following proceedings took place:

"Q. You also stated that on November 13th Mr. Murdock returned in the afternoon to your office? A. I did. Q. And you handed him the proposed contract with Mr. Hatch? A. I did. (Plaintiff offers to prove by his witness the conversation between him and Mr. Murdock relating to the contract, which conversation was had at St. Louis on November 14, 1892, but, defendant objecting, the court sustained the objection, and refused to allow plaintiff to testify to any conversation between him and said Murdock on November 14th, save such as related to the transmission of the contract from St. Louis to Port Henry, to which action of the court in so ruling plaintiff then and there duly excepted.)"

It will be observed that all that the plaintiff offered to prove was "the conversation between him and Murdock relating to the contract." This offer was not accompanied by any statement as to what that conversation was, or that it was material to any issue then being tried. The insufficiency of the exception is rendered apparent by a single consideration. If this court should reverse the case because the witness was not permitted to state the conversation, what is there in this record to show or suggest that upon another trial, when the witness is allowed to state the conversation, a single word of it will be material to the case or admissible in evidence? The offer to prove the "conversation," without some statement as to what it was, and showing its materiality, was too general to be made the foundation of a valid exception. The rule is well settled that the bill of exceptions must show the materiality of the evidence which was tendered and rejected. The evidence rejected, or a statement of what it tended to prove, must appear in the bill of exceptions. *Packet Co. v. Clough*, 20 Wall. 528; *Railway Co. v. Smith*, 21 Wall. 255; *Thompson v. Bank*, 111 U. S. 529, 4 Sup. Ct. 689; *Clement v. Packer*, 125 U. S. 309, 8 Sup. Ct. 907; *Patrick v. Graham*, 132 U. S. 627, 10 Sup. Ct. 194; *Lyon v. Batz*, 42 Mo. App. 606; *Bener v. Edgington*, 76 Iowa, 105, 40 N. W. 117. Moreover, it does not appear from the record before us that Murdock was the agent of the defendant for the purpose of selling the land, or that he had any authority to approve or confirm any sale thereof made by the plaintiff. It results that the circuit court did not err in directing the jury to return a verdict for the defendant, and its judgment is therefore affirmed.

QUAKER CITY NAT. BANK v. NOLAN COUNTY.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1894.)

No. 234.

VALIDITY OF COUNTY BONDS—CONSTITUTIONAL RESTRICTIONS—BONA FIDE PURCHASERS.

Francis v. Howard Co., 4 C. C. A. 460, 54 Fed. 487, and Millsaps v. City of Terrell, 8 C. C. A. 554, 60 Fed. 193, followed. Citizens' Bank v. City of Terrell (Tex. Sup.) 14 S. W. 1003, and Nolan Co. v. State (Tex. Sup.) 17 S. W. 823, approved.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action by the Quaker City National Bank, of Guernsey county, Ohio, against the county of Nolan, Tex., to recover on coupons cut from certain bonds issued by that county. The case was tried to the court, without a jury, upon an agreed statement of facts. This statement of facts, which is of great length, will be found incorporated in the opinion rendered in the circuit court by Rector, District Judge, and reported in 59 Fed. 660. That court held that the bonds were invalid, under the constitution of the state, and that plaintiffs, though purchasing in the open market for value, were affected with notice of their invalidity. Judgment was accordingly rendered for defendant. Plaintiff brings error.

John J. Butts, for plaintiff in error.

W. W. Leake, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

McCORMICK, Circuit Judge. The questions involved in this case are not open questions in this court. On reasoning which we have approved, and still consider sound and sufficient, both of the vital propositions submitted have been decided by the supreme court of Texas adversely to the contention of the plaintiff in error. Citizens' Bank v. City of Terrell, 78 Tex. 456, 14 S. W. 1003; Nolan Co. v. State, 83 Tex. 183, 17 S. W. 823; Francis v. Howard Co., 4 C. C. A. 460, 54 Fed. 487; Millsaps v. City of Terrell, 8 C. C. A. 554, 60 Fed. 193. We have read with care and interest the learned and able brief submitted for the plaintiff in error, but are unwilling to open the questions which we have settled on full argument of counsel, and careful consideration by the court. The judgment of the circuit court is affirmed.

BLUM v. BOWMAN et al.

(Circuit Court of Appeals, Fifth Circuit. December 31, 1894.)

No. 326.

DEEDS—DESCRIPTION.

In an action of ejectment the question at issue between the parties depended upon the location of a line described in a grant by courses and

distances from a fixed point, such courses and distances following in part the lines of a survey some of the bounds of which were fixed by monuments. There was a conflict in evidence as to whether one of the calls of such survey, by which the boundaries of the land in controversy were fixed, was erroneous, and should have been changed so as to locate a corner at a different point; the defendant alleging that it was erroneous, and the plaintiff claiming title according to the actual reading of his grant, and of the survey by which its bounds were, in part, fixed. The court charged the jury that they should first determine the location of this corner, and from it determine the boundary of the land in question; but, if they could not, with reasonable certainty, determine the location of such corner, then they should fall back on another corner, as to which there was no dispute, and from it determine the boundaries of the land in question by following the calls of the grant. *Held* error; that the jury should have been so instructed as to leave them free to locate the disputed line from any of its admitted corners, by the calls of the grant in question, unless satisfied that the defendant had sustained the burden of showing a discrepancy in the particular claimed by him.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action by Hyman Blum against W. M. Bowman and others to recover certain lands in Cherokee county, Tex. On the trial in the circuit court a verdict was rendered for the defendants. Plaintiff brings error.

W. W. Leake and Henry Sayles, for plaintiff in error.

A. K. Swan, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

McCORMICK, Circuit Judge. The issue in this case is the location of the east boundary line of a grant made by the state of Texas to Cherokee county, known as the "Cherokee County School Land." The proof shows that in 1853 a number of surveys were located on the Wichita in the name of John A. Scott, covering the course of that stream for a number of miles, and touching each other. These surveys were at least partially made on the ground, and the corners on or near the stream, where bearing trees could be had, were designated by marked trees. In 1855 the surveyor who had made the Scott surveys platted in by projections, without any work then done on the ground, the location of the Cherokee county school land, the calls of which location, as returned by the surveyor to the land office and as set out in the patent which issued thereon, began at the southwest corner of Scott's survey No. 8, which is a well-established, undisputed point on the ground. The calls proceed east 1,505 varas; thence north 2,400 varas; thence east 1,100 varas; thence north 1,200 varas; thence east 1,900 varas; thence north 1,900 varas; thence east 520 varas; thence north 1,086 varas; thence east 1,900 varas; thence north 1,900 varas, calling here for the northeast corner of Scott's survey No. 13; thence east 6,625 varas to a corner; thence south 9,886 varas to a corner; thence west 13,557 varas to a corner; thence 1,400 varas to the beginning point. The first six of these calls are coincident with lines and corners of Scott's surveys Nos. 8, 9, and 10, and the closing call traces the

east boundary line of Scott's survey No. 7. These lines and corners of the Scott surveys Nos. 7, 8, 9, and 10 are well established on the ground, and are undisputed. It seems to be established by the proof, and substantially conceded, that to construct the Cherokee county school land survey from its undisputed beginning corner, or from any of the undisputed corners running with the calls for course and distance, or reversing them, would locate the east boundary line of that survey where the plaintiff claims it is, and entitle him to recover. The survey, thus constructed, would embrace the number of acres called for in the grant, and the full measure of land authorized by law to be located for Cherokee county for school purposes. The defendants contend that the seventh call, for 520 varas, was erroneous, and should have been for 1,537 varas, in order that the succeeding eighth, ninth, and tenth calls should reach and terminate at a point coincident with the northeast corner of Scott's survey No. 13. It is admitted that this is an open prairie corner, wholly unmarked by natural or artificial objects. The defendants introduced evidence tending to show that at the northwest corner of Scott's survey No. 13 there was a marked bearing tree, and that the field notes in Scott's survey No. 13 showed that its north line ran east 1,900 varas to a point for corner, and they claimed that the true northeast corner of this survey was 1,900 varas east from its northwest corner as fixed by the marked bearing tree mentioned in their evidence. The plaintiff offered evidence tending to show that 1,017.7 varas west from the bearing tree claimed by defendants as witnessing the northwest corner of this survey there was a marked tree to witness its northwest corner, which plaintiff contends is supported by the calls for course and distance in the east and north lines of Scott's survey No. 11 and the east and north calls of Scott's surveys Nos. 12 and 13. The defendants offered the field notes of Scott's surveys Nos. 12, 15, and 16, and oral testimony in connection with the calls in the field notes of these different adjoining or neighboring surveys. In this state of the proof the circuit court charged the jury as follows:

"The material question in the case is, where are the northeast and northwest corners of survey No. 13, in the name of John A. Scott? When you have located the northeast corner of said survey No. 13, then you will locate the northwest corner of Cherokee county school land at the same place. Plaintiff claims that the northwest corner of said survey No. 13 is 1,017.7 varas further west than defendant claims it to be. Each designate by the evidence a tree as the northwestern corner of said Scott survey No. 13. Plaintiff invokes the field notes of Nos. 10, 11, 12, and 13 of John A. Scott surveys in aid of their construction, as also to show where the true location of said survey 13 is, as also certain marks which they claim are old line marks, pointing out the corner claimed by them as the true northwestern corner of said survey No. 13. If the location of said survey No. 13 in the name of said Scott is as claimed by plaintiff, then you will find for plaintiff the land claimed by them. If, on the contrary, the location of said survey No. 13 is located on the ground as claimed by defendants, then you will find for defendants the land in controversy claimed by them. If, under the foregoing instructions, you cannot with reasonable certainty establish the northwest corner of survey No. 13 in the name of Scott, as claimed by either plaintiff or defendant, then you may fall back on this southwest corner of survey No. 8 in the name of John A. Scott. This corner there is no dispute about. Should you find yourself forced back on said corner as the only one established by the evidence, then you may con-

struct the Cherokee county school lands from this corner, and in doing so may reverse the calls. You may, in such case, go backward or forward on the footsteps of the surveyor, or upon the calls, if there was no actual survey of the Cherokee county school lands. If you construct the Cherokee county school lands from said last-named corner, then you will determine whether said Cherokee county school lands include those claimed by plaintiff. If so, you will find for defendants. If said Cherokee county school lands do not include the lands claimed by plaintiff, then you will find for plaintiff such of the lands claimed by plaintiff as are not embraced by said Cherokee county school lands."

There was error in this charge, in that it gives undue dignity to the call for the northeast corner of Scott's survey No. 13. The familiar classification and gradation of calls in original grants of land by which their relative importance and weight are to be determined have been announced, construed, and applied in very many cases which have been decided by the supreme court of Texas, and have become so far elementary as to excuse, if not forbid, repetition here. *Hubert v. Bartlett's Heirs*, 9 Tex. 97; *Booth v. Upshur*, 26 Tex. 64; *McCown v. Hill*, Id. 359; *Booth v. Strippleman*, Id. 436; *Phillips v. Ayres*, 45 Tex. 602; *Fordtran v. Ellis*, 58 Tex. 245; *Woods v. Robinson*, Id. 655; *Davis v. Smith*, 61 Tex. 18; *Boon v. Hunter*, 62 Tex. 582; *Gerold v. Freeman*, 68 Tex. 201, 4 S. W. 256; *Lilly v. Blum*, 70 Tex. 704, 6 S. W. 279; *Stafford v. King*, 30 Tex. 257; *Lockett v. Scruggs*, 73 Tex. 519, 11 S. W. 529; *Randall v. Gill*, 77 Tex. 351, 14 S. W. 134; *Reast v. Donald*, 84 Tex. 648, 19 S. W. 795. As was said in *Booth v. Upshur*, supra:

"There is no law fixing the effect of any call found in a grant, or giving one more weight or importance than another. Therefore, by merely looking at the face of the grant, which has several calls, the controlling call cannot be determined. * * * The lowest grade * * * is made to prevail over the highest grade * * * when, applying the calls of the grant to the land, the surrounding and connected circumstances * * * show that course or distance is the most certain and reliable evidence of the true locality of the grant."

In the case we are considering the plaintiff's land is bounded on the west by the east boundary line of the grant to Cherokee county. There is no discrepancy apparent on the face of the calls of that grant. The defendants claim that the true location of Scott surveys Nos. 11 and 13 show a discrepancy in the calls of the Cherokee grant. The burden of proof to establish this discrepancy rests on the defendants who set it up. The question is one of fact for the jury, and should be so submitted that the jury would be free to construct the Cherokee county survey from any of its admitted corners by its own calls, unless the evidence, in their judgment, establishes the northeast corner of Scott survey No. 13 at the point claimed by the defendants. If, on consideration of the whole of the evidence given them, the jury are not satisfied that the point claimed by the defendants to be the northeast corner of Scott's survey No. 13 is the correct location of that corner, they should disregard the call for that corner, and construct the Cherokee county grant by its own calls from any of its established and admitted corners. The judgment of the circuit court is reversed, and the case is remanded to that court, with direction to it to award the plaintiff a new trial.

LINCOLN NAT. BANK OF LINCOLN, ILL., v. PERRY et al.

(Circuit Court of Appeals, Eighth Circuit. February 18, 1895.)

No. 385.

1. PRACTICE—AMENDMENT OF RECORD AFTER ISSUE OF WRIT OF ERROR.

An action was brought against P. and R., with three other persons, who were not served, and did not appear or take any part in the trial. Judgment having been rendered in favor of the defendants, the plaintiff sued out a writ of error; making P. and R., only, parties. By a mistake of the clerk, the record, as lodged in the appellate court, showed that the three defendants, other than P. and R., had appeared and participated in the trial, and that judgment had been rendered in their favor. P. and R. moved to dismiss the writ of error for want of parties. The plaintiff then moved, in the lower court, to have the record corrected *nunc pro tunc*, which was done, after hearing P. and R. in opposition. *Held*, that it was probably within the power of the trial court to amend its record so as to correct the clerk's mistake and conform the record to the truth, and that, at all events, if erroneous, its action should be corrected by writ of error.

2. PROMISSORY NOTE—NEGOTIABILITY.

A promissory note which contains an agreement to the effect that if there shall be any depreciation, prior to the maturity of the note, in collateral deposited to secure its payment, then the payee or holder may call for such further security as he deems satisfactory, and, if it is not furnished within two days, may proceed at once to sell the collateral, is not a negotiable note.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

F. A. Youmans (J. H. Clendening and Homer C. Mechem, on the brief), for plaintiff in error.

John H. Rogers (James F. Read, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a suit by the Lincoln National Bank, the plaintiff in error, against James K. Perry and John A. Ross, the defendants in error, and against three other persons, to wit, J. M. Lane, Orsen Kent, and Harry E. Kelley, the action being founded on a note in the sum of \$5,000, which was executed in favor of R. L. Du Vall by said James K. Perry and John A. Ross on December 31, 1890. There was a verdict and judgment in favor of the defendants, and the plaintiff below has brought the case to this court by writ of error.

The first question to be considered is whether a pending motion to dismiss the writ of error should be sustained. The facts pertinent to the decision of this question are as follows: The record, as originally lodged in this court, showed that the defendants Lane, Kent, and Kelley had appeared and participated in the trial in the circuit court of the United States for the Western district of Arkansas, and that a judgment had been rendered in their favor, as well as in favor of the defendants Perry and Ross. Nevertheless, Lane, Kent, and Kelley were not joined as defendants in the writ of error, and for that reason Perry and Ross moved to dismiss the writ,

on account of the nonjoinder therein of all the persons in whose favor the judgment had been rendered. Subsequently the plaintiff bank applied to the circuit court of the United States for the Western district of Arkansas for an order amending and correcting its record so as to show, in accordance with the fact, that Lane, Kent, and Kelley had neither appeared nor participated in the trial in the circuit court, and that no judgment had in fact been rendered in their behalf by the trial court. This application was supported by an affidavit of counsel showing that two of said defendants, to wit, Lane and Kent, had never been served with process in the suit; that neither Lane, Kent, nor Kelley had appeared or participated in the trial in the circuit court; that the issues tried in that court were solely between the plaintiff bank, on the one hand, and Perry and Ross, the makers of the note, on the other; and that the affiant had only recently discovered the alleged error in the record which he sought to have corrected. After the hearing of said application, which was resisted by Perry and Ross, the circuit court found and decided that there was an error in its record, in the respects alleged by the plaintiff bank. It accordingly ordered that the plaintiff's application to correct the record be granted, and that the record be amended *nunc pro tunc* so as to show that neither Lane, Kent, nor Kelley had appeared at the trial, and that no judgment was entered in favor of either of said defendants. Subsequently the plaintiff in error suggested a diminution of the record, and the proceedings aforesaid in the circuit court, together with the amended record, showing a judgment in favor of Perry and Ross only, have been duly certified to this court.

It is manifest from the foregoing statement that if a defect existed in the original record lodged in this court which rendered the motion to dismiss the writ of error tenable, that defect has been cured by the proceedings taken in the circuit court to amend and correct the record, and the motion to dismiss the writ of error is no longer tenable, unless such proceedings in the circuit court were wholly unauthorized by law, and were therefore void. We are not prepared to admit that the circuit court exceeded its power, in undertaking to amend its record in the manner aforesaid, if it was satisfied that through accident or inadvertence, or a misprision of the clerk, the record did not in fact speak the truth. The power to correct mistakes in its record, occasioned by oversight, which are of such nature that the record does not show what was in fact done or decided, is a power that is inherent in all courts of superior jurisdiction, and is frequently exercised in furtherance of justice. The power in question does not extend, of course, to the correction of errors of law committed by the court, which, in all cases, must be remedied by appeal or writ of error, but is strictly limited to the correction of mistakes or misprisions of the clerk or other officers, by reason of which the record does not speak the truth, or fails to speak the whole truth. *Matheson's Adm'r v. Grant's Adm'r*, 2 How. 263, 281; *Bank v. Moss*, 6 How. 31, 38; *Insurance Co. v. Boon*, 95 U. S. 117, 125; *In re Wight*, 134 U. S. 136, 10 Sup. Ct. 487; *Black*, Judgm. §§ 130, 131, and cases there

cited. It seems, also, that the power to thus correct mistakes in the record may be exercised within any reasonable period, even after the lapse of the term at which the mistake was committed, and even after the erroneous record has been removed to an appellate court by appeal or writ of error. *Matheson's Adm'r v. Grant's Adm'r*, supra; *Walker v. State*, 102 Ind. 502, 513, 1 N. E. 856; *Seymour v. Harrow Co.*, 81 Ala. 250, 1 South. 45; *Whiting v. Society*, 8 C. C. A. 558, 60 Fed. 197. In the light of the authorities, we cannot hold that the circuit court exceeded its power in amending the record in the manner above indicated. The record was false in point of fact, and the circuit court so found, in that it recited that Lane, Kent, and Kelley had appeared and defended the suit, and that the court had actually rendered a judgment in their favor, whereas Lane and Kent had not even been served with process, and the court had not tried any issue, as between the plaintiff bank and either of said three defendants, and had not rendered a judgment in favor of either of them. The judgment actually spread of record was the act of the clerk, and in no sense the act of the court. Such mistakes, we think, are clearly subject to correction within any reasonable period of time. But if we should concede that the circuit court acted erroneously, in correcting its record, then it is questionable, to say the least, whether its action in that behalf is now subject to review. It assumed to correct its record on the theory that it was erroneous, owing to a mistake of the clerk. The defendants in error appeared, and resisted the application; but they failed to except to the order amending the record, or to bring the action of the trial court before this court for review by a writ of error. Under these circumstances, there are some authorities which maintain, with good reason, that such subsequent action of the trial court can only be reviewed by an appeal or by writ of error, and that if not so challenged, it must be accepted as conclusive. *Adler v. Sewell*, 29 Ind. 598; *Railroad Co. v. Whorley*, 74 Ala. 264; *Simmons v. Craig*, 137 N. Y. 550, 33 N. E. 76; *Walker v. State*, supra. Without pursuing this branch of the case further, it is sufficient to say that we conclude that the motion to dismiss the writ of error should be denied.

It is necessary, therefore, to consider the case upon its merits. The note in suit appears to be a renewal of a previous note for the same amount, and of like tenor and effect, that was executed by the defendants Perry and Ross, and was delivered by them to R. L. Du Vall, the payee, in payment for 800 shares of stock in the Georgia Hedge Company, an Arkansas corporation. After the execution of the renewal note, which is now in controversy, it was indorsed by Du Vall to the firm of Lane, Kent & Kelley; and by the latter firm it was indorsed and transferred, for value and before maturity, to the Lincoln National Bank of Lincoln, Ill., the present plaintiff. Perry and Ross filed a very lengthy answer to the suit. From the averments contained in the answer, it fairly appears, we think, that the following defenses were pleaded in substance: First, that the note was void because executed in violation of the

constitution of the state of Arkansas; second, that the makers of the note, Perry and Ross, had been induced to execute and deliver the original note through false and fraudulent representations made by Du Vall, the payee; third, that the consideration of the note had failed, because Du Vall had disposed of the 800 shares of stock in the Georgia Hedge Company, for which the original note was executed, which stock, the answer averred, had been left in his hands as collateral to secure the payment of said note. These defenses were supplemented by the further allegation that Lane, Kent & Kelley knew of the fraudulent character of the note in suit when they acquired it, and that the transfer of the note by them to the plaintiff bank was merely colorable, and that the bank was not a bona fide holder of the paper, but that the payee, R. L. Du Vall, was the real owner thereof. It was also averred in the answer, in substance, that the note in suit was not a negotiable instrument, because the amount payable thereon at maturity was uncertain. At the conclusion of the trial the plaintiff moved the court to direct the jury to return a verdict in its favor for the full amount due on the note, to wit, \$5,503.10. This motion was denied. The case was then submitted to the jury on the three following instructions, the first of which was given at the instance of the plaintiff and the others at the instance of the defendants:

(1) "If the plaintiff purchased this note before it matured, for a valuable consideration, then it is a bona fide holder of said note, and may recover herein, unless you find from the evidence that the plaintiff knew when it purchased said note the circumstances under which it was obtained from the defendants." (2) "The court instructs the jury that if they find that said R. L. Du Vall, in consideration of the note of which the note sued on is a renewal, sold the defendant Perry a certain amount of Georgia Hedge Company stock, and has failed or refused to have said stock transferred to said Perry, and, in violation of his said agreement, has fraudulently, and without Perry's knowledge and consent, assigned said stock to trustees appointed by said Du Vall,—a contract to which Perry was not a party, and had no knowledge or notice of,—then the note was without consideration." (3) "If the jury find from the evidence that the note sued on was a renewal of a former note, which was procured to be executed by false and fraudulent misrepresentations, and was without consideration, then the burden of proof is upon the plaintiff to show that it purchased said note in good faith, without notice of its want of consideration, or its procurement by false and fraudulent misrepresentations, and for a valuable consideration; and, if the proof does not satisfy you of these things, the verdict should be for the defendants Perry and Ross."

The plaintiff complains, principally, of the trial court's refusal to direct a verdict in its favor, and of the court's action in giving instructions Nos. 2 and 3 at the instance of the defendants. The motion to direct a verdict for the plaintiff was based on the ground that the note in suit was a negotiable instrument; that the plaintiff bank was a purchaser of the same for value, before maturity; and that there was no evidence before the jury to affect it with knowledge of defenses as between the makers and the payee. If the note was indeed a negotiable instrument (a question to be hereafter considered), we should feel ourselves constrained to hold that the motion to direct a verdict for the plaintiff ought to have been sustained, as there was, in our judgment, no evidence to disprove

the fact that the plaintiff bank was a purchaser for value, before maturity, and without notice of defenses.

The second of the above instructions is criticised on the ground that the facts recited therein do not show that the note in suit was originally "without consideration," as the court declared, but rather show that the consideration had failed, subsequent to its execution, by reason of the fact that Du Vall, while holding the stock for which the note had been given, had transferred and assigned the same to a third party, and had thereby converted it to his own use, and put it out of his power to deliver the same on the payment of the note. This, however, was an immaterial error. A total failure of consideration precludes a recovery on a note, as well as a want of consideration, when the relations of the parties are such as to admit of such defenses. It is of no consequence, therefore, in the present instance, that the words "without consideration" were used, when the phrase "failure of consideration" would have been more appropriate.

The third instruction is challenged on two grounds—First, because it erroneously assumed that there was some evidence tending to show that the plaintiff bank was not a purchaser for value; and, second, because it put upon the plaintiff the burden of proving affirmatively that it bought the note without notice of defenses, besides compelling it to prove that it was a purchaser for value. This brings us to a consideration of the important question whether the note in suit was a negotiable instrument, within the meaning of the law merchant; for, if it was not negotiable, those features of the instruction that are criticised may be ignored, as the instruction, if the note was non-negotiable, was more favorable to the plaintiff than it had any right to demand or expect. The question of negotiability depends upon the effect of a collateral agreement which was incorporated into the note, and for the purpose of showing its relation to the note the whole instrument is quoted below, in the margin.¹

¹ \$5,000.

Little Rock, Arkansas, Dec. 31, 1890.

One year from January 13, 1891, we, or either of us, promise to pay to the order of R. L. Du Vall five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity at the rate of eight per cent. per annum until paid; having deposited or pledged with said Du Vall, as security for the payment of this or any other liability or liabilities of the undersigned already or hereafter contracted to said Du Vall, the following certificate, No. 3, capital stock of the Georgia Hedge Company, for 800 shares. And the undersigned hereby give to said Du Vall or assigns, or any substitute or person he or his agents or assigns may select, full power and authority to sell, discharged from any right of redemption, said collateral security, or any portion thereof or any substitute therefor or additions thereto, at public or private sale at the option of said Du Vall or assigns, on the nonperformance of the above-mentioned obligations, or the nonpayment of any of the above-mentioned liabilities, at any time or times thereafter, without making any demand for payment, and without advertising the sale of the property herein pledged, nor giving the undersigned any notice whatever; applying the proceeds to the payment of any, either, or all of the above-mentioned obligations, including costs and interest, and accounting to the undersigned for the surplus, if any. In case of deficiency the undersigned promise to pay

It will be observed that there is embodied in the note an agreement to the effect that if there shall be any depreciation, prior to the maturity of the note, in the collateral deposited to secure its payment, then the payee or any holder may call for such further security, as he deems satisfactory, and, if the same is not furnished within two days, may proceed at once to sell the collateral. It is undoubtedly true, we think, that it would be the duty of the holder of the paper to make an immediate application of the proceeds of the collateral, if, under the aforesaid stipulation, he elected to sell the collateral in advance of maturity. While the agreement is silent as to the application of the proceeds in case of the sale of the collateral before maturity, yet it is fair to infer that the parties intended an immediate application of the proceeds towards the extinguishment of the makers' liability. Any other interpretation of the agreement would authorize the holder of the paper to sell the collateral before maturity, retain the proceeds, and thereafter dispose of the paper to a third party without indorsing the amount that had been received from the sale of the collateral. It is not probable, we think, that the makers of the note intended to enter into an agreement that would authorize the payee to thus deal with the note and the security. Wherefore, it must be held that the agreement, rightly interpreted, contemplated an immediate application of the proceeds to the payment of the note, in case of a sale of the collateral either before or at maturity. Is a note which contains such a stipulation in the body thereof a negotiable instrument? One of the chief requisites of a negotiable note or bill is that it shall show with certainty the amount payable thereon at maturity and that it shall not be cumbered with conditions which render the amount then payable uncertain. As was said in *Costelo v. Crowell*, 127 Mass. 293 (and the language was quoted with approval in the case of *Bank v. McCord*, 139 Pa. St. 52, 59, 21 Atl. 143), "it is settled by an uninterrupted series of decisions that any language put upon any portion of the face or back of a promissory note, which has relation to the subject-matter of the note, by the maker of it, before delivery, is a part of the contract, and that if, by such language, the payment of the amount is not necessarily to be made at all events, and of

said Du Vall or assigns the amount forthwith, with interest after such sale. And it is understood and agreed, should there be any depreciation in the value of any of said securities prior to the maturity of this note, such an amount of additional security shall be furnished as will be satisfactory to said First National Bank or assigns; and should such additional security not be furnished within two days after demand is made, either in person or by written notice put in the post office, said Du Vall or assigns, or substitute or person he may have selected, may proceed at once to sell, as above specified, the security or securities herein named. And, in event payment is not completely made at maturity, the undersigned further agree to pay an attorney's fee of ten per cent. on the amount due and unpaid, if suit is brought to enforce payment of this note and its interest, or any part that may remain unpaid, which said fee shall become due and recoverable in the action brought to enforce the payment of this note, for the use of the attorney bringing said suit.

James K. Perry.
John A. Ross.

the full sum, in lawful money, and at a time certain to arrive, and subject to no contingency, the note is not negotiable." See, also, Daniel, Neg. Inst. §§ 51, 52. The rule last stated is too familiar to justify further citations. It frequently happens that notes discounted by banks contain a statement that certain securities have been deposited as collateral to secure their payment, together with a stipulation authorizing a sale of such securities, in a certain manner, at the maturity of the paper, if it is not then paid. Such recitals and stipulations do not render the time or fact of payment, nor the amount to be paid at maturity, in the least degree uncertain; and for that reason it is generally held that they do not impair the negotiability of a note that is, in other respects, so drawn as to satisfy the requirements of the law merchant. *Towne v. Rice*, 122 Mass. 67, 74; *Perry v. Bigelow*, 128 Mass. 129; *Wise v. Charlton*, 4 Adol. & E. 786; *Fancourt v. Thorne*, 9 Q. B. 312. See, also, *Hodges v. Shuler*, 22 N. Y. 114; *Kirk v. Insurance Co.*, 39 Wis. 138; *Hosstatter v. Wilson*, 36 Barb. 307. It is manifest, however, that an important element of certainty is destroyed by a collateral agreement appended to a note which may cause a payment to be made thereon of an uncertain sum at an uncertain time before maturity, and thus render the amount payable at maturity somewhat less than the amount specified on the face of the paper. A note of that description, which carries with it the probability, or even the possibility, that it may be partially or wholly extinguished before maturity, differs essentially from bank bills and other forms of currency which negotiable paper is supposed to resemble, and whose functions it is intended to perform. It has accordingly been held in several well-considered cases that stipulations of that nature embodied in a promissory note will impair its negotiability. Thus, in the case of *Bank v. Wells*, 73 Wis. 332, 41 N. W. 409, a note contained a collateral agreement authorizing the holder to sell, at the maturity of the paper, certain warehouse receipts for provisions that had been deposited as collateral security, "or [to sell the same] before [maturity] in the event of said security depreciating in value, * * * and to apply so much of the proceeds to the payment of this note as may be necessary to pay the same." It also contained this further provision: "And in case the proceeds of the sale of said collateral * * * shall not cover the principal, interest, and expenses, we promise to pay the deficiency forthwith after such sale." It was held that such a stipulation appended to the note destroyed its negotiability, by introducing into the instrument an element of uncertainty as to the amount payable in case any sum was paid before maturity, and as to the time when it would be paid. It was also said that it was probable that, had no express authority been given to sell the collateral before maturity, there would still have remained an element of uncertainty that would have been fatal to negotiability. In the case of *Smith v. Marland*, 59 Iowa, 645, 13 N. W. 852, the note sued on contained a stipulation, in substance, that if the payees, at any time, considered themselves insecure, they or their indorsees might declare the note due, and take possession of certain personal property for which the

note had been drawn, and sell the same on five days' notice. It was held that the note in question was not negotiable, because the amount which might be payable thereon at maturity was uncertain. In a later case decided by the same court (*Bank v. Taylor*, 67 Iowa, 572, 25 N. W. 810), the note in suit contained a collateral stipulation authorizing the payee, whenever he deemed himself insecure, to take possession of certain personal property for which the note had been given; but, inasmuch as the stipulation did not authorize a sale of the property before the maturity of the paper, it was held that it did not render the amount payable at maturity uncertain, and on that ground alone the case was distinguished from *Smith v. Marland*. A note containing a similar provision to the one found in *Smith v. Marland*, supra, was also held to be nonnegotiable by the supreme court of Kansas. *Iron Works v. Paddock*, 37 Kan. 510, 15 Pac. 574. See, also, *Killam v. Schoeps*, 26 Kan. 310; *Bank v. Armstrong*, 25 Minn. 530.

We are forced to concur in the view taken by these cases,—that the negotiability of a promissory note ought not to be upheld when it contains an agreement authorizing the holder in a certain contingency to demand such further collateral security as he deems satisfactory, and if it is not furnished, to sell the original collateral and to apply the proceeds in payment of the paper before it has become due. Under existing decisions permitting negotiable notes to contain a stipulation authorizing the sale at maturity of collateral securities, and, in some states, authorizing the insertion of an agreement to pay exchange and attorney's fees, as well as a warrant to confess judgment, such instruments have already been burdened with all of the luggage which they can conveniently carry. Furthermore, as notes and bills are designed to circulate freely, and to take the place of money in commercial transactions, sound policy would seem to dictate that they should be in form as concise as possible, and that the obligation assumed by the maker or makers should be expressed in plain and simple language. *Woods v. North*, 84 Pa. St. 407; *Johnston v. Speer*, 92 Pa. St. 227; *Bank v. Bynum*, 84 N. C. 24. It is easy to foresee that, if parties are permitted to burden negotiable notes with all sorts of collateral engagements, they will frequently be used for the purpose of entrapping the inexperienced and the unwary into agreements which they had no intention of making, against which the law will afford them no redress. We hold, therefore, that the note in suit was a nonnegotiable instrument.

It follows from what has been said that the objections urged against the third instruction, above quoted, are untenable. It further follows, we think, that, though the case below was tried on the erroneous theory that the note in suit was negotiable, yet that no error was committed, of which the plaintiff in error can be heard to complain, on the present record. The jury evidently found, in pursuance of the directions given in the third instruction, that the note was procured to be executed by false and fraudulent representations, and that the consideration had failed for the reason stated in the second instruction. Besides, the first instruction

given at the plaintiff's request inferentially admitted that the circumstances under which the note had been obtained from the makers were such that Du Vall, the original payee, could not recover, as against them, and that the plaintiff was only entitled to recover by virtue of the fact that it was an innocent purchaser for value, before maturity. The judgment of the circuit court is therefore affirmed.

DRAKE v. PAULHAMUS.¹

(Circuit Court of Appeals, Ninth Circuit. February 25, 1895.)

No. 180.

1. ASSIGNMENTS FOR CREDITORS — CONVEYANCES BY INSOLVENT — WASHINGTON STATUTE.

The statute of Washington relative to assignments for the benefit of creditors provides that "no general assignment of property by an insolvent or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective debts." *Held*, following the decisions of the Washington courts, that such an assignment must be voluntary, and an actual intention to assign must exist, and that such an intention cannot be imputed to an insolvent debtor because he conveys or mortgages all his property to one or more creditors.

2. ACTION AGAINST UNITED STATES MARSHAL—PLEADING.

In an action against a United States marshal for wrongfully taking plaintiff's goods it is not necessary to allege that such goods were taken by the defendant as marshal.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This was an action by W. H. Paulhamus against James C. Drake for wrongfully taking from plaintiff's possession a stock of goods. In the circuit court plaintiff recovered judgment. Defendant brings error.

Doolittle & Fogg and Charles O. Bates, for plaintiff in error.

Frederick A. Brown, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge. This action was originally brought in one of the superior courts of the state of Washington and transferred on the petition of plaintiff in error to the circuit court of the United States for the district of Washington. The action was for damages for the taking from the possession of defendant in error (plaintiff below) by plaintiff in error (defendant below) of a stock of goods, wares, and merchandise. The complaint alleges the possession of Paulhamus, the forcible dispossession by plaintiff in error, the refusal to deliver the property on demand, and its value to be \$7,500. The answer denies the allegations of the complaint, and sets up an affirmative defense that Drake was United States marshal, and that he acted as such, and not otherwise; that one W. R. Lindsay was the owner of the property, and that he (Drake) levied upon and took possession of the property under a writ of attach-

¹ Rehearing pending.

ment issued from the United States circuit court for the district of Washington in an action brought by one M. I. Cahn against said Lindsay. There were the usual and sufficient allegations to sustain the validity of the attachment. The answer also contained the following allegations:

"That on the 17th day of November, A. D. 1893, the said W. R. Lindsay, being then the owner and in possession of the property mentioned in the complaint filed herein, together with other property, consisting of real estate in the county of Pierce, and state of Washington, for the purpose of hindering, delaying, and defrauding his creditors, and preventing them from collecting their just debts, unlawfully and fraudulently executed a pretended bill of sale of the said property mentioned in the complaint to the plaintiff herein, in trust for the payment of certain debts claimed to be due and owing by said W. R. Lindsay. Said bill of sale was given for the pretended consideration of \$7,735.84. That said plaintiff caused said bill of sale to be recorded in the office of the auditor of Pierce county, state of Washington, on the 22d day of November, A. D. 1893. That on said day, and as a part of the same transaction, and as a part of the same purpose of hindering, delaying, and defrauding the creditors of the said W. R. Lindsay, the said W. R. Lindsay conveyed by a deed and mortgage all of the real estate owned by him in said Pierce county, state of Washington, to Josephine M. Lindsay, his wife, and to George B. Lindsay and Catherine A. Lindsay, relatives of the said W. R. Lindsay, and caused said deeds and mortgages to be recorded in Pierce county, state of Washington. That the property mentioned in said bill of sale and in said deeds and mortgages was all of the property owned by the said W. R. Lindsay. And by said transfers, as aforesaid, the said W. R. Lindsay attempted to dispose of all of the property owned by him, and attempted to give full control of said property to the said plaintiff and the other grantees above mentioned. That the said execution of said pretended bill of sale and the said deed and mortgage were intended by the plaintiff, and each of the parties above mentioned, to be one transaction, and were in fact one transaction, and was intended for the purpose of hindering, delaying, and defrauding the creditors of the said W. R. Lindsay by attempting to take out of the power of such creditors to reach the stock and assets of the said W. R. Lindsay. That the said W. R. Lindsay has not any property other than that embraced in the said pretended bill of sale, deeds, and mortgages aforesaid out of which the said judgment of said M. I. Cahn could be satisfied in whole or in part, and that, unless the said property upon which this defendant has levied under said writ of attachment can be applied to the payment of said judgment, the same must remain wholly unpaid. That all of the said pretended transfers of said property were made with the intent to delay and defraud creditors of the said W. R. Lindsay, and were without consideration, all of which was well known to this plaintiff; and at the time of the levy of the writ of attachment, as above set forth, the said W. R. Lindsay was the owner of the property mentioned in the complaint filed herein and levied on under the writ of attachment aforesaid."

The case was tried by the court and a jury, and the latter rendered a verdict for plaintiff (defendant in error) for the sum of \$6,898.50.

There are a number of assignments of error. Those needing special attention may be summarized under two heads: (1) That the complaint alleges that the property was taken by Drake personally, and that the proof shows that it was taken, if at all, by him as United States marshal, and it is therefore claimed that the complaint is not proved. (2) The action of the court restricting the jury to the determination of the proposition whether there was an actual sale by Lindsay to Paulhamus, or whether the sale was simulated or colorable with a fraudulent trust in Lindsay, and refusing to instruct the jury that the acts and conduct and

conveyances by Lindsay should be considered as equivalent to a general assignment of his property to his creditors, and giving preferences, were not valid, because not made for the benefit of all of his creditors in proportion to the amount of their respective claims.

The first ground of error is easily disposed of. We do not think that it is well taken. *Poinsett v. Taylor*, 6 Cal. 78; *Hirsch v. Rand*, 39 Cal. 315.

The second ground of error requires more consideration. The effect of Lindsay's acts depends upon the statutes of Washington as interpreted by its tribunals. *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 235, 10 Sup. Ct. 1013; *May v. Tenney*, 148 U. S. 64, 13 Sup. Ct. 491. The statute, so far as we are concerned with it, is as follows (Gen. St. Wash. § 2741):

"No general assignment of property by an insolvent or in contemplation of insolvency for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective debts."

Sec. 2743, Gen. St. Wash.: "The debtor shall annex to such assignment an inventory under oath of all his estate real and personal. * * * Every assignment shall be in writing and duly acknowledged in the same manner as conveyances of real estate and recorded in the record of deeds of the county where the person making the same resides. * * *"

In *Turner v. Bank*, 2 Wash. St. 192-194, 26 Pac. 256, the effect of these provisions came up for consideration. The facts of the case were somewhat similar to those of the case at bar. Justice Scott, speaking for the court, said:

"Lloyd & Co. were engaged in the mercantile business, and, being considerably indebted to various parties, they executed mortgages to certain of their creditors to secure the amounts they were owing them respectively. The Iowa National Bank, having been so secured, began an action to foreclose the mortgage. Appellants *Turner & Jay*, being judgment creditors, and not secured, sought to intervene in said suit. Their petition in intervention alleges that Lloyd & Co. were indebted largely in excess of their ability to pay; that the mortgages aforesaid covered all of their property, and were all executed on the same day; and that the execution of such mortgages, under the circumstances, was, in effect, an assignment of their property for the benefit of the parties to whom the mortgages were made, and that it was fraudulent as to appellants. Appellants asked that the mortgage be adjudged void as to them, and the property held subject to execution for the satisfaction of their judgment. An execution had been issued thereon, and returned nulla bona prior to said intervention. The plaintiffs demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer. There is no law in this state to prevent a debtor, even though he be in failing circumstances, from paying or securing a portion of his creditors, so long as he does so in good faith, although he should dispose of his entire property in that way, and leave other debts unsatisfied. It is not disputed that this mortgage, and also the others, were given for the purpose of securing bona fide debts. There is no reason in justice or equity why this particular mortgage should be held void, and the mortgagee deprived of its security, in order that the property may be made available to satisfy the claim of these intervening creditors. The judgment is affirmed."

The question was again considered in *Furth v. Snell*, 6 Wash. 542-546, 33 Pac. 830. In that case an insolvent debtor conveyed all his property to one creditor, and it was contended, as in the case at bar, that the conveyance should be held in law as equivalent to an assignment. The court say:

"We are unable to agree with respondents' contention in the premises. While we have an assignment law which provides that an insolvent debtor may turn his property over for the benefit of his creditors, and by so doing, under some circumstances, may obtain a discharge of his indebtedness, and while a preference of creditors in such transaction will not be permitted, yet the assignment itself is not compulsory. It is entirely optional with the debtor whether he will avail himself of the provisions of this act. If he does not choose to resort to proceedings in insolvency, there is no way of compelling him to do so, and we have previously held that a debtor, even if in failing circumstances, may in good faith dispose of his entire property for the purpose of paying a portion of his debts, although other debts are left unsatisfied. *Turner v. Bank*, 2 Wash. St. 192, 26 Pac. 256; *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. 985; *Benham v. Ham*, 5 Wash. 128, 31 Pac. 459; *Samuel v. Kittenger*, 6 Wash. 261, 33 Pac. 509."

A Colorado statute providing for general assignments came up for consideration in *May v. Tenney*, supra. The parts passed upon were as follows:

"Any person may make a general assignment of all his property, for the benefit of his creditors, by deed, duly acknowledged, which, when filed for record in the office of the clerk and recorded in the county where the assignor resides, or, if a non-resident, where his principal place of business is, in this state, shall vest in the assignee the title to all the property, real and personal, of the assignor, in trust, for the use and benefit of such creditors."

"No such deed of general assignment of property by an insolvent, or in contemplation of insolvency for the benefit of creditors, shall be valid, unless by its terms it be made for the benefit of all his creditors, in proportion to the amount of their respective claims."

"* * * But nothing in this act contained shall invalidate any conveyance or mortgage of property, real or personal, by the debtor before the assignment, made in good faith, for a valid and valuable consideration."

They are identical in effect, therefore, to the Washington statute. Justice Brewer, after an able review of cases, including some cited by plaintiffs in error, said:

"This statute, so far as we are advised, has not been before the supreme court of Colorado for construction; at least not for any question involved in this case. The first section, it will be perceived, gives permission to make a general assignment. There is no compulsion. There is neither in terms nor by implication any duty cast upon an insolvent to dispose of his property by a general assignment, or anything which prevents him from paying or securing one creditor in preference to others. On the contrary, the last half of section 18 plainly recognizes the right of a debtor to prefer by payment or security; and, in the light of this statute, the quotation which we have made from the supreme court of Colorado becomes pertinent, which clearly affirms the right of a debtor to do with his property as he pleases, except as in terms restrained by statute; and a statute which simply permits a debtor to make a certain disposition of his property works no destruction of his otherwise unrestrained dominion over it."

We think, therefore, that under the Washington law an assignment must be voluntary, and that an actual intention to assign must exist, and that such an intention cannot be imputed to an insolvent debtor because he conveys or mortgages all his property to one or more creditors. It hence follows that the instructions asked by plaintiff in error were rightfully refused, and, there being no other error in the case prejudicial to him, the judgment of the circuit court is affirmed.

PACIFIC POSTAL TELEGRAPH CABLE CO. v. FLEISCHNER et al.

(Circuit Court of Appeals, Ninth Circuit. January 21, 1895.)

No. 121.

1. APPEAL—REVIEWABLE QUESTIONS—WAIVER OF JURY—FINDINGS OF FACT.

Where a jury has been waived in accordance with Rev. St. § 649, the question whether the court's findings of facts are supported by the evidence is not reviewable on error, for that section declares that such findings "shall have the same effect as the verdict of a jury."

2. ATTACHMENT—AMENDMENT OF SHERIFF'S RETURN.

A sheriff's return upon a writ of attachment of personal property may be amended, by leave of court, by attaching an inventory of the property seized, where such inventory was omitted from the original return, and there is no showing of intervening rights which will be prejudiced thereby. 55 Fed. 738, affirmed.

3. TELEGRAPH COMPANIES—DELAYING MESSAGE—SUIT FOR DAMAGES.

A party damaged by the delay of a telegraph company in transmitting a dispatch ordering the levy of an attachment is not bound, before instituting a suit against the company, to test by suit the validity of prior attachments obtained by other creditors in consequence of the delay.

4. SAME—EVIDENCE OF DAMAGE—PROOF OF INSOLVENCY.

In proving the damages sustained by a creditor by the delay of a telegraph company in sending a dispatch ordering proceedings against the debtor's goods, the insolvency of the debtor may be shown by parol evidence of information gained by inquiries made of the debtor himself.

5. SAME—EVIDENCE OF CUSTOM.

Where a telegraph company received and agreed to immediately transmit an important telegram, knowing that its wires were down at the time, and not informing the sender thereof, *held* that, in a suit to recover damages, it was competent for the plaintiff to give evidence that, prior to that time, defendant, under similar circumstances, had caused messages to be transmitted by a rival company, which it did not attempt to do in this case. 55 Fed. 738, affirmed.

6. SAME—LIABILITY FOR DELAY—STIPULATIONS AGAINST NEGLIGENCE, ETC.

A telegraph company cannot be allowed, by stipulations on its message blanks against liability for delays in transmitting unrepeatable messages arising from the negligence of its servants, or from unavoidable interruptions in the working of its lines, to relieve itself from liability in a case where it receives a message with full information of its great importance and the necessity for immediate transmission, knowing at the time that its lines were then down, but neither informing the sender thereof, so as to give him an opportunity to send by another line, nor itself attempting to transmit the dispatch by such other line. 55 Fed. 738, affirmed.

7. SAME—LIMITING RECOVERY—FRAUD.

Under such circumstances, the conduct of the company operates as a fraud upon the sender; and it cannot therefore be allowed by any stipulations in its blanks to reduce the right of recovery to the price of transmission, but it is liable for the full damages occasioned. 55 Fed. 738, affirmed.

8. SAME—INTEREST ON DAMAGES.

Damages for delay in transmitting a telegram having been allowed to the full amount prayed for, *held*, that it was error to allow interest thereon from the commencement of the suit.

9. APPEAL—REVERSAL—ERROR CORRECTIBLE BY COMPUTATION.

Where the only error is in allowing interest, the amount of which may be ascertained by computation, the judgment will not be reversed in toto, and a new trial ordered, but the court below will be directed to enter a judgment, such as should have been entered in the first place.

In Error to the Circuit Court of the United States for the District of Oregon.

This was an action by L. Fleischner, Sam Simon, M. A. Mayer, and Sol Hirsch, partners under the firm name of Fleischner, Mayer & Co., against the Pacific Postal Telegraph Cable Company, to recover damages occasioned by delay in transmitting a telegraphic message. A jury was waived in the circuit court, and the facts found by the court, and judgment rendered for plaintiffs. 55 Fed. 738. Defendant brings error.

Frederick V. Holman (W. S. Wood, of counsel), for plaintiff in error.

Cox, Teal & Minor and Dolph, Bellinger, Mallory & Simon, for defendants in error.

Before McKENNA, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

KNOWLES, District Judge. This is an action to recover damages accruing to defendants in error by reason of the neglect of plaintiff in error to send a telegram to certain attorneys in Seattle, state of Washington, in regard to instituting suit against H. & B. Grunbaum for the sum of \$3,866.21. The telegram was delivered to plaintiff in error at Portland, Or. The cause was tried in the United States circuit court for the district of Oregon. A jury was duly waived, and the facts found by the court, and judgment entered for defendants in error.

The following are the findings of facts upon which the judgment was based:

First. That the plaintiffs are partners in business under the firm name of Fleischner & Co., and are citizens of the state of Oregon; and defendant is a corporation duly organized under the laws of the state of New York.

Second. That on June 24, 1891, the firm of H. & B. Grunbaum, of Seattle, Wash., were indebted to the plaintiffs herein to the amount of \$3,704.37; and on that day said firm duly confessed judgment in favor of H. & B. Grunbaum in the superior court of the county of King, state of Washington, for the sum of \$16,844.81, on which judgment execution was immediately issued, and the property of said firm duly levied on by the sheriff of King county, Wash., under such execution.

Third. That at 9:15 o'clock a. m. of June 25, 1891, plaintiffs herein duly delivered to the defendant, at its office in the city of Portland, Or., for immediate transmission and delivery, the following message:

"Rush.

"To Preston, Carr & Preston, Seattle: H. & B. Grunbaum owe Fleischner, Mayer & Co. thirty-eight hundred sixty-six dollars twenty-one cents. Reported closed by sheriff. Protect claim, and report at once.

"Cox, Teal & Minor."

—Paying the regular tariff for transmission thereof, and, at the time of delivering the same, notified the defendant of the importance of said message, and requested that it be sent immediately, which the defendant, receiving the same, promised to do.

Fourth. That said message was delivered by plaintiffs to the defendant written upon one of the defendant's blanks, with the contents of which the plaintiffs were familiar, on the top of which were printed the following words:

"Pacific Postal Telegraph Cable Company.

"All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message shall order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed be-

tween the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery or for nondelivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charges for repeated messages, viz.: One per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employé of this company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and, if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance special charges will be made, to cover the cost of such delivery. The company will not be liable for damage in any case where the claim is not presented in writing within six days after sending the message.

John W. Mackay, President.

"W. C. Van Horne, Vice President.

"Send the following message subject to the above terms, which are hereby agreed to."

But the defendant was fully apprised by the language of the message itself of the amount of the plaintiffs' claim, the danger of its loss, and the necessity of its prompt protection; and these facts were further emphasized by the verbal statements made by the plaintiffs at the time the message was delivered by the plaintiffs for transmission. The plaintiffs further stipulated, before they left the message with the defendant for transmission, and before they paid for its transmission, that it should be forwarded at once; and this stipulation was assented to by the defendant at the time, and became a part of the contract to transmit and deliver the message.

Fifth. That, at the time said message was so delivered to said defendant for transmission, defendant's wires between Portland, Or., and Seattle, Wash., were down, and had been down since 8 o'clock a. m. of said day; and said defendant was unable to transmit said message over its wires when so delivered to it, which fact was known to said defendant at said time, but not communicated to plaintiffs; but that the cause of such interruption was not known to it at said time, and was not caused by any negligence on their part.

Sixth. That said wires were repaired, and communication between Portland and Seattle restored, soon after twelve o'clock noon, and said message was transmitted to Seattle. The transmission thereof was commenced at or about 11:40 o'clock a. m. of said day, but for some unknown causes the transmission was interrupted, and the said message was not received at the office of the defendant in Seattle, Wash., until 12:30 o'clock p. m. of June 25, 1891, and was received by Preston, Carr & Preston, to whom it was addressed, at 12:45 o'clock p. m. of said day; and action was at once brought by said Preston, Carr & Preston, in the superior court of the county of King, state of Washington, on behalf of the plaintiffs herein, against said firm of H. & B. Grunbaum, for the amount stated in said message, and all the property of said firm was duly attached by the sheriff of said King county, Wash., under an attachment issued in said action.

Seventh. That the plaintiffs' message, if sent either by the Western Union or by the defendant at 9:15 o'clock, or within a reasonable time thereafter, in the usual course of business, would have reached the attorneys at Seattle before 10 o'clock; and, if it had reached them then or at any time before 11 o'clock a. m., a suit would have been brought upon plaintiffs' claim, and plaintiffs would have been paid in full.

Eighth. That between the time when such message should have been transmitted and delivered by said defendant, if its line between Portland and Seattle had been open, and the time it was actually transmitted and delivered, actions had been commenced against said firm of H. & B. Grunbaum, and all their property attached for amounts greatly in excess of its value; and that upon a sale thereof, made by said sheriff under execution issued in said actions, said plaintiffs were unable to realize any portion of their said claim against said firm; but that, if said message had been promptly transmitted and delivered by said defendant, the claim of said plaintiffs would have been secured, and the amount thereof realized in full from the sale of said property.

Ninth. That, at 10 o'clock a. m. of said June 25th, a message was placed in the San Francisco office of the Western Union Telegraph Company for transmission and delivery, addressed to said Preston, Carr & Preston, at Seattle, directing them to attach the property of said H. & B. Grunbaum upon claims amounting to \$36,000, and that said message, after being repeated at Portland in transit, was received by said Preston, Carr & Preston, at Seattle, at 11 o'clock in the morning of said day; that thereupon they seized and duly attached and secured a lien upon all the property of said debtors for \$36,000; and that, upon a sale of the attached property, the plaintiffs realized nothing; and that the judgment debtors had no other property out of which the plaintiffs' claim could be paid.

Tenth. That at the time said message was delivered to said defendant, and throughout said day, the Western Union Telegraph Company had a line of wire in constant operation and in readiness to transmit messages between said points; and that it was the custom and usage of said defendant to forward messages by the line of said Western Union Telegraph Company when unable to do so on its own lines.

Eleventh. That said defendant was negligent in not notifying said plaintiffs of its inability to transmit said message over its own wires when received by it; and after the same had been so received, and said defendant had promised the immediate transmission thereof, it was its duty to have forwarded the same by the lines of said Western Union Telegraph Company; and that said defendant is liable to the plaintiffs for any loss resulting from such neglect.

Twelfth. That H. & B. Grunbaum have been totally insolvent ever since the 24th day of June, 1891, and plaintiffs have been unable to realize any sum whatever on their judgment against them.

Thirteenth. That the damages sustained by the plaintiffs by reason of the negligence of the defendant is the sum of \$3,704.37, and such sum should bear interest at the legal rate from September 7, 1891.

And, as a conclusion of law from the foregoing, the court finds that the plaintiffs are entitled to a judgment against said defendant for the sum of \$3,704.37, with interest thereon at the rate of 8 per cent. per annum since September 7, 1891, together with their costs and disbursements herein.

Plaintiff in error excepted to the 2d, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 13th, and to parts of the 4th and 5th, findings of fact, on the ground "that they are each and all contrary to the evidence, and that there is no evidence to support such finding and findings." Plaintiff in error also excepted to the conclusions of law in the case. The ruling of the court in making these findings and in overruling plaintiffs' exceptions to the same is assigned as error. This is an attempt to have this court re-examine the evidence in this case, and determine whether or not it supports the findings of the circuit court.

Section 649, Rev. St., is as follows:

"Issues of fact in civil cases in any circuit court may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing

waiving a jury. The finding of the court upon the facts which may be either general or special, shall have the same effect as the verdict of a jury."

The seventh amendment to the constitution of the United States provides that:

"No fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

According to such rules, it could only be re-examined where the court in which the trial was had granted a new trial for sufficient reasons, or the appellate court awarded a *venire facias de novo* for some error which intervened in the proceedings. *Parsons v. Bedford*, 3 Pet. 433; *Bassette v. U. S.*, 9 Wall. 38; *Insurance Co. v. Folsom*, 18 Wall. 237. Giving the findings of a court the same effect as the verdict of a jury, and it is evident that this court cannot review the evidence, and determine whether they are supported thereby. When bills of exceptions are taken to the ruling of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, such rulings may be reviewed in the appellate court. *Rev. St. § 700*; *Norris v. Jackson*, 9 Wall. 125; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321; *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234.

In this case there were numerous exceptions taken by plaintiff in error to the ruling of the court in admitting evidence. Several of these exceptions relate to the admission in evidence of the certified copies of the papers in the case of *Maurice L. Grunbaum, Dexter Horton & Co., J. A. Ford, and Fleischer, Mayer & Co.* against *H. & B. Grunbaum*. The point of objection presented was that these certified copies failed to show that any inventory was filed in these cases, as required by law in the state of Washington, of the property attached as a part of the return of the sheriff. The sheriff, in his return, after stating the date of receiving the writ of attachment in each of the above cases, returned:

"By virtue and in pursuance thereof, I, on the same day, levied upon and attached as the personal property of the defendant named in said writ, and already in my possession by virtue of an execution No. 11,117 of the court docket contained in the inventory annexed to No. 11,119, of the court docket, by taking said property into my custody."

It appears that, at the date of making this return, no inventory was annexed to Case No. 11,119. Subsequently, however, the sheriff, by permission of court, amended his return, and did annex said inventory. The question arising in the consideration of this assigned error is as to whether the sheriff could amend his return so as to cure this defect by subsequently annexing this inventory. It is admitted that the statute law of Washington requires an inventory of the property attached to be attached to the return of the officer. There is no doubt but that the law allowing attachments of the property of a defendant in a civil action in certain cases, being a statutory remedy, must be strictly pursued. It would appear that section 322, 2 Hill's Ann. St. Wash., provided for such an amendment. It is as follows:

"This chapter shall be liberally construed and the plaintiff at any time when objection is made thereto, shall be permitted to amend any defect in the

complaint, affidavit, bond, writ or other proceeding, and no attachment shall be quashed or dismissed or the property attached released if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued, and the court shall give the plaintiff a reasonable time to perfect such defective proceedings."

The intention by virtue of this statute was to give a court large discretion in permitting amendments in attachment proceedings. There is no reason why every other paper or record in an attachment proceeding should be permitted to be amended, save a return of a ministerial officer who made the levy of the writ. This statute does not seem to have been construed by the highest courts of that state. If it should be held that no such authority was contained in this statute, we are confronted with another rule in such cases. In the case of *Tilton v. Cofield*, 93 U. S. 163, 167, the supreme court says: "Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice." Again: "Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others." In that case, besides amending the declaration, the affidavit in the attachment proceedings was amended, and it was held proper under this general power incident to a court of justice. This case was followed in *Erstein v. Rothschild*, 22 Fed. 61. If an affidavit in an attachment proceeding, which is the very foundation of this auxiliary proceeding, can be amended, much more should an officer be allowed to amend his return, in the discretion of the court, to the writ of the attachment therein. It may be said, generally, that the returns of ministerial officers are subject to amendment, in the discretion of the court to whom such application is made. *Malone v. Samuel*, 13 Am. Dec. 172, and note; 22 Am. & Eng. Enc. Law, 200, "Service of Process." There is no reason for any different rule in regard to the return upon a writ of attachment than the return on any other writ. It is claimed in this case that the return is a part of the levy of the writ. It is not so stated in the statute laws of Washington. See 2 Hill's Ann. St. Wash. § 300. This defines what constitutes a levy upon personal property. In the case of *Rowan v. Lamb*, 4 Iowa, 468, it was held—and I think properly—that the return constitutes no part of the levy. It is further urged that the return gives the court jurisdiction, and with a return to the writ of attachment plaintiff would be deprived of his lien. In support of this we are cited to 1 Wade, Attachm. § 229. If this is applied to any other class of cases than actions in rem, I do not think it is correct. Service of a writ gives jurisdiction. A return is but evidence of service. In attachment proceedings the levy under the writ gives the lien; the return is evidence of the levy, and such evidence as a court can act upon. This was an action in personam, and the attachment proceedings were auxiliary thereto.

But we are not confronted with a state of facts contemplated in said section 229, because we have a return in this case, perfected, it is true, by amendment. When an amendment is allowed, to what time does it relate? The effect of an amendment is, unless restricted in some manner, to cure the error against which the amend-

ment is made, and render the return good ab initio. 1 Wade, Attachm. § 154. When can an amendment be made? It may be made after judgment, if no intervening rights are affected. The same rule should prevail as in regard to other returns. Id. § 151. An amendment to a return may be made after a sheriff has gone out of office, and after an action has been commenced against him. Smith, Sher. 214, 215, 408; Gavitt v. Doud, 23 Cal. 79. The supreme court, in the case of Tilton v. Cofield, supra, quoted approvingly this language from the case of Green v. Cole, 13 Ired. 425: "Courts have the power to amend their process and records, notwithstanding such amendments may affect existing rights." Generally, I think this question of the amendment of a return to a writ of attachment is called in question where the levy has been made upon real estate. In such cases the return gives notice of the attachment. Usually, a copy of it is filed with the recorder of deeds. But, when an officer has possession of personal property under a writ of attachment, it would appear all parties would have sufficient notice to put them upon inquiry as to his rights. But there have been presented no intervening rights in this case which would prevent amendment to the return of the sheriff. The return in the action of defendants in error was perfected by this amendment. The return upon that was as defective as the others up to that date. I think, therefore, the point made in these exceptions cannot be maintained.

The next exception is to the admission of certain evidence which was introduced to show what the sheriff did under his writ of attachment in regard to the possession of the sheriff under the writ. As I have shown that it was proper to amend the return to the writ, which was done, it would appear that this was no more than cumulative evidence. Whether or not, as between third parties or against a party not a party to an action in which a return is made, what was done in the matter of levying upon property can be proven by parol, it is not necessary in this case to consider. Wharton on Evidence (section 833) expresses the rule that an officer may "put in evidence supplementary facts not inconsistent with his return." Nothing more was done in this case. At all events, this evidence, if immaterial, did not affect the judgment in the case, and is therefore no ground for reversal of the same. Mining Co. v. Taylor, 100 U. S. 37; Cooper v. Coats, 21 Wall. 105.

The point that the defendants in error should have brought suit to test the validity of the attachments prior to these instituted by them is not well taken. The rule that in cases of tort the party injured should make reasonable exertions to render the injury as light as possible does not apply in this case. There is no rule of law that would require the plaintiff in error to maintain a lawsuit against other parties with a view of protecting plaintiff in error from its own wrong, especially when it does not appear that such an action would have been successful. Strause v. Telegraph Co., Fed. Cas. No. 13,531.

The objection to the testimony of Rothschild was not well taken. It is evident the object of his evidence was to prove insolvency of the Grunbaums. This could be done in various ways. Return of

an execution nulla bona is one way. The opinions of witnesses may be taken. Rothschild stated what means he had resorted to in order that the insolvency of H. & B. Grunbaum might be ascertained. In doing this, he made inquiries of H. Grunbaum concerning his affairs. It is stated in Abbott's Trial Evidence (page 617) that an "opinion as to solvency may be based partly on what was said by others acquainted with the person, at the place and at and before the time." Inquiries made of the debtor himself ought to be as competent evidence in forming an opinion as to solvency as inquiries made of other parties. Rothschild arrived at the conclusion that H. & B. Grunbaum owed about \$97,000, and had assets of about \$70,000 nominally. This was sufficient to show insolvency.

The twenty-fourth specification of error relates to the admission of the evidence of one Patterson in regard to an alleged custom of the plaintiff in error in taking telegrams intrusted to it for transmission to the office of the Western Union Telegraph Company's office for transmission at certain times, when its own wires were down. I think this evidence was proper, with the view of showing that it was not an impossibility for the plaintiff in error to send the telegram of defendants in error even if its wires were down; that on other occasions it had seen fit to send telegrams by that competing line in order to protect customers. Plaintiff in error had contracted, it appears from the findings of the court, to transmit this telegram of defendants in error at a time when it could not operate its line. If a party injured by another's tort or breach of contract has the active duty imposed upon him by law of making reasonable exertions to render the injury as light as possible, and, if possible, to prevent any damage, it would appear that one who has contracted to perform a service in one way, if he should find that way closed to his performance, should do what he could, by any other means practicable and available, to prevent damage to the one who has intrusted him with an important service. The evidence upon this point shows that plaintiff in error willfully stood by its contract when it knew the impossibility of performance thereunder. For these purposes, I cannot see that there was any error in admitting the evidence.

The last and important point in this case is as to whether the findings of the circuit court sustain its judgment. It is claimed that the stipulation contained in the printed words at the top of the telegraphic blank used by defendants in error, and with which they were acquainted, so limited its liability that plaintiff in error cannot be made responsible for damages occasioned by the delay in or failure to send the said message. There are stipulations in the said printed matter to the effect that the plaintiff in error shall not be liable for mistakes or delays in the transmission or delivery or nondelivery of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor in any case for delays arising from unavoidable interruptions in the working of its lines. The finding was that, at the time plaintiff in error received the message in question, its lines were down between Portland and

Seattle; that this fact was known to plaintiff in error, and not to defendants in error. It is further found that plaintiff in error was fully apprised by the language of the message itself of the amount of plaintiffs' claim, the danger of its loss, and the necessity of its prompt protection. These facts were also made known to plaintiff in error at the time of the delivery of the message. The message itself was marked "Rush." As has been said, plaintiff in error contracted to transmit and deliver this message. At the time, its wires were down, and there was an impossibility in performing the contract as required. The general rule is that when the impossibility of performance is known to the promisor, but not known to the promisee, the former is liable in damages for failure to perform. 3 Am. & Eng. Enc. Law, subd. 73, p. 898, tit. "Contract"; 2 Pars. Cont. 673. In the work entitled "Communication by Telegraph," by Gray (section 18), this rule is expressed:

"If a telegraph company is unable, through a disarrangement of its lines or other cause, to do what it makes a business of doing, it must inform those who wish to employ it of the fact, and thus acquaint them with the advantage of employing other means. A telegraph company offers and is employed solely to effect the rapid communication of a message. The excuse for a failure to effect that communication that the company, when it made the contract, knew that it could not perform it, can hardly be deemed a valid one."

This language commends itself to me; and it is in accordance with the general rules in regard to contracts. When one party knows that another is contracting with him upon the belief that he has the means of performing the same, a concealment of the fact that he has no such means amounts to a fraud. Kerr, Fraud & M. 94; 2 Kent, Comm. marg. p. 482.

If the effect is given to the printed matter in the telegraphic blank above referred to claimed by the plaintiff in error, then it would give it the power to commit a fraud with impunity. It is generally held that a telegraph company may make reasonable rules for the management of its business; but the question as to whether such rules are reasonable is a matter for the determination of a court called to consider the same, and that such a company cannot relieve itself against gross negligence. True v. Telegraph Co., 11 Am. Rep. 156; Thomp. Electr. § 183, and cases cited.

If a telegraph company cannot make a regulation by which it is relieved from gross negligence, much less should it be allowed to stipulate against its own fraud in making a contract. It is agreed that an incorporated telegraph company, holding itself out to do the business of transmitting intelligence generally, is in the nature of a quasi public corporation. At all events, it is engaged in a public business, analogous to that of a common carrier. In many places there is no competing line, and it exercises a monopoly in the business of transmitting intelligence with rapidity. The telegraph has become a necessity in business transactions, and a company conducting such a business ought not, as a matter of public policy, to be allowed to formulate and maintain any regulations which would allow it to work a fraud upon those seeking to employ this necessary means of communication, and yet afford the person defrauded no adequate means of redress.

The next point presented is as to the amount of damages defendants in error should be entitled to recover in this case. It is claimed that, under the stipulation in the contract, they should be entitled only to the 94 cents paid for the dispatch. I do not think it is a reasonable regulation for a telegraph company to make a regulation that will allow it to commit a fraud, and then say that it shall be liable for only nominal damages. No one contracts with a telegraph company with the expectation that it is committing or will commit a fraud upon him. The usual doctrine is that any person who commits a fraud shall be responsible for the direct damages sustained thereby. If any one violates a contract, he shall be liable for the approximate damages the injured parties suffer, when they are such damages as might be reasonably expected to flow from the breach.

In the case of *Hadley v. Baxendale*, 9 Exch. 345, the rule was thus expressed:

"When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally—i. e. according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and this was known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

This language was quoted approvingly in the case of *Primrose v. Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098.

In this case the special circumstances under which the contract was made were known, it appears from the finding of the court, to plaintiffs in error. Now a regulation which would take a telegraph contract out of the rules that apply to all other contracts ought not to be favored as a reasonable one, considering the circumstances under which many telegrams are sent. It has been claimed that the forcing a stipulation into a contract for the transmission of a message by a telegraph company which would exempt it from liability for gross negligence should be considered as having been agreed to under a sort of moral duress, and therefore void. Much more should a stipulation forced into a contract by such a company which would exempt it from a liability for a fraud be declared void. The question of stipulations upon telegraphic blanks is fully discussed in 25 Am. & Eng. Enc. Law, pp. 790-798. The authorities there collected, I think, sustain the author in the view that any stipulation which would exempt a telegraph company from liability for its gross negligence is void. Other text writers sustain the same view. Gray, *Commun. Tel.* § 40; *Thomp. Electr.* §§ 188-193. Many authorities might be collected to the same effect. The case of *Primrose v. Telegraph Co.*, *supra*, does not establish a different doctrine. In that case the telegram was a cipher one. Neither its importance nor purport was known to the

company. There was a mistake in transmitting the same. The court held that the regulation which required that such a message should be repeated was a reasonable one. But there was no holding in that case that the company, by any regulation, could exempt itself from liability for gross negligence or a fraud. The conclusion I have reached, therefore, is that, if the stipulation has the force claimed for it in this case by plaintiff in error, it is void.

I have considered this question as though the stipulations set forth upon the printed blank do apply to the facts presented in this case, but I am of the opinion that neither in letter nor spirit do they apply to a case like the one at bar. This was a case where the company contracted to transmit a message for defendants in error, and did not have the means then of complying with the contract, and when it concealed this important fact, and without which, undoubtedly, it would not have been intrusted with the transmission of the same. The stipulations in the blank, I think, refer to cases where the telegraph company is able to comply with its contract, but, through the negligence of its employes, fails to transmit the telegram intrusted to it, or delays it, or is negligent in the manner of transmitting it, or is not able to send the telegram through defective appliances, but does not conceal this fact. It appears that there were other means for transmitting the message from Portland to Seattle. Hence the message could have been transmitted. Although it does not appear that the contract for its transmission was made with reference to the fact that plaintiff in error was accustomed to send telegrams intrusted to it for transmission by the Western Union Telegraph Company lines, still it could have done so, and protected defendants from the damage it incurred. It seems, however, that the plaintiff in error chose to stand by the contract it had made to transmit the message over its own lines, when at the time it knew it was unable to do so.

Under the rule heretofore expressed for assessing damages, I find that the court was right in assessing defendants in error's damages at \$3,704.37. The court found that, in addition to this, the defendants in error were entitled to interest on the same from September 7, 1891, at the legal rate, which appears in Oregon to be 8 per cent. This finding is claimed as error so far as the interest is concerned. I think there was no warrant for finding that the amount of damages defendants in error sustained should bear interest from the day the suit was commenced. In the complaint the allegation of the amount of damages is \$3,704.37. The demand for judgment is for the same amount. The claim in this case was for unliquidated damages. Such demands do not bear interest. 1 *Suth. Dam.* p. 609; *Hawley v. Dawson*, 16 *Or.* 344, 18 *Pac.* 592.

In the case of *Green v. Van Buskirk*, 7 *Wall.* 139, the supreme court, speaking by Justice Field, said:

"Interest is not allowable as a matter of law, except in cases of contract or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury."

When interest is taken into consideration in assessing damages, it forms a part of the damages found, and is included in the general amount, and is not assessed on the amount of damages found. The only claim for damages was, as I have stated, \$3,704.37. It would have been improper to give a judgment for more damages than were claimed in the complaint. *Palmer v. Reynolds*, 3 Cal. 396; *Pierce v. Payne*, 14 Cal. 420.

As the amount in which the judgment is defective can be clearly ascertained from the findings and the judgment itself, I see no reason for reversing the judgment in toto, and sending the cause back for a new trial. In such cases the court may direct the circuit court to enter such judgment as should have been entered under the pleadings and findings. *Ft. Scott v. Hickman*, 112 U. S. 150, 5 Sup. Ct. 56.

The judgment as entered by the circuit court is reversed, and the cause remanded to that court, with direction to enter a judgment for the plaintiffs in that court, against the defendant therein, for the sum of \$3,704.37, and costs of suit, taxed at ———.

HAWLEY, District Judge (concurring). I concur in the conclusions reached by my Brother KNOWLES on all the points discussed in his opinion and in the judgment therein announced. But I base my concurrence, with reference to the merits of the case, upon the general principles clearly enunciated in the quotation from *Gray on Telegraphic Communications* (section 18), which seem to me to be sound, equitable, and just. It was the duty of the telegraph company, after having been informed of the importance of the message and of the necessity of its prompt transmission, to have then and there informed the sender of the message of the fact that its wires were not at that time in working order. It could not avoid any liability by concealing the truth as to the condition of its line. It was its duty to deal with its customer in good faith and upon equal terms; to notify him of the true state of the facts, so as to leave it optional with him to try the other line, or take his chances on the line in question being speedily repaired. By failing to perform this duty, it deprived itself of the right, which it otherwise might have had, of availing itself of the terms and conditions of the stipulation and rules which were printed upon its blank form of messages.

McKENNA, Circuit Judge. I concur in the judgment, for the reasons stated by Judge HAWLEY.

McGOWAN et al. v. LARSEN.

(Circuit Court of Appeals, Ninth Circuit. February 25, 1895.)

No. 175.

1. NEGLIGENCE—MAINTAINING LIGHT ON FISH TRAP—EVIDENCE.

In an action for the death by drowning of plaintiff's intestate, caused by defendants' failure to maintain a light on their fish traps, as required

by Pen. Code Wash. § 284, where defendants alleged that the light was extinguished by an unprecedented freshet, evidence that it was defendants' custom to put lights on their traps before the passage of the law requiring it, that defendants had ordered their men to take particular care of the lights, and that witness had once seen one of defendants' lights struck out by an oar, was inadmissible.

2. PLEADING INCONSISTENT DEFENSES—INSTRUCTIONS.

Though defendant may have a right to plead two inconsistent defenses, and has introduced testimony to sustain each, a charge that both cannot be true, one must be false, is not erroneous.

3. INSTRUCTIONS—ACCUSATION OF PERJURY.

The use of the word "false" in such instruction is equivalent to "untrue," and cannot be construed as an "accusation of perjury or willful false statement."

4. SAME—DUTY TO MAINTAIN LIGHT ON FISH TRAPS—DEGREE OF CARE.

In an action for the death of plaintiff's intestate, caused by failure of defendants to maintain a light on their fish traps from sunset to sunrise, as required by Pen. Code Wash. § 284, a charge that it is not enough to put a light on the traps, but defendants must use reasonable care to keep it burning, and, if it should go out from causes which could not be guarded against, reasonable diligence must be used to restore it, leaving it to the jury to say what, under the circumstances, would constitute reasonable diligence, is not erroneous.

5. APPEAL—REVIEW.

On appeal, appellant is confined to the exceptions taken at the trial, and cannot urge different exceptions in his brief.

In Error to the Circuit Court of the United States for the District of Oregon.

Action by one Larsen, administratrix of Peter W. Larsen, deceased, against one McGowan and others, for wrongfully causing the death of plaintiff's intestate. There was a judgment for plaintiff, and defendants bring error.

This action was originally brought in the circuit court of the state of Oregon for Clatsop county, under section 138 of the Code of Civil Procedure of Washington, which is as follows:

"Sec. 138 (8). The widow, or widow and her children, or child or children if no widow, of a man killed in a duel shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every action the jury may give such damages, pecuniary or exemplary, as under all circumstances of the case may to them seem just."

The case was transferred, on petition of plaintiffs in error (defendants in the action), to the circuit court of the United States for the district of Oregon. Defendant in error (plaintiff in the action in court below) sues as administratrix of the estate of Peter W. Larsen, deceased, and alleges that the plaintiffs in error jointly owned and operated a fish trap in Pacific county, state of Washington, and negligently and unlawfully omitted to show conspicuously, or at all, any bright white or other light upon said trap continuously between the sunset on the 14th and sunrise on the 15th of May, 1893; that the deceased, Peter W. Larsen, was between said times engaged in fishing for salmon with a boat and gill net in the vicinity of said trap, and by reason of the omission to show a light as aforesaid he was, about 2:30 o'clock, thrown against said trap and into the river, and drowned. The answer of the defendant denies these allegations, and affirms that they did conspicuously show

a light continuously for said time, and, further, affirms that at the commencement of the night they placed and strongly attached a bright white light upon said trap in an open, conspicuous position, where it could be seen, and that they took reasonable and proper precautions to insure its existence and burning during the night; that said light was prepared and secured as it had always been, and would withstand storms and gales, but that a freshet of tremendous magnitude, such as had not been known on the river within the memory of man, occurred, and filled the river with drift, which struck the trap with such force as to demolish the same and cause the removal of any light placed thereon. As a further defense the deceased is charged with contributory negligence in going upon the river and attempting to fish in its then condition. Plaintiff, replying, denied the new matter to the answer. The case was tried by a jury, who rendered a verdict for plaintiff in the sum of \$3,000.

Section 284 of the Penal Code of Washington is as follows:

"Sec. 284. Any person or persons owning, operating or using any pound-net or trap shall cause to be painted in a conspicuous place on said pound-net or trap, while the same is in use, a number designated by the fish commissioners of this state, said number consisting of a black number or figure or figures not less than six inches in height painted on a white ground; and shall also conspicuously show at night time, between sunset and sunrise, a bright white light; and any person or persons violating the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding two hundred and fifty dollars."

There are a number of assignments of error, including exceptions to exclusion of testimony and to instructions given by the court. The instructions excepted to are as follows: "(4) That the circuit court erred in its charge to the jury in announcing that the defendants have made two defenses, one of which is that they did have a light out, and the other that they did not have a light out, and in stating that both of these statements could not be true,—one must be false,—and in all that the court said upon that subject, the same being as follows, to wit: 'To this complaint the defendants make two answers. First, they say that they had no light out. Then, for a further and separate defense, they say they did have a light out; that they had a light, and kept it burning all night, at this place. Then, for a further and separate defense, they say they did not have a light out at this place, but that as a matter of fact they put one out in the fore part of the evening, and that, by reason of the unprecedented condition of things,—the high water and the large amount of drift,—this drift, striking the piling that was connected with the piles upon which this light was hung, caused the light to go out, and that this was through no fault or negligence of theirs. Of course, it is needless to say that both of these statements cannot be true. One of them is false, and it is for you to determine which is the true statement, and if either is true.' (5) That the said court erred in its instruction to the jury as to the necessity of keeping a light; said instruction being as follows, to wit: 'It is the duty of these defendants to keep lights upon these traps. It is made their duty by law. I do not mean to say by this that this is an absolute duty. It is their duty to put out a light there, but that is not enough. It is their duty to keep a light burning there from sundown to sunrise on each night. But I do not mean to say that this is an absolute duty; that is to say, that if this light should go out under circumstances which a reasonable prudence could not provide against, and if there should be a failure to restore the light for the same kind of reason, that would excuse the defendants. If they put out a light, and kept the necessary guard or watch to see that that light was kept burning, and in consequence of the unprecedented flood or drift under the light it had gone out, and they were unable to reach it, it having gone out without any fault of theirs, of course, under these circumstances, they would not be chargeable with negligence. Subject to these limitations, they would be. It is their duty. They have these traps in this river, and if they cannot, under all ordinary circumstances, keep these lights burning upon the traps, they can at least remove the traps. It is their duty, if they maintain these traps in the river, to keep lights upon them; not only to light the lanterns, and put them out, but to keep them there by the exercise of reasonable diligence.' (6) That the said court erred in its instruction to the jury

as to the degree of care exacted from the defendants; said instruction being as follows, to wit: 'As to what would be reasonable diligence under these circumstances, that is a fact I would submit to you. You will consider, of course, the nature of the injury that is liable to result, all the circumstances surrounding the existence of this trap, and the care and expense involved in maintaining the light,—consider the duty which they are under,—and then determine from all the facts and circumstances in the particular case whether the defendants are excusable in failing to restore the light, if there was any light there; and if the light went out, and if it was not restored, as I believe it is not claimed that it was, unless the first answer, which sets up that there was a light burning all night, would justify the inference that the light had gone out and been restored.' (7) That the said circuit court erred in its suggestion to the jury that the defendants removed the light shortly after daylight; said instruction being as follows, to wit: 'And so, in the light of these surroundings, you will determine which class of witnesses is correct as to whether there was a light there or not; which class of witnesses is more likely to be correct. There is one circumstance which, in my mind, has some significance. It is the fact that the captain of the La Camas testified that this light was burning there after three o'clock, when they left. This must be about daylight, as this was in the month of May,—one of the very longest days of the year. The testimony of the witness who put out the light there, whose testimony was taken before the coroner, is that the light was out when he took it down. It does not appear when he took the light away; what time does not appear. I think it was stated some time during the course of the trial by counsel, and tacitly agreed to, that it was some time after daylight,—probably soon after daylight. Now it strikes me as having some improbability about it that this light could have been burning when the captain of the La Camas saw it, some five minutes after three, and should have gone out by the time it was taken down by this man, whose business it was to take it down, although it might be that it went out during this time. It seems to me that it is not very probable under those circumstances. However, my judgment is not to govern; the matter is for your determination, not mine.' The exclusion of evidence excepted to is as follows: (1) That it was the custom of defendants to put out lights on their traps before the passage of the law requiring it. (2) That H. C. McGowan had given orders to his men to take particular care of the lights. (3) That George Bell had seen "one of Mr. McGowan's lights struck out one night with an oar."

A. F. Sears, Jr., for plaintiffs in error.

Raleigh Stott, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge, after making the above statement, delivered the following opinion:

The rulings of the court in excluding testimony were correct. No inference of sufficient degree of probability could be drawn from it under the issues to make it admissible.

To sustain their exception to the ruling of the court for giving the instruction contained in the fourth assignment of error and above quoted, plaintiffs in error contend that under the laws of Oregon they were entitled to plead inconsistent defenses, and, citing Pom. Rem. & Rem. Rights, § 722, that they could not be compelled to elect between such defenses, nor could evidence in favor of either have been excluded at the trial on account of inconsistency. "If this be true," counsel say, "it is obvious that the interests of the plaintiffs in error were seriously affected by the remarks of the court in criticism of these defenses. If they were entitled to their defenses, they were entitled to them without their being weighted down by

these strictures," meaning the comments of the instruction. But this does not follow. The defenses they might be able to make (we assume it without deciding it), and evidence in support of them might be admissible; but after it is admitted it must receive consideration, and its character either absolutely or in relation to other evidence must be determined, that a judgment may be formed. Inconsistent defenses—that is, when the truth of one negatives the truth of the other—cannot both be found true; and in reaching a judgment of the truth of either the court may assist the jury, if it make no comment which the evidence will not bear, and assume no function which it is the jury's right to exercise. The record does not contain the evidence, and we must assume that the defenses were made as stated by the court. It is manifest that only one could be true. If there was no light out, one could not have burned all night; and if one burned all night it could not have been extinguished before morning by a freshet. The comment of the court, therefore, was correct, and it submitted to the jury the only proposition the jury had a right to find, to wit, the truth of one of the defenses.

Counsel urge in their brief that by the use of the word "false" in the instruction the court "made a direct accusation of perjury; of willful false statement,"—and that the jury must have received the word in such sense, and not as an equivalent for "untrue." This is inferred because in certain statutes imposing penalties or detriments the word is so construed. The inference we do not think is justified. Besides, the context refutes the contention of counsel.

We do not find any error in the instructions contained in the fifth and sixth assignments of error. The statute requires any person owning or operating a trap to "conspicuously show at night-time between sunset and sunrise a bright white light." It must be displayed continuously. It must be put out at sunset and maintained until sunrise. The excuses for the nonobservance of this duty, in view of the facts and the degree of care required, were properly explained.

To the instruction contained in the eighth assignment of error, plaintiffs in error take in their brief a different exception to that taken at the trial. They must be confined to the latter. The record states the exception as follows:

"To which instruction of the court the defendants, by their said counsel, duly excepted as to the court's suggestion that the defendants removed the light next morning, probably soon after daylight; which exception the court allowed, the court saying: 'I said he removed it the next morning. It does not appear when he removed it the next morning, but probably soon after daylight.'"

That is, the exception was to two suggestions of fact: (1) The defendants removed the light next morning; (2) that this was done "probably soon after daylight,"—and the improbability which the court mentioned was that between 5 minutes after 3 and "soon after daylight" the light "should have gone out," hence it must have gone out before 5 minutes after 3, and that the captain of the La Comas was untruthful or mistaken as to the fact or time. This

reasoning counsel for plaintiffs in error does not seem to think is very strong, but it is only necessary to say that it was submitted to the jury for what it was worth; the learned judge saying: "However, my judgment is not to govern; the matter is for your determination, not mine." We think the limits allowed to the court were not transcended, more particularly when considered in connection with the rest of the instructions given. There being no error in the record, the judgment is affirmed.

CINCINNATI ST. RY. CO. v. WHITCOMB.

(Circuit Court of Appeals, Sixth Circuit. March 4, 1895.)

No. 251.

1. PRACTICE—VARIANCE—OHIO STATUTE.

Plaintiff, while driving his wagon along a street on which were the tracks of defendant's street railway, was struck by one of defendant's electric cars, his wagon crushed between the car and another wagon, and plaintiff injured. There was a conflict of evidence as to whether the injury was caused by the first collision, or by the backing away of the car after such collision, and as to whether or not there was a second collision after the first. Plaintiff's complaint alleged that the injury was caused by a second collision. Defendant's evidence tended to show, and the jury found, that the injury was caused by the backing of the car. *Held*, that under the statute of Ohio (Rev. St. Ohio, §§ 5294-5296) providing that no variance between the allegations in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice, this variance was immaterial.

2. SAME—GENERAL AND SPECIAL VERDICTS—CONSISTENCY.

The jury found generally for the plaintiff, and also specially that the injury to plaintiff's wagon was caused by the first collision, and the injury to plaintiff himself by the backing of the car; but they disagreed as to whether the motor was reversed for the purpose of backing the car before or after the collision. *Held*, that there was no inconsistency between the general verdict and the special findings and disagreements.

3. NEGLIGENCE—DEGREE OF CARE—CROSSING STREET-CAR TRACKS.

It is not the law that persons crossing street-railway tracks in a city are obliged to stop, as well as look and listen, before crossing such tracks, unless there is some circumstance which would make that ordinarily prudent.

4. SAME—OPERATION OF ELECTRIC CAR.

The standard of ordinary care is not absolute, but varies according to circumstances and the possible or probable danger from the use of the instrument; and in the case of a heavy electric car, operated at considerable speed in the streets of a city, it is not error to modify a request for instruction that the company, operating such car, is required to use ordinary care, by pointing out that a higher degree of caution is required in managing such car than in managing ordinary vehicles.

5. STREET RAILWAYS—RIGHT OF WAY IN STREETS.

It is not error to refuse to charge a jury, specifically, that the cars of a street railway have a paramount right of way in the street, when the court has already charged that the tracks of the railway in themselves constitute a warning that a car may at any time approach, and that, when a vehicle is on the track, it is bound to get out of the way, and not obstruct the passage of the car.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an action by Charles K. Whitcomb against the Cincinnati Street-Railway Company to recover damages for a personal injury. In the circuit court plaintiff recovered judgment. Defendant brings error.

Charles K. Whitcomb, a citizen of the state of Kentucky, recovered a verdict and judgment against the Cincinnati Street-Railway Company, a citizen of Ohio, in the circuit court of the United States for the Western division of the Southern district of Ohio, as damages for a personal injury. This is a proceeding to review that judgment. Whitcomb was a garden truck huckster, and in his business used a horse and wagon. The Cincinnati Street-Railway Company is engaged in the maintenance and operation of an electric street-car line, running from Avondale, a suburb of Cincinnati, into that city, by way of Hunt street. Whitcomb, on the 3d of August, 1893, stopped in front of a saloon on the west side of Hunt street, and went in. There are two tracks upon Hunt street at this point, and the width of the street from curb to curb is 46 feet, leaving about 16 feet between the outer rail of each track and the curb. The car which afterwards collided with Whitcomb was running from Avondale south into the city of Cincinnati on the west track. To the north of where Whitcomb's wagon stood the track curved to the west. From the curb at this point it was possible to see up the track from 200 to 400 feet. The street car was running at the rate of 8 miles an hour. Some 60 feet south of where Whitcomb's wagon stopped, on the same side of the street, was a broken-down slop-feed wagon, extending diagonally from the curb towards the railway track. Whitcomb testified that, when he came out of the saloon, he looked north up the track, and saw no street car; that he then got on to his wagon, and, in order to avoid the malt wagon, drove towards the track; that, before he reached the track, he looked back again up the track. His wagon was covered, but the front side curtains were rolled up. The street car overtook Whitcomb when he was opposite the malt wagon, and between it and the track. Just where his left wheels were is made uncertain by the evidence, and whether the dashboard of the car struck the wagon, or the collision took place between the back wheels of the wagon and some of the side standards of the car after the dashboard of the car had passed the wagon, is not clear. Certain it is that the car crushed the huckster wagon against the heavy malt wagon without injuring Whitcomb, and that subsequently the car backed, and then moved forward again, and that, either in the backing or in the second forward movement, the wagon of Whitcomb was upturned, and he was injured. The evidence for the plaintiff supported his claim that his injury was caused by a second collision, while defendant adduced much testimony to show that there was no second collision, but that the upturning of the wagon and the injury to the plaintiff were caused by the backing alone. The motorman testified that Whitcomb turned suddenly across the track when the car was too near him to stop it; that, in order to facilitate the stopping, he not only put on the brake, but also reversed the motor; and that the backing of the car after the first collision was due to the reversal of the motor before the first collision. There was counter evidence tending to show that the motor was reversed after the collision, and that the backing was due to that reversal. The amended petition of plaintiff charged "that the said defendant, by its servants, agents, and employes, was guilty of gross and wanton negligence in the following respects: That it negligently failed to ring the bell or sound the gong on its said electric car, so as to warn plaintiff of the approach of the same, and negligently failed to stop said car after plaintiff's perilous position was known, and when, by the exercise of reasonable care on its part, the said collision might have been prevented. By reason of these acts, and without negligence on the part of plaintiff, his wagon was struck by the defendant's said electric car, so that plaintiff was thereby, and by reason thereof, placed in a perilous position. Plaintiff says that while in said perilous position, and without negligence on his part, and without time or opportunity to extricate himself from said perilous position, the defendant, through its servants, agents, and employes in charge of said electric car, was guilty of further and additional gross and wanton negligence in the following respects: That it did, with full knowledge on its part of plaintiff's perilous position, cause said electric car to be backed a short distance, and then caused

said car with great force and violence to be collided with the said horse and wagon of the said plaintiff, by reason of which last-named collision plaintiff was greatly damaged in his person, etc. And plaintiff further says that by reason of defendant's said negligence, through its servants, agents, and employes in charge of the running and operation of said electric car as aforesaid, his horse, drawing his said wagon, was killed, and his wagon broken and demolished, by reason of all which the plaintiff has been damaged in the sum of five thousand dollars."

The jury returned a general verdict for the plaintiff, and also answered certain questions of fact put to them by the court, and failed to answer other questions as follows: "First. Was the injury to the plaintiff and his wagon and his horse caused by the collision when the car first struck the wagon, or by the backing of the car after it struck the wagon? Answer: The injury to the horse and the wagon was due to the first collision, and the injury to the plaintiff was due to the backing out of the car. Second. If you find that the injury was caused by the backing of the car after it struck the wagon, you will please answer each of the following questions: (1) Was the motor reversed before the car struck the wagon? Answer: Disagree. (2) Was the motor reversed after the car struck the wagon, and did that reversal cause the backing? Answer: Disagree. (3) If not, what was the cause of the backing? Answer: Disagree. Third. After the backing of the car, did it, when again moved forward, strike plaintiff, his horse or wagon? If so, did that striking cause the injury complained of? Answer: No." A motion was made on the part of the defendant for a special finding non obstante verdicto. This was overruled, and judgment entered for the plaintiff on the general verdict.

Kittredge, Wilby & Simmons and Paxton, Warrington & Boutet, for plaintiff in error.

W. H. Jackson and Simmons & Simmons, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts). The general verdict of the jury was evidently based on the finding that the injury to the plaintiff's person was caused by the negligent backing of the car after the first collision, and not by a second collision. It is argued that this is such a variance from the charge of negligence in the petition that judgment should have been entered for the defendant. The petition charged that the backing was negligent, and that the moving forward to the second collision was negligent, but ascribed the injury to the second collision. The evidence of the plaintiff tended to show that the injury was due to the second collision. The evidence of the defendant, however, tended to show that the injury was due to the backing alone.

Section 5294 of the Revised Statutes of Ohio provides that:

"No variance between the allegation in a pleading, and the proof, shall be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits, and when it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as are just."

Section 5295 provides:

"When the variance is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment, without costs."

Section 5296 provides:

"When the allegation of the claim or defense, to which the proof is directed, is unproved not in some particular or particulars only, but in its general scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof."

In *Hoffman v. Gordon*, 15 Ohio St. 211, the petition charged defendant with flooding the plaintiff's cellar by obstructing the street, and the answer denied the charge. On the trial, evidence admitted without objection showed that the flooding was occasioned by defendant's wrongful opening of the sidewalk, making a channel through which the water was forced into the cellar by obstructions placed in the street by others. It was held not to be error for the court, although no amendment of the petition was asked or made, to find upon this evidence for the plaintiff, and to render judgment accordingly. Such proceeding was held by the court to be in conformity with the sections of the Ohio Code above quoted. Said the court, Judge Welch pronouncing the opinion:

"The evident object of the Code is to vest in the court a discretion, where it can be done without surprise or injury, to try the case upon the evidence, outside of the pleadings; and, if objection be made, to allow the pleadings to be conformed to the evidence, at once and without terms. When a trial is so had, without objection, we are only carrying out the spirit of the Code, by refusing to reverse the proceedings on account of the variance. Had this evidence been objected to when offered, it is quite apparent that the plaintiff would have asked and obtained unconditional leave to amend. To allow the defendant, after he has suffered the evidence to go to the jury without objection, to reverse the judgment on that account, would be manifestly unjust to the other party."

In the present case the plaintiff asked the court to be allowed to make an amendment to the petition to conform to the theory of the case by which the injury was caused by the negligent backing. This was objected to by the defendant, and the motion was denied, on the ground that it was unnecessary. We think the ruling of the trial court that the variance was immaterial was correct. Certainly, the defendant could not be surprised by the evidence that the injury to the plaintiff was occasioned by the backing of the car, because that evidence was introduced on its behalf, and the application of the plaintiff was only to amend his pleadings to accord with the evidence brought out by defendant. The case was tried on the theory that either in the first collision, in the backing, or in a second collision, there was negligence, causing the injury complained of; and a verdict on either ground might have been properly sustained, without surprise or prejudice to defendant.

Secondly, it is said that the judgment for the plaintiff cannot be supported because the findings and disagreements of the jury are inconsistent with the general verdict. The jury found that the injury was caused by the backing of the car. They disagreed as to whether the reversal of the motor, which caused the backing, occurred before or after the first collision; but they necessarily agreed that, whether the reversal of the motor occurred before or after the collision, the backing of the car was the result of the motorman's negligence. There was evidence tending to show that,

even if the reversal took place before the collision, the backing could have been avoided by due care of the motorman after the collision. The motorman was asked by counsel for the plaintiff:

"Q. Now, when the car started back, the motor having been reversed, what effort, if any, did you make to stop that car? A. In going back? Q. Yes. A. Well, I saw I was releasing the man, and was not doing him any harm, and I let the car go back then. Q. About how far? A. Well, between four and six feet."

This tended to show that, whether the reversal of the motor occurred before or after the first collision, the subsequent backing of the car was voluntary on the part of the motorman, and might have been stopped by him. As the jury found that the reversing was the cause of the injury to Whitcomb, and that it was negligent, a finding by the jury as to when it took place with reference to the first collision was immaterial, and a disagreement as to such a fact could not affect the validity of the verdict. This covers all the assignments of error except those which are based on the charge of the court.

The exceptions to the charge of the court are very voluminous, very long, and many of them are quite frivolous. Generally, the exceptions to the charge may be comprehended under three heads: First, the court was asked to charge the jury that it was the absolute duty of Whitcomb not only to look and listen for the coming of the car, but also to stop, look, and listen. It certainly is not the law that persons crossing street-railway tracks in a city in a vehicle are obliged to stop before crossing, unless there is some circumstance which would make that ordinarily prudent. We have already held in the cases of *Railroad Co. v. Farra*, 66 Fed. 496, and *McGhee v. White*, Id. 502, that it is not the absolute duty, as matter of law, for one crossing a steam-railway track to stop, look, and listen, but that the necessity for stopping is to be determined by the circumstances, and is usually a question to be left to the jury, and so the court below in this case treated it. The rule cannot be stricter in respect to crossing a street railway than in crossing a steam railroad. The cases relied upon are chiefly Pennsylvania cases. In that state the supreme court has adopted a rule of law requiring every person to stop, look, and listen before crossing the railroad track. This rule is not followed in other states, and certainly is not the law in the federal courts.

The second general objection to the charge of the court is that it declined to give an instruction that the street railway had the paramount right of way in the street. The court below seems to have considered that the word "paramount" was likely to mislead members of the jury, and to give them the impression that the railroad company had the exclusive right to the street between the tracks. The court did say to the jury this:

"The electric street-car tracks of the street railway company along Hunt street, along which plaintiff was driving, were in and of themselves a warning to Whitcomb that a car might at any time approach upon the track towards which or upon which he was driving. Gentlemen, I said to you this morning that the street-railway company had the right to use the streets; that the plaintiff had the right to use the streets. None of

them had an exclusive right, but there is this one qualification with reference to street cars passing along the street as provided for in the ordinances of the city, which are in evidence. Wherever a wagon or other vehicle is on the track in advance of a car, it is bound to get out of the way, and not to obstruct the passage of the car."

This is a correct exposition of the relative rights of the street-railway companies and the rest of the public who use the street. If this is all that the word "paramount" means, then the court, in effect, charged the jury that the street-railway company had the paramount right to use the space between its tracks upon the street. If "paramount" means more than this, the charge requested should not have been given. We cannot therefore see that the defendant was prejudiced by the action of the court upon this charge.

Finally, it is objected that the court imposed upon the railway company a higher degree of care than the law justifies in avoiding collisions with vehicles upon its track. The court was requested to give the following instruction:

"While it is the duty of the company to exercise ordinary care and diligence to avoid collision and other accidents, the rule does not dispense with care and prudence on the part of persons who use the street in common with the company. * * * I do not give this instruction exactly in the form in which it is asked, but I do give it substantially. It is not merely ordinary care that this street-railway company should exercise. In the movement of an electric car or of a horse car on the streets more care is required than in driving a wagon, because it is a larger vehicle and moves more rapidly. It is of greater weight and momentum, and it cannot be stopped so easily. When it comes to moving an electric car, which weighs, according to the testimony, about eight tons, and is impelled by a motor of sixty horse power,—thirty times the power applied to an ordinary horse car, and moving it more rapidly, with its greater weight and momentum (the testimony in this case is that a car, when in full speed, can be stopped in about three lengths of the car; that is, about ninety feet),—all these circumstances increase correspondingly the requirements as to the management of the car. It is the duty of the company to exercise proper care, for the reasons that I have given."

We think this charge correctly stated the law. The court was evidently attempting to avoid giving the impression to the jury that a company operating a machine of the great force and power of an electric car upon a street upon which other vehicles might lawfully travel was not required to use any more care in this operation than the driver of an ordinary wagon or the driver of an ordinary street car. He, therefore, very properly called the attention of the jury to the distinction between the requirements in the one case and in the other. It is true, speaking strictly and technically, that one is only required to use the care in the manipulation of any machine with reference to the rights of others which the ordinarily prudent man would use. But the standard of ordinary care is not absolute; it varies according to the circumstances, and according to the possible or probable danger which may arise from the use of the instrument. The court did not tell the jury that the street-railway company was obliged to use the highest degree of care, but only a proper degree of care, considering the possibility of danger from the instrument it was operating. This, we think, is quite in accordance with the ruling of the supreme court in the

case of *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, where it was held that the charge to the jury that the railway company, in the selection of its night telegraph operators, was under a duty to its other employes to exercise proper and great care to select competent persons for that branch of the service, was a correct statement of the law to the jury, because of the very delicate and responsible duties which telegraph operators were obliged to discharge. So here. Accidents from electric street railways are numerous. A speed of 10 miles an hour in a traveled street, with a car weighing from six to eight tons, and having such momentum that it cannot be stopped short of 90 feet when running at full speed, certainly imposes upon those who choose to operate it the duty of great care to avoid collisions with persons who are lawfully upon a street; and while it is true that such care, owing to the circumstances, would be but ordinary care, the expression "ordinary care" is one which might give the jury a wrong impression in such a case, and the court properly exercised its discretion to couch its language in a form legally equivalent and less likely to mislead.

Finally, exception was taken to that part of the charge where the court told the jury that even though the plaintiff were negligent, if the defendant, having observed the negligence, might have avoided its effect by due care, the defendant was liable. This charge was not only good law, but was especially applicable to the circumstances of this case, because there was much evidence tending to show that the injury to plaintiff's person occurred through the negligence of the motorman of the defendant after the first collision had taken place, from an unnecessary and ill-advised backing of the car when the plaintiff was in a helpless position, but still remained uninjured. The principle has been several times announced in this court. *Mississippi Valley Co. v. Howe*, 6 U. S. App. 172, 3 C. C. A. 121, and 52 Fed. 362; *Louisville & N. R. Co. v. East Tennessee, V. & G. R. R.*, 9 C. C. A. 314, 60 Fed. 993; *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653; *Railroad Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282.

Finally, it is objected that the court admitted evidence to show that it was the custom in Cincinnati for wagons to keep to the right on a traveled street. This was introduced upon the issue made by the defendant that the plaintiff, when he reached the wrecked malt wagon, should have crossed the track to the left side of the street, instead of driving on to and along the tracks and around the malt wagon, keeping all the while on the right side. The custom was not a very material circumstance, but it was not improperly introduced, for it showed a reasonable motive in the plaintiff not to cross clear over because he would be obliged to come back in order to observe the custom to keep upon the right-hand side of the street as he drove. The court left it to the jury to say whether, under all the circumstances, it was Whitcomb's duty to cross the track to the other side of the street, and simply allowed the introduction of evidence as to custom to suggest a reason (the weight of which was left to the jury) for his wishing to remain

on the right side of the street, if he could otherwise and without negligence do so. Certainly, its introduction was not a reversible error.

On the whole case, we find no error, and we affirm the judgment, with costs.

GRAND TRUNK RY. CO. v. TENNANT.

(Circuit Court of Appeals, First Circuit. February 1, 1895.)

No. 90.

1. **FEDERAL COURTS—JURISDICTION—ALLEGATION OF CITIZENSHIP.**

The pleadings in an action brought in the circuit court described the defendant as the G. T. R. Co. of Canada, and alleged that it was a corporation. *Held* that, in the absence of a specific objection in the circuit court that the defendant was not alleged to be a corporation created by any particular state or country, these allegations were sufficient to give jurisdiction.

2. **NEGLIGENCE—QUESTION FOR JURY.**

In an action for personal injuries to a brakeman in the employ of defendant railroad company, it was claimed that such injuries were caused in part by the improper construction of the car on which such brakeman was riding when the accident happened. The only evidence was such as described the construction of the car, neither party having offered evidence to show that it was either usual and safe, or unusual and dangerous. The defendant requested the court to charge that there was no evidence to show that the construction of the car caused or contributed to the injury. *Held* that, as the inferences to be drawn from the description of the car were exclusively for the jury, such instruction was properly refused.

3. **RAILROADS—DUTIES AS TO CARE OF TRACK.**

It was also claimed that the accident was the result of the defendant's failure properly to clear ice and snow from the track where the accident happened, which was a private track, extending onto a wharf, and as to which there was evidence tending to show that it was not under the care or control of the defendant. The court charged the jury that, when the defendant undertook to do business on the wharf, it took the responsibility of the track. *Held*, that a railroad train hand, whose duties do not require him to ascertain the limits of the corporation's road, has a right to assume that every track upon which he is ordinarily sent, physically connected with the corporation's line, is a part of its system, and that he is entitled, while upon it, to the usual protection; and hence, in the absence of a request that the jury should find whether the brakeman knew the facts as to ownership of the track, the instruction given was proper.

In Error to the Circuit Court of the United States for the District of Maine.

This was an action by Mary E. Tennant, as administratrix of John S. Tennant, deceased, against the Grand Trunk Railway Company, to recover damages for a personal injury. In the circuit court plaintiff recovered judgment. Defendant brings error. Affirmed.

Almon A. Strout (C. A. Hight and H. N. Rice, on the brief), for plaintiff in error.

Orville D. Baker, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. After the jury had been instructed, and while they were out considering their verdict, the plaintiff below, by leave of the court, amended the writ by describing herself as a citizen of the state of Maine, and the defendant below as a citizen of the dominion of Canada. That the court had power to allow this amendment, that it speaks as of the date of the writ, and that it was seasonable, involve too familiar rules to need comment by us. Since *Insurance Co. v. French*, 18 How. 404, it is settled law that, for jurisdictional purposes, it is not sufficient to allege with reference to a domestic corporation, party plaintiff or defendant, merely that it is a citizen of the state named. There must be an averment that it was created by the laws of that state, or to that effect. It seems to be accepted in *Steamship Co. v. Tugman*, 106 U. S. 118, 121, 1 Sup. Ct. 58, that the substance of this rule applies to a foreign corporation, party plaintiff or defendant. Even with the aid of the amendment, it is not specifically alleged that the corporation, defendant below, is or was an alien corporation, in that it was created by an alien state, or to that effect. But in the pleadings—indeed, in the very objection filed by it to the amendment, which objection is made a part of the record—the defendant below is described as the “Grand Trunk Railway Company of Canada.” That the mere fact of the incorporation in its title of the name of a certain state does not necessarily constitute or supply the allegation required was settled in *Piquignot v. Railroad Co.*, 16 How. 104. But less appeared in that case than in the case at bar. Here it was expressly stated in the declaration that the defendant below is a corporation; and, in the absence of any objection taken by it in the court below, it may be presumed that the words “of Canada” describe the country of its creation. In the absence of any objection made in the court below on this particular proposition, the record may fairly be construed against the defendant below; and, as the words “of Canada” are fairly susceptible of the construction claimed by plaintiff below, we give them that construction, and hold that the record, as it stands, alleges the proper jurisdictional facts. There is sufficient doubt not to have required the court to notice the matter of its own motion. *King v. Asylum*, 12 C. C. A. 145, 64 Fed. 331, 332.

We find no error in the overruling of the request of the defendant below for the direction of a verdict in its favor on the whole evidence in the case. Even if the case had stood in its favor with reference to all those parts of it relating to the car in question, which we will refer to again, it was yet a proper one for the jury, under suitable instructions. Even if none of the circumstances were in dispute, the inferences to be drawn from them were fairly so, and the case as a whole comes within *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, and *Railroad Co. v. Powers*, 149 U. S. 43, 45, 13 Sup. Ct. 748, affirmed in *Railroad Co. v. Everett*, 152 U. S. 107, 113, 14 Sup. Ct. 474.

With reference to the specific exceptions, we remark, at the outset, that for the most part the principles of law involved are

familiar ones, and the sole duty of the court was to apply them to a class of facts easily apprehended by juries. Therefore, to make any remarks touching the various questions discussed, except to state generally that the court below correctly and carefully instructed the jury on the main case, would be but a useless repetition of common learning. Out of the mass of cases we will refer to three only, which bear directly on the propositions specially urged on us, touching the alleged want of care on the part of the employé, and the risk claimed to have been assumed by him: *Kane v. Railway Co.*, 128 U. S. 91, 94, 9 Sup. Ct. 16; *Railroad Co. v. Everett*, 152 U. S. 107, 112, 14 Sup. Ct. 474; *Railroad Co. v. Babcock*, 154 U. S. 190, 200, 14 Sup. Ct. 978. There are, however, two points requiring our particular consideration.

The person for whose injuries the suit was brought was a brakeman in the employ of the defendant below. He was at work, in the usual course of his employment, at the rear end of a few freight cars backing down, in the nighttime, in the winter season, upon what was known as "Brown's Wharf," in Portland, for the purpose of coupling to a freight car on the wharf, and drawing it out. He rode down the wharf on the end of the car which was to be shackled to the car previously on the wharf, and, when near the latter, stepped or jumped to the side of the track, under such circumstances that the jury might have found that it was for the purpose of signaling the engineer. An accumulation of snow or ice alongside the track caused him to slip under the wheels of the car, and there he was fatally injured. The plaintiff below claimed that the car was insufficiently and negligently constructed with reference to the steps, handles, or guards at its end, and that if it had been sufficiently and properly constructed and equipped in this respect, the deceased could have retained his hold, and that in this way the alleged peculiar construction of the car contributed to the result. It was claimed by the defendant below that the car was a foreign car temporarily on its road, and the court below apparently assumed, and it did so correctly, that there was evidence to go to the jury on this proposition. There was no claim that the car was out of repair, and the objection to it related to it in its normal condition; and the jury might have been allowed to find that its peculiarities were patent to the slightest inspection or observation by any one accustomed to handling freight cars.

The essential allegations of the declaration touching these alleged defects were as follows:

"And the plaintiff further avers that on said 24th day of January, 1891, said defendant corporation, wholly disregarding its duty in the several respects aforesaid, wrongfully and negligently provided unsuitable and unsafe tracks along said Commercial street, and upon and over said wharf, and negligently allowed said tracks, and the sides and wharf adjoining the same, where the duties of the plaintiff required him to step, alight, and stand, and for a considerable distance therefrom, to become incumbered, obstructed, sloping, and dangerous by improper accumulations of snow, sleet, and ice, and provided unsuitable and unsafe cars for use upon said track, and neglected to equip the same with steps, ladders, handles, guards, and other appliances necessary to render the same safe, suitable, and adapted for their purpose, and in these and other respects negligently exposed the plaintiff to unusual peril in performance of his duties."

The only rulings of the court touching the car, which, under the general remarks we have already made, we need notice, were raised by, or are suggested in, the following requests for rulings, made by the defendant below:

"That if the jury find that the construction of the car, as to the step and handle or rail, was defective, still, the plaintiff's intestate, Tennant, having taken hold of this rail, and standing upon this step of his own will, and having the opportunity to see what the construction was, he cannot recover, even if his injury was caused either in whole or in part by such construction.

"That there is no testimony in this case to show that the construction of the car complained of caused or contributed to his injury, and therefore he cannot recover for any such injury."

The court below gave full and correct instructions touching the subject-matter of the first of these requests; and, as they involve only familiar rules of law, we need not comment on them, as we have already said. With reference to the latter of these requests, neither party has called our attention to any evidence in the record, except that describing the construction of the car. The defendant below put in no proof that it was of usual or safe construction, and neither party offered any evidence to show what opportunities the defendant corporation had, with reference to protecting its employes against its peculiarities, if there were any, and none tending to show whether the intestate had reason to anticipate the use of such cars in the course of his employment, as was the fact in *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298. Both parties were content to let the case go to the jury upon such inferences as they might draw from the mere description of the car. Such inferences are exclusively for the jury, and are not within the range of those which the court can draw. In the absence of any specific proof, the question of the proper construction of this car was exclusively for men of practical experience, and therefore one of fact, which the court has no method of reviewing. It is true the court instructed the jury that it was immaterial, for this case, whether or not the car was received from some connecting line. We are not called on to pass on that proposition, because it was not specifically excepted to, nor was it within the scope of the requests which we have cited. If excepted to at all, it was as a part of extracts from the charge, containing much matter, and excepted to as a whole. It is a wholesome rule, just to the court below, and essential to prevent unnecessary new trials and the consequent expense and delay, that usually no error can be assigned as such unless the record shows that it was specifically brought to the attention of the court below, in such way that it was seasonably enabled to correct inadvertences.

The requested instructions, touching the relations of the defendant corporation to Brown's wharf, were as follows:

"That if the jury find that Brown's wharf, at the place of the injury, was at the time of the accident, on the morning of the 24th of January, 1891, the property of, and under the control of, the proprietors of the wharf, and that the shoveling of the snow at the place of the accident was not done by, and was not under the control of, the defendant railroad, that the defendant railroad would not be liable for the condition of the snow and ice at the side of the track where the accident happened, notwithstanding that it used the

wharf occasionally for delivering cars consigned to the tenants or proprietors of the wharf, and had occasionally, prior to the accident, temporarily run their cars onto the wharf in making up their trains, in violation of the orders of the proprietors of the wharf, and that upon this ground the plaintiff cannot recover.

"That such use would not give the defendant railroad any right to enter upon and control the wharf, nor would it impose upon the defendant railroad any duty or obligation to shovel snow or remove the same, or render it liable for not so doing.

"That if the act of making up trains on any part of the wharf was without the knowledge and direction of the defendant railroad, and contrary to the instructions given the trainmen, the defendant railroad did not take upon itself any liability by such unauthorized acts so far as the plaintiff's intestate is concerned, he being one of the trainmen doing those unauthorized acts.

"That if the plaintiff's intestate knew, or in the ordinary performance of his work might have known, that the defendant company did not shovel the wharf and tracks in winter, the condition of the wharf and tracks was a risk assumed by the plaintiff's intestate, and there can be no recovery."

The last of these requests must be understood to relate to the condition of the tracks without reference to the question of proprietorship, which we will consider further on. Suitable instructions were given by the court below touching what the jury might find the intestate did or did not assume, and touching the effect of his knowledge of the usual state of affairs on the question of his alleged contributory negligence. Whatever was suggested by either of the four requests was properly given, unless it appears otherwise from the following extract from the charge, and the exception to it:

"Now, I have to instruct you, as a matter of law, that when the Grand Trunk Railway Company undertook to do business down upon that wharf, and sent its train and trainmen down there in the transaction of business pertaining to their road, they, for the several occasions on which they so sent the men down there, took the responsibility of that track, whether they owned it or not. Under their relations to the track as shown here, they were not liable for its continuance and constant condition. They were not under obligation, as they were to other portions of their own track, to keep it always in order for sending their men down there; but they were, as to their workmen, under responsibility to have it reasonably and suitably safe for the occasion, when the men were ordered to go there, and did go there."

This was in effect but one proposition, and was properly excepted to as such. All it left to the jury was the determination of the questions whether the defendant corporation undertook to do business on the wharf, and whether it sent its trains and trainmen on the wharf for the transaction of business pertaining to its road. If the jury could pass over these limitations, it was bound by these instructions to regard the track on Brown's wharf, for the purposes of the case, as it would any track constructed, owned, kept in repair, and exclusively operated by the defendant corporation.

The evidence to which we are referred, bearing on this question, was as follows:

Mr. Douglas, who was the agent of the owner of the wharf, testified as follows:

"Q. Now, will you state what tenants, if any, you have on the wharf, and where they are situated at the time of the accident in January, 1891? A. J. H. Hamlin & Son occupied a portion of the wharf on the east side, and also the brick mill on the west side. E. W. Deering & Company occupied

the coal shed. The other tenants were paying wharfage in small pieces; no fixed tenants. Q. I will ask you if you remember the accident. A. I do. Q. Now, whether or not there were one or two tracks down the wharf from Commercial street. A. There were tracks, two lines of tracks. Q. To whom did they belong? A. To the Brown estate. Q. And under whose control were they? A. The Brown estate. Q. Whether or not you had charge of them as the agent of that estate. A. I had. Q. Now, under whose control and direction were the repairs and the maintenance of the wharf and tracks in January, 1891? A. Under my charge. Q. State, if you will, who, from time to time, shoveled out those tracks. A. Men in our employ shoveled them. Q. As to the snow on the rest of the wharf, if anything was done with it during the winter of 1891, under whose control and direction was it done? A. Nothing was done. Q. Except shoveling out the tracks? A. Yes, sir. Q. What railroads, from time to time, came down on Brown's wharf with cars, if any? A. The Boston & Maine road and the Grand Trunk road. Q. For what purpose, in 1891, did they go down the wharf and over that track, in connection with your tenants? A. For the purpose of delivering cars at the warehouses occupied by J. H. Hamlin, for no other tenant received cars at that time but J. H. Hamlin & Son. Q. Was there any other purpose for which they came down there, except for the purpose of delivering cars consigned to J. H. Hamlin & Son, and taking away cars that had been unloaded or loaded that you know of? A. Not to my knowledge."

Mr. Mason, a section foreman for the defendant corporation, testified as follows:

"Q. What are the limits of your section? A. Twenty-eight miles. Q. Where are the boundaries? A. I go from Union wharf to a mile west of Back Cove bridge, towards Gorham. I mean I have twenty-eight miles of track. Q. What are the duties of a section foreman? A. It is to keep the track in repair, in running order for trains. Q. What are a section foreman's duties in the winter? A. It is to keep their track in order, and to keep their track shined up; to keep all snow clear from the track as far as they can. Q. Who has charge of the end section of the Grand Trunk at this end of the road,—that is, the section farthest east? A. You mean in the yard limits? Q. Yes. A. I do. Q. Isn't that the most easterly section of the road, as we call it? A. We go to the heel of Union wharf switch on Commercial street. Q. Is there any one but yourself who has charge of shoveling snow on this easterly section in the winter time? A. No, sir. Q. How long have you been in the employ of the Grand Trunk in this position? A. In this yard, eight years the 18th day of last May, as section foreman. Q. State what, if anything, you have had to do with repairing and maintaining the tracks on Brown's wharf during that time. A. I never had anything to do with it. Q. State whether or not your men had anything to do with it during that time. A. No, sir. Q. State whether or not you, or men under your direction, have had anything to do with shoveling snow on the wharf during that time. A. They never have. Q. Where is Brown's wharf with reference to Union wharf? A. I could not tell where Brown's wharf is. Q. Do you know whether it is above or below Union wharf? A. It is above Union wharf, towards the Boston & Maine. Q. Is it on Commercial street, on the part that the Boston & Maine have under their control? A. Yes, sir; that is where it is."

Mr. Stewart, yard master for the defendant corporation for 31 years, testified as follows:

"Q. During the time that you have been in the employ of the Grand Trunk, has the Grand Trunk done anything in the way of making any repairs on that track or shoveling snow on the wharf within the rails or outside the rails? A. No, sir; not the Grand Trunk bearing the expense of doing it. Q. Have they ever had anything to do with keeping in repair the tracks or shoveling snow at their own expense? A. Not at their own expense. Q. You say they have never had anything to do with maintaining and keeping in repair the tracks at their own expense? A. Yes, sir. Q. Now, state, if you know, whether they have had anything to do with anything upon that wharf, repairing the

tracks in any way there, at their own expense or at the expense of some one else. A. I will tell you what I mean. The wharf company have applied to the general engineer of the Grand Trunk for labor, for section men to put the track in order, and which they paid for,—hired them to do it. Q. That is, the Grand Trunk men were workmen skilled in this kind of work? A. Section foreman and track clearers. Q. State exactly what you mean by the Grand Trunk employes having ever had anything to do with the tracks. A. I mean, if the track was out of repair, rails or ties, they wanted to get a suitable man to repair it, and they would apply either to us or the Boston & Maine for special help,—section foreman and crew,—to put the track in good repair, not having any one as a rule to work for themselves; and they paid for it, and had to go through a certain form to do it,—apply to the general engineer. Q. Did anything of that kind ever happen in relation to shoveling snow? A. No, sir; just simply repairing the track. Q. State what, if anything, the Grand Trunk had to do with those tracks in the year of 1891, or in the latter part of the year 1890, in that winter, either as to repairing or removing snow. A. I don't know whether they did any repairing; shoveled no snow from the track. Q. Do you know of any repairing that year? A. Not aware of any repairing being done. Q. State exactly what use the Grand Trunk Railway Company, or the employes of the Grand Trunk Railway Company, made of that wharf in 1890 and 1891. A. Placed cars on there ordered by the consignees; placed and took away,—took away the empties. Q. Let me ask you if any extra charge was paid by the consignees for putting the cars down on that wharf. A. Yes, sir. Q. What was the charge? A. One dollar per car. Q. What was this payment for, just exactly? A. The extra work of putting the cars up from the street on the wharf? Q. Were you paid for stopping cars on the street? A. No. Q. The same price for putting them on as for taking them off? A. No; only for putting them down. The dollar actually covered putting them down, and taking them back again. Q. Prior to this accident, whether you received any notice from the proprietors of the wharf in relation to the use of it. A. Yes, we did. Q. Whether or not that notice was in writing. A. It was not. Q. To whom was the notice given? A. It was given to me by the agent of the wharf company, the agent of the Brown estate, Mr. Douglas. Q. State as near as you can when you received the notice. A. I cannot give the exact dates; a few years before that accident. Q. You may state what the notice was that you received from the proprietors of the wharf as to the use of it. A. We were requested not to put cars on that wharf other than those that belonged there to the consignees, for the reason that it obstructed the premises occupied by the tenants, and also stated to me that it wore the rails out, the constant use of the track. Q. After receiving that notice, state whether or not you did put cars there, or was it for any other purpose than for the tenants of the wharf? A. Not to my knowledge. Q. Who is in charge of the employes who work upon the street of the Grand Trunk Railway Company? A. I am."

This testimony was proper to go to the jury on the propositions that the proprietors of the wharf not only remained in control of the track, but exercised that control; that the defendant corporation, as such, never repaired the track, nor cleared the snow; that the wharf was not even adjacent to that part of the track on Commercial street kept in repair by it; that it was adjacent to the part kept in repair by the Boston & Maine Railroad; that the track on the wharf was also used by the Boston & Maine Railroad; that its use at the time of the accident, and for some time before, was for limited, private purposes; that it formed no part of a public railroad highway, and no part of the yards of the defendant corporation; and that it was, in fact, a mere private siding, such as are frequently used and well known in connection with wharves, lumber yards, and mills. In short, it was proper evidence for the jury on the proposition that this track was of the kind found to

exist as a private mill-yard track in *Engel v. Railroad Co.*, 160 Mass. 260, 35 N. E. 547; and that, as said by the court in that case on page 261, 160 Mass., and page 547, 35 N. E., the defendant corporation "came on that track only as licensee, or invited under a contract by which it delivered freight in the mill yard on certain terms."

This evidence would raise important questions of law, and cause us to seriously question the ruling excepted to, if there had been any request that the jury should find whether the intestate knew, or should be presumed to have known, the essential facts which this evidence may be said to tend to prove. Whatever might be the rule under other circumstances, we must hold that a railroad train hand, employed in a branch of the service, as the intestate was, where no duties fall on him which contain a call to ascertain the limits of the corporation's road, has a right to assume that any track upon which he is ordinarily sent in the performance of his duty, physically connected with the corporation's main line, is a part of its system, and that he is entitled to the usual care and protection of the corporation while running over it. Where a railroad corporation has running rights over a section of the main line of another, there would ordinarily be no difficulty on this score, as the fact is commonly made known to trainmen by the printed rules and regulations given them for their direction, and in other ways. But, for a siding like this at bar, the presumption on the question of the trainman's knowledge is fairly against the corporation, and it is its duty to meet this presumption if it seeks to raise a defense of the character we are discussing. A railroad corporation ought not to be allowed ordinarily to send its trainmen upon private sidings or tracks, for daily work, without making proper efforts in some way to provide for their safety. The dangerous nature of their employment, and the necessity of their prompt, and sometimes unquestioning, obedience to orders, do not ordinarily justify the court in relaxing the care which railroad managers must extend to them, wherever they may send them for their usual work. Very likely an exception would lie in the case of running rights under the circumstances we have described, and also in cases of private sidings where the essential facts are known to the persons employed. But, as this exception rests on the same foundation as the principle of the assumption of risk by an employé, the party setting it up must furnish sufficient evidence to overcome the opposing presumption, and also the equities based on the general duties of persons and corporations carrying on the hazardous business of operating a railroad. Such evidence, in order to constitute a preponderance of the case, must, ordinarily, be clear and persuasive. The defendant in error says there was none, and the plaintiff in error has not called our attention to any of a specific character, though what we will quote hereafter is relied on. But the essential difficulty with the case of plaintiff in error on this record is that the requested instructions which we have quoted make no mention of this element, and leave it to be inferred that in the court below the defendant corporation did not regard it as

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a necessary one, and so omitted to call the attention of the court to it.

The plaintiff in error relies on the following from the testimony of Kingsbury, a fellow workman of the intestate:

"Q. You were a friend of Mr. Tennant, weren't you, and very warm personal friend of his? A. No personal, any more than being there in the house with them. Q. You were on friendly terms, weren't you? A. Yes, sir. Q. How long had he been in that business? A. About ten years, I think. Q. And during that time, had he been in this, what is called the street, service,—that is, distributing cars from the trains? A. I don't know, but I think he had pretty nearly all the time. Q. And whether or not, to your knowledge, he was thoroughly acquainted with Brown's wharf, the location there? A. I think he was. Q. Coming down to the night of the accident, do you know whether there had been a storm in the early part of the week,—a snowstorm? A. I don't remember; no, sir. Q. Can't you tell? A. There had been a storm some time before that, but how long it was I could not say. Q. It had been shoveled out, hadn't it? A. It had. Q. By no one connected with the Grand Trunk that you know of? A. Not that I know of. Q. It was Mr. Brown's men that shoveled it out, wasn't it, as a matter of fact? A. I don't know who shoveled it out."

This raises an inference that, by reason of his long continuance in the service of the corporation, the intestate might have known the essential facts touching the track on this wharf; but in view of what we have already referred to, that the intestate's occupation covered no call to inform himself in that respect, and further, in view of the fact that nothing in the case raises any presumption to charge him with notice, this possible inference falls far short of that degree or amount of proof needed to enable us to determine that the court below would have erred, even if it had wholly omitted to submit to the jury the matter under consideration, in the absence of a requested instruction, correctly and specifically framed, with reference to this element of the intestate's knowledge or presumed knowledge. We have already shown that the instructions requested were not so framed. Consequently, the error, if there was one, in giving the jury a rule on this point too rigid, was, as the record stands, immaterial. We will add that there is no evidence brought to our attention that Stewart communicated to the intestate the notice which his testimony quoted shows was given by the owners of the wharf in relation to the use of the tracks on it.

The exceptions taken in the course of the examination of the witnesses have been brought to our attention with reference to only two points. The question put to Stewart, and excluded, clearly belonged to the case in chief of the plaintiff in error, and therefore to the direct examination of that witness; and it was within the discretion of the trial judge to refuse it. The testimony of Norton objected to is not of itself very intelligible, nor has it been made so by counsel, and whether it could have prejudiced plaintiff in error in any way is not made clear to us. The grounds of objection stated would have applied quite as well if the witness had offered details of mathematical measurements, and they are therefore plainly insufficient. Whether he should have been allowed to testify in the clumsy manner in which he undertook to answer, or

whether he should have responded more precisely and in direct reply to the question, seems to have been left by counsel on both sides to his own determination.

On the whole, we see no error in the record. The judgment of the circuit court is affirmed.

OREGON SHORT LINE & U. N. RY. CO. v. TRACY.

(Circuit Court of Appeals, Ninth Circuit. February 25, 1895.)

1. MASTER AND SERVANT—ASSUMPTION OF RISK—QUESTION FOR JURY.

Plaintiff, while stationed as a lookout near the front end of cars which were being pushed along a spur track, was thrown forward by a collision with a car standing on the track, and injured. Brush overhung the track, and obscured the view. *Held*, that it was a question for the jury whether or not plaintiff assumed the risk attendant on such condition of the track.

2. SAME—PLEADING AND PROOF.

Evidence that plaintiff knew of the defect which caused his injury, and assumed the risk, is inadmissible, where defendant fails to plead such facts.

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff was injured while stationed as a lookout at the front end of cars which were being pushed along the track, and claimed to have been thrown forward by a collision with a car standing on the track. There was testimony that, when injured, he was attempting to step into such other car. *Held*, that whether or not plaintiff was negligent in attempting to step into the other car, if he so attempted, was a question for the jury.

Writ of Error to the Circuit Court of the United States for the District of Oregon.

Action by Frank Tracy against the Oregon Short Line & Utah Northern Railway Company for personal injuries. Judgment for plaintiff, and defendant brings error.

Cox, Cotton, Teal & Minor, for plaintiff in error.

A. S. Bennett, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The defendant in error was the plaintiff in the court below in an action against the railway company to recover damages for personal injuries received by him on the 16th day of August, 1891. The plaintiff was a brakeman in the employment of the railway company. At the time of his injury he was a member of the crew of east-bound freight train No. 28. At Clarnie station, about seven miles from Portland, there is a spur or side track about one mile in length, extending to a stone quarry. In the regular course of the railway company's business, the train was required to take "blind siding reports"; that is, they were to ascertain at all sidings or spur tracks, such as that at Clarnie, the number of cars upon such tracks, and the condition of the same.

On the morning that the plaintiff was injured his train arrived at Clarnie about 10:30. The conductor of the train remained with the cars upon the main track. The plaintiff, together with two brakemen and a train hand, took the engine to go down the spur track to obtain the required information concerning cars that might be found there. They found four or five empty coal cars at the head of the spur, near the main track. They coupled the engine to these cars, and pushed them on down the spur, to look for others. The plaintiff stood upon the foremost car, and furthest from the engine, and was keeping a lookout for obstructions upon the track. The train was running at a speed of four or five miles per hour, possibly faster, when the plaintiff gave to the engineer a signal to go slower. Almost immediately thereafter he gave a signal to stop, having discovered a car upon the track. These signals were answered by the engineer, but the train struck the standing car. The force with which the cars came together is variously stated by the witnesses; some of the witnesses testifying that the force was not greater than in an ordinary coupling; the plaintiff testifying that it was many times greater. The plaintiff charges in his complaint, and stated in his evidence, that by reason of the force with which the cars came together he was thrown from the center of the car upon which he stood, over the end of the car, and upon the track, where he received the injury. The defendant's evidence tended to show that the plaintiff undertook to step from his car into the car that stood upon the track, and that in so doing he fell between the cars. The plaintiff charged the defendant with negligence on account of the condition of the track on the spur, alleging that, on account of the curves of said track, and the amount of brush and timber that was allowed to grow thereon, it was possible to see but a short distance ahead of the train, and that the defendant had negligently failed and neglected to remove the brush and timber along the track; that thereby the view was obscured so that it was impossible for any one in charge of the train, or riding upon the same, to discover any obstruction which might be ahead of him upon the track. The trial resulted in a judgment for the plaintiff for the sum of \$4,000.

The principal question for consideration upon the writ of error concerns the instruction of the court to the jury in regard to the condition of the defendant's track, and the obstruction to the same by reason of the brush. It is said that the court erred in refusing the instruction asked for by the defendant, and in charging the jury as follows:

"It is the duty of a railroad company to be careful and prudent in providing a safe roadbed for its employes, and in keeping the same free from obstructions; and if it fails in this respect, and its employes are injured thereby, without fault on their part, the company is liable. There is no arbitrary rule as to how near the track brush or timber may be left standing. This is a matter that depends upon circumstances, the character of the road, the use to which it is put, the difficulty or expense of clearing, and the danger, if any, to which those engaged on the road are subject in consequence of such nearness. It is a question that addresses itself to your judgment as practical men, whether the conduct of the company in this respect was reasonable under all these circumstances."

The instruction requested by the defendant is as follows:

"The question of overhanging brush, which the plaintiff claims was of such a character as that it obstructed the view of himself and trainmen while passing over the side track in question, is material in this case, and you cannot consider these claims of the plaintiff in determining the question of whether or not there was any negligence of the defendant upon which the plaintiff can recover."

It is contended by the plaintiff in error that the presence of the brush overhanging the track on the spur was one of the conditions of that track, visible to the plaintiff, and that he assumed all the risks incident thereto. In support of that contention reference is made to *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530; and *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. 1166. In the first of these cases the plaintiff was injured while coupling freight cars. The injury was said to have been occasioned by the fact that the cars were fitted out with double deadwoods or bumpers of unusual length; but it appeared that cars constructed in that manner were not unusual upon that track, and that the risk of coupling them was an obvious one, and required no special skill or knowledge for its detection. It was therefore held that the risk of coupling such cars was one of the ordinary risks incurred by the plaintiff, and that he could not recover. In the case of *Southern Pac. Co. v. Seley* an employé of the railroad company was injured, while coupling cars of the company, by putting his foot into an unblocked frog at the switch, whereby his foot was caught and held, and he was thrown down and killed. In an action by his administratrix for the damages it was held that Seley must be assumed to have entered into and continued in the employment of the railroad company with full knowledge of any danger which might arise from the use of unblocked frogs. In *Tuttle v. Railway Co.*, the accident would not have happened to the employé but for the sharpness of a curve of the company's track, and it was contended that the construction and maintenance of a track with such sharp curves was itself negligence. But the court held that the perils from a sharp curve were seen and known, and that they were not like the defects of unsafe machinery, which the employer has neglected to repair, and which his employés have reason to suppose is in proper working condition. The court said:

"The danger existed only on the inside of the curve. This must have been known to him. It would be presumed that, as an experienced brakeman, he did know it, for it was one of those things which happened in the course of his employment under such conditions as existed here."

But it is not apparent in the case before the court that the dangerous condition of the track, owing to the overhanging brush, was one of the conditions of its construction, or that such danger was necessarily apparent to an employé of the road, however skilled or experienced. The condition of the brush by the side of the track is not a fixed one. It is not like the curves, or the embankments, or the established structures of the road. Nor was this spur a part of the track which was in daily use. The condition of the brush was a

changing one. In one season, or in a few weeks even, the brush might grow to such an extent as to entirely change the condition of things. This case, instead of being related to the cases depending upon the construction of the road, such as the decisions above referred to, is rather analogous to the cases where the changing conditions of the road have introduced an element of peril which before did not exist, and was therefore not seen and not assumed by the employé. In the case of *Babcock v. Railroad Co.*, 150 Mass. 467, 23 N. E. 325, the plaintiff, an employé of the road, in attempting to get upon a moving engine, struck upon a pile of railroad ties, which was placed within eighteen inches of the track, and had been there for five weeks. He testified on the trial that he did not know that the ties were there, or that, if he knew it, he did not remember to have seen them. The court held that, if this were true, the plaintiff had a right to expect that the track would be free from such obstructions, and that it was a question for the jury to say whether he himself exercised due care. In *Eames v. Railroad Co.*, 63 Tex. 660, the plaintiff, an employé of the company, was injured by a collision of his train with cattle that had got upon the track, but which could not be seen by reason of the bushes growing over the right of way. It was held that the company was liable for negligence in suffering the brush to so encroach upon the track. In the case of *Hulehan v. Railway Co.*, 68 Wis. 520, 32 N. W. 529, the plaintiff was a brakeman, who, while coupling the defendant's cars, and running alongside the track for that purpose, struck his foot against pieces of wood which the company had suffered to remain on and about the track. It was held that the fact that the brakeman had a general knowledge of the neglect of the company to keep its track clear about its woodyard did not conclusively show that he assumed the risks arising therefrom, especially if he did not know of the obstructions on the track at the place where he was injured; and that it was a question for the jury in such a case to say whether he was guilty of negligence in remaining in the employment of the company. In *McClarney v. Railway Co.*, 80 Wis. 277, 49 N. W. 963, the evidence was that a train was derailed on account of the presence of ice and snow which was suffered to remain and accumulate upon the track, whereby the plaintiff was injured. It was held that the railroad company owes to its employés the duty of keeping its track free from dangerous obstructions, such as ice, snow, or rubbish. In the case of *Railway Co. v. O'Brien*, 4 U. S. App. 221, 1 C. C. A. 354, 49 Fed. 538, the plaintiff's intestate had been injured by reason of sand and gravel which had been washed upon the track, thereby derailing his engine. There was evidence to the effect that the company had been negligent in constructing its track, in that it had made no provision for a culvert at the point where the sand and gravel was deposited, and that the topography of the country was such as to make apparent the necessity for such a culvert at that place. The court distinguished that case from the *Tuttle Case*, and said:

"The difference between the kind of knowledge called into action in determining the sharpness of a curve that is needed in running a railway line at a

given point and that exercised in determining whether the exigencies of a given situation require that some escape or outlet should be furnished for water liable to come down a natural waterway intersecting the line of railway is so great that it renders the rule applicable to the one case inapplicable to the other. The training and knowledge of an engineer is not needed to enable one to understand the action of water in rushing down a gully or similar waterway, nor to know, if an obstruction like a solid railway roadbed is built across a waterway, down which any considerable amount of water may be expected to pass, that unless an outlet is given to it, it must of necessity collect against the roadbed, and perchance overflow it. Such facts are matters of common knowledge, gathered from the experience and observation of every-day life."

The distinguishing principle between these two classes of cases is that in the one the defects are visible and apparent, and the dangers therefrom are presumed to be known and assumed, while in the other the danger is not seen, and no such presumption arises. The condition of the switches and frogs, the degree of the curvature of the track, are all fixed conditions, which are visible to the eye. The experienced employé knows that he is to serve the railroad company with its road and cars in the condition in which he sees them, and he knows the danger that may attend such service. But he does not necessarily know, and he cannot be expected to meet, dangers which arise from changes in those conditions, however apparent may be the causes which produce them. He is not presumed to know that the rains and floods will have covered the track with earth and sand at a place where common prudence would require that provision be made against the occurrence of such an obstruction. He is not required to assume that ice and snow will be allowed negligently to accumulate upon the track and switches, or that other obstructions will be placed on or about the same, so as to render the track unsafe, or his work more dangerous than it otherwise would be.

But it is urged that the plaintiff was in a position to see the condition of the track upon the spur, and that it was his duty to govern the movement of the train in accordance with the danger which, if it existed, must have been apparent to him. There can be no doubt that the plaintiff was, at the time of the injury, practically in charge and control of the train. As the train was going, he was the foremost of the employés stationed thereon, and it was his duty to look out for obstructions. If danger was apparent to him from the fact that the overhanging brush obstructed his view of the track, it was his duty to cause the speed of the train to be slackened, and to allow it to proceed no faster than was consistent with the safety of himself and of his coemployés. He was as much required to adjust the movement of the train to the circumstances of his shortened range of vision and the danger that might result therefrom as he would have been had his view been obscured by fog or darkness. The law does not require a railroad company to clear its track of brush. It clearly has the right to suffer brush to grow thereupon to any extent it sees fit, provided it does not lead its employés into an undisclosed danger. If the employés can see the danger, they have the means of avoiding it. But there was evidence in this case tending to show that the brush which obstructed the view

was not uniform. At the upper end of the spur, where the train started to go down to the quarry, there appears to have been little brush to interfere with a proper watch over the track at the rate of speed at which the train was going. As they approached the place of the injury, however, there is evidence that the brush was much more dense. The plaintiff testifies that it was in consequence of this fact he gave the first signal to go slower. So far as the evidence is concerned, the jury may have taken the view that the railway company was negligent in suffering the brush to overhang the track at about the particular point where the accident occurred, and that the danger was, by reason thereof, not apparent to the plaintiff; or that the plaintiff, in the exercise of reasonable care and diligence on his part, might not have discovered the same. There was other evidence in this connection which the jury might properly consider,—evidence which tended to prove that a certain degree of speed was expected of the freight train, and that its scheduled time for going from Portland to Clarnie, including the run down the spur and back and taking report of the cars there found, was limited to one hour. In view of all the evidence, the court might properly leave it to the jury in their judgment to say whether there was negligence upon the part of the railway company in leaving the brush standing as it was upon the right of way.

It is assigned as error that the court excluded evidence offered by the defendant tending to prove that the plaintiff knew the condition of the track where the accident occurred, and that he therefore assumed the risks incident thereto. The defendant had not pleaded such knowledge upon the part of plaintiff, and the ruling of the court was in accordance with the doctrine established by the authorities. 14 Am. & Eng. Enc. Law, 844; *Mayes v. Railroad Co.*, 63 Iowa, 562, 14 N. W. 340, and 19 N. W. 680; *Hulehan v. Railroad Co.*, 68 Wis. 520, 32 N. W. 529; *Railroad Co. v. Orr*, 84 Ind. 50. The doctrine of these decisions is that the assumption of the risk after knowledge of the defects is matter of defense in the nature of a waiver of the right to recover for the defendant's negligence, and must be pleaded.

It is further assigned as error that the court, in instructing the jury upon the subject of contributory negligence, concluded the charge with the following words:

"If he fell in the exercise of reasonable care, no matter whether he fell while stepping off one car to another, if it was caused by the jolt of the cars, the company was negligent in that respect."

It is argued that the plaintiff saw the cars approaching, and that from his experience he was able to judge what the effect of the shock would be, and that, instead of remaining in a place of safety, and taking precautions by bracing himself or by holding to the sides of the car, he assumed that the shock would not be dangerous, and voluntarily stepped forward, and placed himself in a position of the greatest danger. It is contended that the instruction permitted the jury to find that the plaintiff could recover, even while stepping from one car to the other, provided his fall was caused by a jolting or the bumping of the cars, occurring at the time. This

view of the instruction leaves out the consideration of the fact that the court, in the whole charge upon the subject of contributory negligence, distinctly coupled the same with the condition that the jury should find that the plaintiff fell while in the exercise of reasonable care upon his part. The plaintiff's own evidence was that he did not attempt to step from one car to the other, but was thrown over the end of his car. There was some testimony of the other witnesses to the effect that it appeared to them at the time that he was attempting to step into the forward car. The charge of the court informed the jury, in substance, that if, in the excitement of the moment, the plaintiff, while exercising reasonable care, attempted to step from one car to the other, that fact would not defeat his recovery. Taking the whole charge upon the subject of contributory negligence, we find no error which would justify the reversal of the judgment. The judgment is affirmed, with costs to the defendant in error.

HITCH v. UNITED STATES.

(District Court, S. D. Illinois. April 8, 1895.)

1. UNITED STATES MARSHAL—FEES AND MILEAGE.

In a proceeding before a commissioner, under Rev. St. § 1042, for the discharge of poor convicts, a marshal is entitled, under section 829, to fees for serving mandates to bring before the commissioner convicts applying for discharge, for attendance before the commissioner, and for discharging such convicts.

2. SAME.

Under Rev. St. § 829, allowing mileage for going, only, to serve any warrant, etc., or other writ, a marshal is entitled to mileage on writs of commissioners for the production of prisoners under section 1042.

3. SAME.

Where prisoners were in custody under commitment by a commissioner, and subsequently indictments were returned into court, sitting at a distance, and bench warrants were issued for such prisoners, the marshal is entitled, under Rev. St. § 829, to mileage in serving such warrants, but not to fees for such service, nor expenses of arrest.

4. SAME.

Under Rev. St. § 829, a marshal is entitled to mileage in traveling a second time to attend the hearing of a defendant before a commissioner; such hearing having been postponed from a previous date, when the marshal was present.

5. SAME.

Under Rev. St. § 829, allowing mileage "for each mile actually and necessarily traveled," a marshal is entitled to mileage only on the shortest practicable route by the ordinary mode of travel, though he actually traveled by a longer route, which, because of better railroad facilities, can be traveled in less time, for the reason that it was near the close of a term of court, and, to save further expense in maintaining prisoners, it was necessary for them to arrive before court closed, and it was doubtful if this could be done by the shorter but slower route.

Petition by Charles P. Hitch, marshal of the Southern district of Illinois, for fees claimed by him, and disallowed by the comptroller for official services.

Facts.

First. The petitioner entered upon the discharge of his official duties May 27, 1889. He rendered his accounts monthly and quarterly. They were duly ap-

proved by this court in the presence of the district attorney. And the compensation actually received by him, together with the amounts claimed by him in this proceeding, would not amount to the maximum compensation allowed him by law for any of the calendar years involved. Second. In his account for fees earned during October, 1889, he made a claim for 488 miles of travel, at 6 cents a mile, from Cairo to Springfield, to serve bench warrants, on different dates, in two cases, being 244 miles of travel on each writ. In his account for the same month he also claimed transportation of four prisoners from Springfield to Cairo via East St. Louis, 976 miles, at 10 cents a mile, and the same for each of four deputies, being 244 for each prisoner and each deputy. On this account the comptroller allowed him mileage for 432 miles, at 6 cents a mile, for serving the two bench warrants, and disallowed the other 56 miles claimed, 28 miles on each writ, at 6 cents a mile, being disallowance of \$3.36 on this claim of mileage. In like manner, he disallowed 112 miles of the distance claimed for transportation of the prisoners, and mileage of the deputies, being a further disallowance of \$22.40, and a total disallowance for that month of \$25.76. The evidence shows that the shortest practicable route from Springfield to Cairo is via Centralia, and is 216 miles, but the route via East St. Louis, which is 244 miles, is many hours shorter in time, because of better railroad connection; and it is the route actually traveled in performing these services, for the reason that it was just at the close of the term of this court at Cairo, and it was important to serve these writs, and have the prisoners at Cairo, before the court should adjourn, and it was not certain that could be done if the route via Centralia was taken. Third. In his account for November, 1889, he claimed fees for serving six mandates of United States commissioner to bring four convicts before him on their several applications for discharge under section 1042, Rev. St., at \$2 each, being \$12; also for discharging each of said convicts, at 50 cents each, \$3, and for attendance before the commissioner, on the hearing of the applications of three of said convicts for discharge, on three different days, at \$2 for each attendance, being \$6, a total of \$21, all of which was disallowed by the comptroller. In his account for January, 1890, fees for services of similar character, amounting to \$16.50, were claimed; for February, \$51; for March, \$34; for April, 1891, \$9; for June, 1891, \$10; for July, 1891, \$5; for August, 1891, \$5; for September, 1891, \$23.50; for October, 1891, \$9.50; for November, 1891, \$11.50; for January, 1892, \$5; for February, 1892, \$51.50; for March, 1892, \$30.50; for April, 1892, \$6.50; for May, 1892, \$14; from July 1 to September 30, 1892, \$25.50; from October 1 to December 31, 1892, \$2.50,—all of which were disallowed by the comptroller, being a total disallowance for services of this character from November, 1889, to January, 1893, of \$331.50. Fourth. In his account for September, 1890, he claimed mileage, \$6.72, for travel from Springfield, his residence, to Danville, to attend a hearing before United States commissioner. The prisoner in this case had previously been arrested by the marshal, and taken before the commissioner for a hearing, but on the prisoner's application the hearing was continued to a time some days later, and the prisoner was held to bail to await the time fixed for the hearing, and the marshal returned to Springfield, but on the day fixed for the hearing he returned to Danville, and was at the hearing. This claim was disallowed by the comptroller. Fifth. In the account for April, 1892, the marshal claimed \$6 for service of three bench warrants on three persons named. He also claimed \$3.10 for expenses in endeavoring to arrest these persons, the dates of these expenses being identical with the dates of service of the bench warrants. He also claimed \$12.96 for mileage on each of these bench warrants from Cairo to Springfield, "a distance of 216 miles," being \$38.88, and in all, for April, 1892, \$47.98, all of which was disallowed by the comptroller. This court was then in session at Cairo, and the grand jury, at the Cairo session, returned indictments against the three persons named in these warrants. The prisoners had previously been committed to jail at Springfield, on preliminary hearings before a United States commissioner at Springfield, and were remaining in jail there, under such commitments, to await the action of the grand jury. When the indictments were returned at Cairo, bench warrants were actually issued to the marshal for them, and he served them, by proceeding from Cairo to Springfield, taking the prisoners from the Springfield jail, and bringing them into open court at Cairo.

James A. Connolly, for plaintiff.

Wm. E. Shutt, U. S. Dist. Atty., for the United States.

ALLEN, District Judge (after stating the facts). It will be observed that these several disallowances may be divided into separate classes, as follows: Class 1. For serving mandates of commissioners to produce before them convicts applying for discharge under section 1042, Rev. St., §180. Class 2. For discharging poor convicts, under section 1042, when ordered by the commissioner after the hearing provided for by that section, §47. Class 3. For attendance upon commissioners, on hearing, in cases of poor convicts, under section 1042, Rev. St., §102. Class 4. For mileage from Springfield to Chester, on mandates issued by the court at Springfield upon the warden of the penitentiary at Chester, Ill., to produce poor convicts applying for discharge under section 1042, Rev. St., §78.96. Class 5. For travel, with bench warrants, from Cairo to Springfield, for expenses to arrest on such bench warrants, and for serving said warrants, §47.98. Class 6. For mileage from Springfield to Danville to attend a hearing of a defendant before a commissioner, such hearing having been postponed from a previous date, when the marshal was present, §6.72. Class 7. For mileage and transportation of prisoners from Cairo to Springfield via East St. Louis, 122 miles, instead of via Centralia, 116 miles, §25.76. Classes 1, 2, and 3 will be considered together.

Under section 1042, Rev. St., "when a convict has been imprisoned thirty days solely for non-payment of a fine or costs, he may make application in writing to any commissioner in the district where he is imprisoned, setting forth his inability to pay such fine, or cost, and after notice to the district attorney, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter." If upon such hearing it shall appear to the commissioner that the convict is unable to pay the fine, or fine and cost, and has no property exceeding \$20 in value, except such as is exempt by law, he administers the oath to him, as prescribed in that section, and the convict shall then be discharged, and the commissioner gives to the jailer or keeper of the jail a certificate setting forth the facts. While this section does not, in direct terms, provide that the poor convict shall be brought before the commissioner, yet it manifestly contemplates a hearing before the commissioner, at which the district attorney may be present, and of which he must be notified. Certainly, it cannot be contended that such hearing should be had in the absence of the petitioner. An oath is also to be administered by the commissioner to the convict. The word "oath" implies an oral swearing before the commissioner. How is the convict to get from his prison to the commissioner for a hearing and oath, except by means of a writ from the commissioner, directed to some one to bring the prisoner before him? And to whom, except the marshal, is the commissioner to direct his writ? From the moment when sentence is pronounced against him until the moment when the commissioner announces his discharge of the convict, he is, in contemplation of law, in the custody of the mar-

shal, until by him delivered to the prison keeper, and in the custody of the latter while he remains inside the prison; and, until his sentence is completely served, he can only be taken from the prison by the marshal, on a writ of some kind, except in cases of a habeas corpus writ directed to the keeper. The commissioner has no right to direct a writ to the prison keeper. He must direct his writ to the marshal. So when the application is made the commissioner necessarily directs a writ to the marshal to bring the convict before him. This writ puts the convict in the custody of the marshal. By section 847, Rev. St., the commissioner is entitled to fees for his services under section 1042. Why not the marshal also? His services are as necessary in serving the writ as if it were issued by the district or circuit court. His presence is necessary at the hearing before the commissioner, as the convict must be there, and in his custody, and the marshal must then and there discharge him, if the commissioner so decides after the hearing. Section 829, Rev. St., provides that the marshal's fee for service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or summons, or subpoena for a witness, shall be \$2 for each person on whom service is made. The same section provides that the marshal's fees for attending examination before a commissioner shall be \$2 a day, and the same for each deputy, not exceeding two, necessarily attending, and 50 cents for discharging a prisoner; and section 847, Rev. St., calls this proceeding under section 1042 an "examination," and fixes the commissioner's fees for it. As to these three items, therefore, the conclusion is that the marshal is entitled to them, amounting to \$329.

Item 4, for mileage on writs of commissioner for production of prisoners under section 1042, seems to be proper. The writs were issued at Springfield, and the marshal traveled with them from Springfield to Chester for the purpose of there obtaining United States prisoners who were confined in the penitentiary, bringing them before the commissioner, at Springfield, who had issued the writ. Section 829, Rev. St., provides a fee of 6 cents a mile for going, only, to serve any warrant, etc., or other writ. These mandates of the commissioner are clearly within the designation "other writ"; the proof shows the travel was actually made, as claimed, on such writs; and the marshal is therefore entitled to the amount of this item, \$78.96.

Item 5. These claims, we have seen, are for service of bench warrants, \$6; expenses endeavoring to arrest, \$3.10; and mileage from Cairo to Springfield, with said warrants, \$38.88,—for three prisoners who were already in jail in Springfield, on commitment by United States commissioner for offenses against the United States, for which offenses they were subsequently indicted at Cairo, in the same district. When these bench warrants issued, the defendants were then actually in the custody of the United States at Springfield, and they were wanted in court at Cairo to plead to the indictments returned against them there. Had the indictments been returned into the court at Springfield, where the prisoners

were confined, no writ would have been necessary, and no fees could have accrued to the marshal for bringing them before the court. Rev. St. § 1030. But in these instances the court was at Cairo, and the defendants in jail at Springfield, 216 miles away. The court, by its clerk, did actually issue and deliver to the marshal writs which were, in form, bench warrants, ordering the arrest, etc., of the defendants. The service required of the marshal was not merely to bring prisoners into court, from a prison at the place where the court was being held, as is contemplated by section 1030. It is not important to consider whether bench warrants were actually necessary in these instances. These were writs actually issued, and the prisoners were actually transported, by virtue of them, from Springfield to Cairo. The marshal is therefore entitled to his statutory mileage for travel on these writs, amounting to \$38.88. *Kinney v. U. S.*, 54 Fed. 319. As to the fees of \$6 claimed for serving them, and the claim of \$3.10 for expenses in endeavoring to arrest these persons, it is otherwise. There was no necessity for "service of warrants,"—formal reading of these writs to these prisoners,—for they were already in the custody of the United States, and although the writs were "warrants," in form, yet the form must give way to the fact. Hence, the charge for service of the writs was properly disallowed by the comptroller. The same is true of the charge of \$3.10 for expenses in endeavoring to arrest. These expenses are allowed the marshal to cover his actual necessary expenditures while searching for the defendant, and paying assistants, etc. But in these cases he had no searching to do. The defendants were secure in the custody of the United States when he started from Cairo for them, and he did not endeavor to arrest them, for they were already arrested. He had nothing to do but to go to Springfield and get them, and, his mileage for that travel being allowed him, he can properly claim no more. The court therefore finds, as to this item (5), that the marshal is entitled to \$38.88, and is not entitled to the other \$9.10 claimed.

Class 6. This item of \$6.72 for mileage from Springfield to Danville to attend an adjourned hearing before a commissioner seems to have been disallowed on the theory that the marshal was entitled to only one mileage, for travel, to the place where a hearing is had before a commissioner, no difference how many times it may be actually necessary for the marshal to make the travel, by reason of continuances granted by the commissioner. The commissioner did grant a continuance of some days to the defendant when he was first brought before him. This the commissioner had a right to do, it being presumed that proper cause was shown by the defendant. This made it necessary either for the marshal to remain there during the period of continuance, to the neglect of his other duties, or to return to his home and office at Springfield. But he must be present at the hearing to take charge of the prisoner at the conclusion, if necessary, and to be there he must again make the travel from Springfield to Danville. He did so, and is clearly entitled to the mileage for it, \$6.72.

Class 7. This is a disallowance of \$25.76 arising from a charge by the marshal of mileage and transportation of prisoners from Springfield to Cairo by rail, via East St. Louis, 244 miles. The comptroller claims that the distance from Springfield to Cairo by rail, actually necessary to be traveled, is via Centralia, and is only 216 miles, while the marshal admits the difference in distance, but claims that the East St. Louis route, although 28 miles longer, is the "shortest practicable route," because, by reason of better railroad connections and faster trains, it can be traveled in several hours less time, and is the route he actually traveled with these prisoners, for the reason that it was just at the close of a term of court at Cairo, and it was necessary, to save further expense of maintaining the prisoners, that they should be at Cairo before the term closed, and it was not certain they could be there if the route via Centralia were taken. Mileage is allowed the marshal only "for each mile actually and necessarily traveled." Rev. St. § 829. While it might occasionally facilitate the business of the court to allow the marshal a discretion to travel with writs and prisoners by the longer route, and quicker, rather than by the shorter but slower route, and the court does not hold that an emergency may not arise to justify the marshal in demanding and receiving his mileage by the longer route, yet no such emergency appears in this case, and it is believed that the public interest is better subserved by the general rule that the actual and necessary travel specified by the statute shall be held to be the travel by the shortest practicable route by the ordinary mode of travel. This seems to be the rule applied by the comptroller, as to these items, and no emergency being shown to justify a departure from this rule, as to the travel, the court approves it, and finds for the defendant as to this class, \$25.76. The judgment of the court, therefore, is that the plaintiff recover the sum of \$456.06 and his cost of suit.

UNITED STATES v. SAFFORD.

(District Court, E. D. Missouri, E. D. February 9, 1895.)

No. 3,880.

POST OFFICE—EMBEZZLING LETTERS.

The statute making it a crime to take a letter from the post office, or which has been in any post office, "or in the custody of any letter or mail carrier before it has been delivered to the person to whom it is directed" (Rev. St. § 3892), does not extend to the case of a letter stolen from the desk of the addressee, upon which it has been placed by the mail carrier, in the absence of any one to receive it.

This was an information against Edward W. Safford, for violation of Rev. St. § 3892, relating to the abstraction or embezzlement of letters from the post office, etc.

Wm. H. Clopton, for the United States.

PRIEST, District Judge. The defendant, a youth of 17 years, has been arraigned under an information charging him with hav-

ing embezzled a letter containing an article of value, which had been in the post office of the United States at St. Louis, and had not been delivered to the person addressed, namely, the Druggist Publishing Company. Defendant, having no counsel, expressed a desire to plead guilty to the charge, and, in order to gauge the punishment, inquiry was made concerning the circumstances of the offense. In response the district attorney informed the court (while recommending that the sentence be suspended during good behavior) that the letter had been placed by the mail carrier upon the desk of the Druggist Publishing Company's manager, to whom it was addressed, from whence it had been stolen by the defendant, who had gained unlawfully an entrance into the office. Is this an offense under the provisions of section 3892, Rev. St. U. S.? That section provides that "any person who shall take any letter, postal card or packet, * * * out of a post-office or branch post-office or from a letter or mail carrier, or which has been in any post-office or branch post-office or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it is directed, with a design to obstruct the correspondence," etc., "or shall secrete, embezzle or destroy the same," shall be punished by fine or imprisonment or both. The language of this statute is very general and very comprehensive; sufficiently so to punish any person who might be appointed to receive the mail of another, and, having lawfully received it, should thereafter form a design to embezzle or destroy it. The courts all agree that such an interpretation should not be given to this statute, and this is obviously correct. Several considerations lead unerringly to such a conclusion. Congress only intended to secure the sanctity of the mail while it was in the custody of the postal department en route from the sender to the person to whom it was directed. Beyond the protection of the mail while discharging the functions of postal service with respect to it the federal government has no rightful power or legal concern. Its right to impose any penalties is an incident to its power to establish post offices and post roads, and in the discharge of this function to protect the correspondence from the depredations of its own employés, as well as the unlawful aggressions of others. It would be reprehensible to assume that congress made a pretext of this power to establish rules of good conduct and punish violations of them between a principal and agent or to promulgate police regulations independent of the postal service, and after the postal functions had been performed. Such matters are of local concern, amenable to state law. It is but just that one who, having been delegated by another to receive his mail, and, having received it, should embezzle it, should be punished; and it is likewise just that one who should steal a letter after it had been delivered, and before it came into the manual possession of the party to whom it was directed, should be punished; but we should not allow our anxiety to suppress immoralities and punish crime to cause us to ignore the proper tribunals and proper authority for the redress of grievances of this character. So a statute, broad in its terms, will be restricted by construction to the objects which the legislature had in view, and

especially will its terms be restricted within the organic authority of the enacting body. *Farnum v. Blackstone Canal Co.*, 1 Sumn. 46, Fed. Cas. No. 4,675; *Sage v. City of Brooklyn*, 89 N. Y. 189; *People v. McClave*, 99 N. Y. 83, 1 N. E. 235; *Suth. St. Const.* §§ 246, 324. Speaking with respect of the construction of this statute, Judge Betts, with whom was sitting Judge Nelson, in *U. S. v. Parsons*, 2 Blatchf. 104, 106, Fed. Cas. No. 16,000, said:

"What, then, is the true import and force of the phrase, 'shall have been in a post office or in the custody of a mail carrier,' and of the phrase, 'before it shall have been delivered to the person to whom it is directed?' Are they of unlimited extent, covering every condition of a letter until it reaches its rightful destination? To give the language this construction would be to continue letters which had been once in the mail under the power and control of the federal government, in every change and transfer from person to person and place to place, and without limitation of time. Legislation of such a scope and extent would clearly not be in furtherance of the functions and duties of the post-office department, but in protection of the private property of individuals after it had become detached from that department and was wholly out of the charge of its agents. Such legislation would thus necessarily take quality and form of a municipal regulation governing the relations and responsibilities of individuals to each other in respect to letters and their contents which had been in the post office, although not obtained from the post office or any of its agents, or in the possession of a party through any act of fraud or deceit against the post-office laws. And congress would, in effect, be invested with the power to compel every person into whose possession a letter which had been in the post office should come to take upon himself the responsibility of carrying and delivering it to the person to whom it should be directed. We think that the object of this twenty-second section does not look beyond a possession of letters obtained wrongfully from the post office or from a letter carrier. Its design is to guard the post office and its legitimate agents in the execution of their duties in the safe-keeping and delivery of letters. After the voluntary termination of the custody of a letter by the post office or its agents, the property in and right of possession to it belong wholly to its real proprietor, and his rights are under the guardianship of the local law, and not of that of the United States."

In *U. S. v. Driscoll*, 1 Lowell, 303, Fed. Cas. No. 14,994, Judge Lowell, in considering this statute with respect of an indictment predicated upon it, said:

"The scope and purpose of these clauses and of the whole section appear to be to protect the mails from every kind of danger while in the custody of the United States. Some of the language is broad enough to include within its literal meaning every letter that has ever been in a post office, and every person that can deal with any such letter before it reaches the manual possession of its owner. Taken literally, the first clause is broad enough to cover even the person to whom the letter is addressed. But the law must have a reasonable construction, and one in accordance with the subject-matter, which is the due and proper custody and delivery of the mail. It must be taken to refer to letters with which the United States have concern under their power and duty to transport and deliver the correspondence of the country. It cannot be that the owner of a letter would be liable for such an act, and it is clear that the same rule applies to the agent. The first clause refers to an unlawful taking, whether with or without the connivance of an officer of the department; and without such a taking the offense is not complete. Here the taking was lawful. The second clause of the section is not so clear. Under this clause the taking is not an essential element of the offense. The law reads 'take or open,' etc. The language is disjunctive. But I think the delivery means in this, as in the other, clause, delivery to the person or to his authorized agent. When such a delivery has been made, the government is discharged of further responsibility, and its functions cease to

operate upon the letter. If the clerk or servant of the owner betrays his trust, that is a matter to be looked into by the authority of the state, whose laws regulate such agencies. If those laws make the act an embezzlement, there will be a remedy; if they do not, it would not be becoming in congress to do so if it could,—which may be doubted. These letters had been delivered to the persons to whom they were directed, because they had been delivered to a servant duly authorized by them to receive their letters. Two cases have been cited by the defendant's counsel,—U. S. v. Parsons, 2 Blatchf. 104, Fed. Cas. No. 16,000, and U. S. v. Sander, 6 McLean, 598, Fed. Cas. No. 16,219,—in the latter of which it is held that if a letter had been delivered to an authorized person, and the opening took place afterwards, this statute did not apply, because delivery to the agent or servant is delivery to the person to whom the letter is addressed; and in the former the judgment was that the United States was discharged from further responsibility in the premises after a bona fide delivery, though to the wrong person, himself innocent, when the offense was begun and consummated by a stranger, after the delivery had been perfected. The views of the judges in these cases were fortified by considerations derived from the natural functions, so to speak, of the federal government, it not being probable that the United States would attempt to regulate the relation of master and servant. I am informed upon good authority that Judge Sprague has made a similar decision. I have considered this question once before. A letter had been left at a shop, where the letters of the person to whom the particular letter was addressed were, with his knowledge and consent, usually left. A stranger—the defendant—intermeddled with such a letter after such delivery, and was indicted under the latter clause above cited; and, the case being by consent submitted to me in a somewhat informal way, I ruled upon it, and the result was a nol. pros. The government has cited only one case,—U. S. v. Pond, 2 Curt. 265, Fed. Cas. No. 16,067,—but it is one of high authority, though, I suppose, not actually binding on this court, which has concurrent jurisdiction of all criminal cases, not capital. The point there came up on a motion to quash. Such a motion is always addressed to the discretion of the court, and I understand the decision to go only to this extent: that it is not necessary to allege in the indictment that the letter was in custody of the United States at the time it was opened. This is undoubtedly so. The remarks of Mr. Justice Curtis go further, no doubt; still I do not consider them to go to the length necessary to support this prosecution, because they do not refer to a delivery of the letter to one authorized to receive it. Judge Sprague's opinion was given after the decision of U. S. v. Pond had been made, and that case was called to his attention, and he must have considered, as I do, that it was not an authority to the point now in controversy."

In U. S. v. Thoma, 25 Int. Rev. Rec. 171, Fed. Cas. No. 16,471, the defendant was indicted under section 3892 for embezzling a letter which had been in the post office before the same had been delivered to the person to whom it was addressed. The letter was sent in care of the defendant. Judge Nixon in that case said:

"The design of the section is to guard the inviolability and safety of communications through the mails from the start to their destination. Any tampering with a letter during that period, either by an official of the department or by other person, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or any secretive embezzlement or destruction of the same, is carefully guarded against. But the delivery of the letter to the defendant terminated the action and authority of the post-office department over the subject-matter. It was directed to the defendant's care. He was designated as the person to receive it from the post office. So far as the department was concerned, its responsibility ended with the delivery to him. Whether he retained it or passed it over to the legal representatives of the deceased owner, or whether he had a right to retain it as against their demands for it, are questions for the local laws to settle, just as they determine all other questions relating to the custody or ownership of property."

In the case of *U. S. v. Sander*, 6 McLean, 598, Fed. Cas. No. 16,219, Judge Willson said of this statute:

"But a more serious and grave question is raised by defendant's counsel in requesting the court to charge the jury 'that if they should find the letter in question had been delivered by the postmaster at Vermillion to the defendant, who was at the time a fully-authorized agent of Phoebe Sturdevant to receive it, that any embezzlement by him thereafter, and before delivery to her, does not constitute an offense under the statute.' It is claimed by counsel that a delivery to an authorized agent is a delivery to the principal, and that when this is done the functions of the post-office department, and the powers of the federal government are at an end in the premises. We believe this position of counsel to be well taken. It is a familiar principle of law that an act done by an authorized agent within the scope of his authority is an act of the principal. 'Qui facit per alium facit per se.' Hence it is that the delivery of goods by a third person to an agent, and his acceptance of them for his principal, is, in contemplation of law, a delivery to and acceptance by the principal. So payments made a third person to the agent in the course of his employment is payment to the principal, and, whether actually paid to the principal or not, by the agent, it is conclusive on him. A letter, packet, or other valuable thing, having been committed to the post-office department for carriage and delivery, if once parted with by the postmaster to a person authorized to receive it, from that moment ceases alike to be under the control of the department and the power and authority of the general government. The sanction by the federal courts of the contrary doctrine would be dangerous in its tendency, and subversive of reserved state authority. No power is given to congress to legislate upon the subject, except what is incident to and necessary to carry out the grant contained in the eighth section of the first article of the constitution. The grant is simply 'that congress shall have power to establish post offices and post roads'; and, while we would not adopt the limited and narrow construction given to this grant by President Monroe in his special message to congress of 4th May, 1822, yet we would not extend implied powers further than what is necessary to carry out with safety to the public the legitimate operations of the post-office establishment. When functions of the department are exhausted by the proper delivery of mail matter (once placed in its charge), such mail matter is then beyond the reach and authority of any legislation of congress."

In the foregoing cases the letters were delivered to persons authorized to receive them, while here the letter which the defendant stole was left by the carrier, according to the usual custom of delivery, upon the desk in the office of the person to whom it was directed. This, it is contended, makes a material difference. We do not think so. The one was physical and moral depository, while the other merely a physical. Each was the appointed receptacle of the person addressed, and the delivery to either was an acceptance by the person addressed, and an acquittal of the post-office department of its obligation with respect to the mail. Whenever the post-office department or its agents voluntarily parts with the mail, that is an end of the relation to and authority over it. Of course, if one by deceitful or artful practices should persuade a mail agent to deliver to him correspondence which he was not lawfully entitled to receive, it would be an offense under this statute, because his artifice would give quality and character to the act; and the deceitful persuasion stand as a coercive and unlawful taking. But whatever one party appoints or acquiesces in as an acceptance and the other recognizes as a delivery must be acknowledged and enforced as a delivery by the courts. Where the minds of the parties agree, it is need-

less to attempt to destroy the force of this concurrence by reference to what the courts have said in cases where the parties disagree both as to facts and inferences from disputed facts. In this case, unless we should hold that placing the letter upon the desk as it was by the carrier was a delivery (of which there can be not the slightest doubt), we should be compelled to hold that it had been abandoned by the carrier, and for this the statute prescribes a punishment which would seem to be adequate to insure fidelity upon the part of carriers and post-office agents. It is desirable, of course, to protect correspondence from publicity through the instrumentality of prying, officious, and evil-disposed persons, after as well as before it comes into the manual possession of those for whom it is intended; but the federal government has exhausted its power in this direction when it has established such regulations as may occur to it as efficient so long as the mail is in its actual custody en route. The mere fact that it has had a mission to perform with respect to such correspondence does not invest letters with a quality of federal interest or concern which ever afterwards entitles it to exert its authority to protect them. They still remain private property, and subject to the ordinary rules of such property. The post office is merely an agent for the delivery of the mail, and has only the right to protect itself in the discharge of this function against the depredations of its agents and others while performing its undertaking. However desirable it may be, and however strong may be the policy which would suggest it, that the mail shall be kept sacred, we can look to congress for efficient aid only so far as it may have authority as incidental to its proprietary and constitutional right to establish "post offices and post roads." The enforcement of general regulations of police must come from the states.

My attention has been called to the case of *U. S. v. McCready*, 11 Fed. 225, as expressing views contrary to those I entertain. While I have the profoundest respect for the learning and ability of the judge who delivered that opinion, I find the more satisfactory reasons and the soundest canons of interpretation in the opinion of the several able jurists whom I have heretofore quoted. The defendant's plea of guilty will not be accepted, under the circumstances, until he shall have had opportunity to consult with counsel whom I shall appoint to defend him.

In re MOORE, Collector of Customs.

(District Court, D. Alaska. March 27, 1895.)

1. INTOXICATING LIQUORS—SEARCH AND SEIZURE.

Under the organic act of Alaska (Act May 17, 1884), § 14, prohibiting the importation of intoxicating liquors, except for certain purposes, under penalty of forfeiture, as provided by Rev. St. § 1955, on petition by the collector of customs, alleging that a person has secreted about his premises intoxicating liquor unlawfully imported from other parts of the United States, a warrant to search for and seize such liquor will be issued.

2. SAME—EXECUTION OF SEARCH WARRANT.

Rev. St. c. 3, § 1955, provides for the forfeiture of liquor unlawfully imported into Alaska. Section 1957 provides that violations of the provisions of that chapter shall be prosecuted in the courts of California, Oregon, or Washington until otherwise provided by law, and authorizes the collector for Alaska territory to seize vessels and merchandise liable to fines or forfeitures. The organic act (Act May 17, 1884), § 3, establishes a district court for Alaska. *Held*, that the collector of customs was authorized to execute a warrant issued by such court to search for and seize intoxicating liquor unlawfully imported.

Application of Benjamin P. Moore, collector of customs, for a warrant to search for and seize certain distilled liquors in his district, imported contrary to law.

Lytton Taylor, Dist. Atty., for petitioner.

TRUITT, District Judge. This case is brought up for determination by the petition of said Benjamin P. Moore, verified by his oath, and addressed to the judge of said court, in which he sets out his official capacity, and then among other things alleges, upon information and belief, that one Paul Baum now has secreted about his premises at Sitka, within said district, a quantity of intoxicating liquor commonly called "whisky," which has been unlawfully imported from other parts of the United States, and prays for a warrant to search for and seize the same. By this application two very important questions are for the first time directly brought before this court, viz.: (1) Does the law authorize the issuance of such a warrant for the purpose named? (2) If so, then can it be executed by the collector or his deputies? The first is the most important question, and really the vital one in the case, for, if the law does not authorize the issuance of the warrant, then the second question is never reached, but, if such warrant is authorized, the question of its execution is of secondary importance. In passing upon the petition I shall therefore consider the above questions in the order of their statement, and examine the statutes that seem to bear upon the authority of the United States judge or a commissioner for this district to issue a search warrant upon such facts as are alleged in the petition herein.

The warrant asked for is of a high and extraordinary nature. It is expressly guarded by article 4 of the original amendment to the constitution proposed by the first congress, and ratified by the several states, for the purpose of securing the rights and liberty of the people from encroachment, disparagement, or violation by the federal government through its departments, courts, or various officers, either military or civil; and unless such warrant is directly authorized by law, or comes within the fair intendment of the same, it should not be issued. In *Nelson v. U. S.*, 12 Sawy. 285, 30 Fed. 112, which was a criminal prosecution under section 14 of the act of May 17, 1884, providing a civil government for Alaska, Judge Deady, in his very able opinion, says:

"No particular question was made on the argument as to the scope and effect of the act, but, as it covers the whole ground, the most reasonable conclusion is that it supersedes or repeals all former laws on the subject of intoxicating liquors in Alaska."

And in *U. S. v. Warwick*, 51 Fed. 280, a case decided in this court, it is held that:

"As to the importation, manufacture, and sale of intoxicating liquor in this district, section 14, *supra*, in connection with section 1955 of the Revised Statutes, and the regulations of the president, must be accepted as the law."

In the latter case, section 20 of the act of June 30, 1834, which was by act of March 3, 1873, added as an amendment to section 1 of the Alaska act of July 27, 1868, for the purpose of making this territory "Indian country" as to the introduction and disposal of spirituous liquors, is held not to be in force here. As the act of July 27, 1868, with the amendment thereto of March 3, 1873, includes all the law of a local character upon the subject of spirituous liquors affecting Alaska prior to the organic act of May 17, 1884, if the said amendment is not now in force, then, unless one or more statutes of a general character touching the subject in some way were extended over this country *proprio vigore* upon its cession to the United States, it is plain that the only law applicable to the present case will be found in said act of July 27, 1868, and the organic act; and as my attention has not been called to any statute of a general character that might, by the most strained construction, apply to this case, and having been unable to find any such myself after a careful examination, I therefore conclude that these acts contain all the law applicable to it. Section 14 of the organic act is as follows:

"That the provision of chapter three, title twenty-three, of the Revised Statutes of the United States, relating to the unorganized territory of Alaska, shall remain in full force, except as herein specially otherwise provided; and the importation, manufacture and sale of intoxicating liquors in said district except for medicinal, mechanical and scientific purposes is hereby prohibited under the penalties which are provided in section nineteen hundred and fifty-five of the Revised Statutes for the wrongful importation of distilled spirits."

At this point in the case it is necessary, before going further, to determine what effect this act had upon prior legislation upon the same subject. What parts or provisions of said chapter 3, tit. 23, were changed or repealed by it? Repeals by implication are never favored by courts.

"There must be a positive repugnancy between the provisions of the new law and the old to work a repeal of the old by implication, and even then the old law is only repealed to the extent of the repugnancy." *Fabbri v. Murphy*, 95 U. S. 191.

In *McCool v. Smith*, 1 Black, 459, Mr. Justice Swayne said:

"A repeal by implication is not favored. The leaning of the courts is against the doctrine, if it be possible to reconcile the two acts together."

Numerous other authorities could be given to the same effect, but even these seem hardly necessary upon the proposition they are cited to support, for the legislative mind seems to have attempted, by the very language used in the act, to preclude any question about its object and intention. It is expressly declared that the provisions of said chapter 3, tit. 23, "shall remain in full force, except as herein specially otherwise provided." Under the

rule governing repeals by implication, and the peculiar language of the act itself, most of the old law must be in force. Section 14 is broader than section 1955 in two respects, for while this section is only against "distilled spirits," and confers upon the president the power to "restrict, and regulate, or to prohibit," it is against "intoxicating liquors," and absolutely prohibits such liquors except for the three purposes named. As these changes are not repugnant to the intention and spirit of said section, I hold that it is still in force as to distilled spirits, and only modified as to the power of the president. In this I am following a well-established doctrine, which is very concisely stated by Mr. Justice Field in *Chicago, M. & St. P. R. Co. v. U. S.*, 127 U. S. 406, 8 Sup. Ct. 1194, as follows:

"When there are two acts or provisions of law relating to the same subject, effect is given to both if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to that extent; but the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one, and omit others, or add new provisions."

Section 14 of the organic act refers to section 1955 for its penalty; hence this part of it is not repealed; and, if the rest is, then we have a unique statute,—that is, one consisting wholly of a penalty. So far as these statutes relate to the subject of intoxicating liquors they are in *pari materia*, for they have a common object, and are intended to prevent a common evil, and should be looked at as one statute in explaining their meaning and import. *Ryan v. Carter*, 93 U. S. 78; *Harrington v. U. S.*, 11 Wall. 356; *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. 60. In section 1955 it provides that "the president shall have power" to make regulations necessary to carry out its provisions, and in section 14 of the organic act it is declared that he "shall make such regulations" as are necessary to carry out its provisions. These regulations have been made by the president, and if, under either one or both of said statutes, the warrant asked for can be issued, then the request of the petition should be granted. In section 1955 it is declared, among other things, that:

"Distilled spirits landed or attempted to be landed or used at any port or place in the territory, in violation of such regulations, shall be forfeited; and if the value of the same exceeds four hundred dollars the vessel upon which the same is found, or from which they have been landed * * * shall be forfeited."

As the forfeiture provided for in this statute is against personal property and vessels carrying or landing it, any attempt to enforce such forfeiture would be vain without first seizing the property and bringing it within the power of the court. And it is a well-settled rule that proceedings to enforce a forfeiture are in the nature of actions in rem, and that seizure is a jurisdictional fact which must precede the commencement of such proceedings. *The Washington*, 4 Blatchf. 101, Fed. Cas. No. 17,221; *The Bolina*, 3 Fed. Cas. No. 1,608; *The Ann*, 9 Cranch, 289. In the latter case it is stated that:

"In order to institute and perfect proceedings in rem it is necessary that the thing should be actually or constructively within the reach of the court."

The petition alleges that domestic intoxicating liquor, commonly called "whisky," is believed to be at certain premises within this district, and that the same has been unlawfully imported or brought into it. The executive order of May 4, 1887, says:

"No intoxicating liquors shall be landed at any port or place in the territory of Alaska without a permit from the chief officer of the customs at such port or place, to be issued upon evidence satisfactory to such officer that the liquors are imported and are to be used solely for sacramental, medicinal, mechanical, or scientific purposes."

It is the practice of the customs officers to seize all such liquors when found in the hands of persons attempting to land it from boats or vessels at any port or place in the territory contrary to law. But suppose the liquors are clandestinely landed and carried into the country. How far inland must they be taken before they become purged of their illegal nature, or exempt from the ban of the law upon them? Is there an arbitrary line or distance from the wharf or beach at which the customs officer must stop, and just beyond which the smuggler can store his illicit goods in safety, or even openly display them and laugh at the law? A construction which would sanction so glaring an evasion of the whole policy and object of the law and the executive order ought not to be adopted. Penal laws, though subject to what is known as the "rule of strict construction," should not be construed with such technical strictness as to defeat the obvious intention of the law. *American Fur Co. v. U. S.*, 2 Pet. 358. "A thing within the intention of the makers of the statute is as much within the statute as if it was within the letter." *U. S. v. Babbitt*, 1 Black, 55. But under the strictest rules of construction, if the statutes upon the subject are to stand as I have indicated, I think the warrant should be issued. Having thus determined the first question in the case, but little need be said in passing upon the other one.

Section 1957 of the Revised Statutes provides:

"Until otherwise provided by law all violations of this chapter, and of the laws hereby extended to the territory of Alaska and the waters thereof, committed within the limits of the same shall be prosecuted in any district court of the United States in California or Oregon, or in the district courts of Washington; and the collector and deputy collectors appointed for Alaska territory, and any person authorized in writing by either of them, or by the secretary of the treasury, shall have power to arrest persons and seize vessels and merchandise liable to fines, penalties or forfeitures under this and the other laws extended over the territory."

There is no repugnancy between this statute and section 14 of the organic act; but section 3 of said act establishes a district court for Alaska, and thus establishes a new forum, in which the offenses against the provisions of chapter 3, tit. 23, of the Revised Statutes must be tried. The new law changes or repeals the old in this respect. But courts have generally upheld parts of a statute capable of standing alone when other parts have been repealed by implication because repugnant to a later act. *Presser v. People of Illinois*, 116 U. S. 252, 6 Sup. Ct. 580; *In re Canal Certificates* (Colo. Sup.) 34 Pac. 274; *Cooke v. Ford*, 6 Fed. Cas. No. 3,173; *Wood v. U. S.*, 16 Pet. 342. In the case of *Wood v. U. S.*, Mr. Justice Story said:

"There must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy."

However, the very language used in the organic act and that used in section 1957 plainly shows that the former should not be held to repeal the latter in toto, or at all, except as to that part providing the court in which offenses named in the chapter should be tried. The new act declares that this chapter "shall remain in full force" except as otherwise specially provided; and section 1957 only makes prosecutions for violations of said chapter triable in the courts of California, Oregon, and Washington "until otherwise provided by law." When the organic act was enacted, the prosecutions mentioned in said section were otherwise provided for by law, and all that portion of the section from the beginning down to and including the word "Washington" became inoperative or was repealed by implication. It was only intended to be temporary. If the rest of this section is allowed to stand, then it gives the collector, his deputies, and any person authorized by either of them in writing, the "power to arrest persons and seize vessels and merchandise liable to fines, penalties or forfeitures under this and other laws extended over the territory." The president seems to have understood or believed that this law was in force after the organic act was adopted, for in his circular of May 4, 1887, he puts the control of intoxicating liquors to be landed at any port or place in Alaska under "the chief officer of the customs." Now, while this does not have the binding force of a decision from a superior judicial tribunal, yet in the language of Mr. Justice Harlan in *U. S. v. Johnston*, 124 U. S. 236, 8 Sup. Ct. 446:

"The contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

And he cites a number of authorities in support of the rule which he says has often been announced by the court. But it may be said that, admitting the authority of the customs officers to seize intoxicating liquors while they are being landed contrary to law, yet after they have escaped the vigilance of these officers, and passed through the guard line that they are supposed to maintain along our coast, then the marshal or his deputies should seize them. Upon this point I express no opinion, further than that the collector can execute the warrant, because it is not in the case. By his petition he asks for this warrant, and from my holding that it should issue, and that he may execute the same, it cannot be implied that another officer of the district might not obtain its issuance and have the same power in executing it. If any person had been caught in the act of illegally landing these liquors, the customs officers could have seized them without a warrant. Under the law, as I understand it, I think both questions in the case must be decided in favor of the petitioner, and the warrant will be issued.

LEW JIM v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 18, 1895.)

No. 186.

1. CHINESE EXCLUSION ACTS—MERCHANTS.

A Chinese person who, during his residence in the United States, was engaged in business as a member of a firm of dealers in fancy goods, but occasionally, during a year previous to his departure for a temporary visit, worked for short periods as a house servant, in order to accommodate an old employer at times when he was without a servant, was engaged in manual labor within the meaning of section 2, Act Cong. Nov. 3, 1893, known as the "McCreary Act."

2. SAME—APPLICATION TO PERSONS LEAVING THE COUNTRY BEFORE THEIR PASSAGE.

Act Nov. 3, 1893, applies to Chinese persons formerly residing in the United States, who left the country before the passage of the act, and afterwards seek to return.

Appeal from the District Court of the United States for the Northern District of California.

This was an application by Lew Jim for a writ of habeas corpus to obtain his discharge from the custody of the collector of the port of San Francisco. The district court remanded the petitioner to the custody of the collector. Petitioner appeals. Affirmed.

Henry C. Dibble, for appellant.

Charles A. Garter, U. S. Atty.

Before McKENNA, Circuit Judge, and HANFORD and HAWLEY, District Judges.

McKENNA, Circuit Judge. The appellant is a subject of the emperor of China, and claims to have been a resident Chinese person in San Francisco, and partner in the Chinese firm of Bing Kee, dealers in Japanese fancy goods, 619 Dupont street, his interest being \$1,000, and that he departed for China September 6, 1892, for a temporary visit, and that he returned on the 1st day of April, 1894, to resume his business as a member of said firm. The collector of the port would not permit him to land, and he applied to the district court for writ of habeas corpus, which was issued, and the matter referred to a referee to take the testimony and report his conclusion to the court. The referee reported that appellant had failed to establish by the testimony of two credible witnesses, other than Chinese, the fact that during the period of one year prior to his departure for China he was not engaged in the performance of any manual labor except such as was necessary in the conduct of his business as a merchant, as required by section 2 of the act of congress approved November 3, 1893, known as the "McCreary Act." The report was excepted to, but confirmed by the district court, which held that he was "a Chinese person, forbidden by law to land within the United States, and has no right to be or remain therein," and entered a judgment remanding him to the custody from which he was taken. From this judgment this appeal is taken.

The evidence establishes that appellant had an interest in the firm of Bing Kee at his departure, and also shows (by a white witness) that for periods of varying lengths, not exceeding two weeks at any one time, he worked as a house servant within a year before his departure, and received wages. This was done for the accommodation of an old employer at times when he was without a servant. Appellant, however, contends that such employment did not constitute the performance of manual labor within the meaning of section 2 of the McCreary act. The Chinese exclusion acts are undoubtedly directed to the exclusion of laborers, but to effectually accomplish this purpose it became necessary not only to make certain the definition of the term, but to make also certain the definition of the term "merchant," under which name impositions upon the law were practiced. This was done by the McCreary amendment to the Geary law, and the burden of proof was cast on the Chinaman to affirmatively establish his character as a merchant. Section 2 of the amendment is as follows:

"The words 'laborer' or 'laborers,' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. The term 'merchant,' as employed herein and in the acts to which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. When an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing. * * *"

The provisions of the section are very strict, and we think appellant engaged in manual labor within its meaning.

The appellant further urges that, as he departed prior to the passage of said section 2, he is not within its provisions, and hence was not required to establish that he did not engage in manual labor other than in his business. We are unable to concur in this view. It is true, as we have said, the exclusion acts are directed against laborers, and that by the treaty between the United States and China, which was in existence at the time judgment was rendered, merchants "shall be allowed," to quote the treaty, "to go and come of their own free will and accord." It is, at this late day of the subject, almost as superfluous to say as to argue that it is competent for the United States to impose conditions on this permission. An intention to do so might not be imputed on ambiguous language, but, where the language is plain, the courts must so interpret it. And we think it is plain, and, considering its object, unmistakable. By previous legislation, Chinese laborers could

not come at all, and to prevent their entering under the disguise of merchants was the object of section 2 and its careful definitions and provisions. It was an immediate remedy for an immediate evil. The judgment of the district court is therefore affirmed.

LAI MOY v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 18, 1895.)

No. 194.

1. CHINESE EXCLUSION ACTS—MERCHANTS.

A Chinese person who, during half his time, is engaged in cutting and sewing garments for sale by a firm of which he is a member, is not a merchant, within the meaning of section 2 of Act Cong. Nov. 3, 1893, known as the "McCreary Act."

2. SAME—APPLICATION TO PERSONS LEAVING THE COUNTRY BEFORE PASSAGE OF THE ACT.

Act Cong. Nov. 3, 1893, known as the "McCreary Act," applies to Chinese persons who left the country before the passage of the act, and afterwards seek to return. *Lew Jim v. U. S.*, 66 Fed. 953, followed.

Appeal from the District Court of the United States for the Northern District of California.

This was an application by Lai Moy, a Chinese person, for a writ of habeas corpus. The district court remanded petitioner, who now appeals.

This is an appeal from a judgment of the district court, Northern district of California, rendered against appellant on habeas corpus proceedings. He claimed the right to land in the United States as a merchant, but the right was denied by the collector of the port of San Francisco. In his petition, he says, after stating he was imprisoned and detained by the master of the steamship City of Pekin, claiming to act under the Chinese exclusion act, that he "does not come within the restrictions of said acts, but, on the contrary, your petitioner alleges that said passenger was a resident of the United States, and departed therefrom on the steamship Belgic, on or about the 6th day of October, 1892; that said passenger is not a laborer, but, on the contrary, is a merchant and a member of the firm of Lum Chong Bro. & Co., dealers in dry goods and clothing; that he conducted said business, under said name for more than one year prior to his said departure; that during such time he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant." The referee to whom the matter was referred reported adversely to appellant, and recommended his remand, and this report was affirmed by the district court. The testimony shows that he departed from the United States on the steamer Belgic on October 6, 1892, and that he was at such time and for some years before a member of the firm of Lum Chong, 746 Commercial street, which did a clothing and dry goods business,—sold, to quote from appellant's testimony, "Chinese clothing, silks," etc., and also manufactured "pants and coats," etc. To the question, "What did you do in carrying on the business of the firm?" he answered, "I used to sell goods and cut out clothes." The following testimony was then given: "Q. Are you a clothes cutter? A. Yes, sir; I understand it. Q. Was not that your principal business? A. That and selling goods. Q. Did you make clothing other than to cut them? A. Sometimes. Q. Now, when you say sometimes, what do you mean by that? A. Well, if we were in a rush, any one of us would take a hand on the sewing machine. Q. What proportion of your time were you employed in cutting and making clothing during the last year before you went to China? A. I suppose nearly equally divided." This testimony was corroborated by another witness.

Section 2 of the McCreary act is as follows: "The words 'laborer' or 'laborers,' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. When an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing. * * *

The assignments of error are as follows: First, that said district court erred in deciding that said Lai Moy was not a domiciled Chinese merchant, and not entitled to enter and remain in the United States; second, that said court erred in deciding that it was necessary for the petitioner to prove by two witnesses other than Chinese that, for more than one year prior to his departure for China, he had not been engaged in the performance of any manual labor other than such as was necessary in the conduct of his business as a merchant; third, that the court erred in holding and deciding that petitioner was not a merchant, because within one year of his departure for China he had performed certain manual labor in connection with his business as a partner in the firm of Lum Chong, clothing and dry-goods merchants; fourth, that the court erred in holding and deciding that petitioner, Lai Moy, was and is a Chinese laborer, and therefore not entitled to return to and remain in the United States.

Henry C. Dibble, for appellant.

Charles A. Garter, U. S. Atty.

Before McKENNA, Circuit Judge, and HANFORD and HAWLEY, District Judges.

After making statement of the case above, McKENNA, Circuit Judge, delivered the following opinion:

The assignments of error, as said by appellant's counsel, present two points:

"First, the act of congress of November 3, 1893, requiring a resident Chinese merchant to establish his status in a certain way, and by a particular kind of proof, does not apply to the case of this petitioner, who departed from the United States prior to the enactment of the law; and, second, the evidence does not warrant the conclusion that the petitioner was not a resident Chinese merchant, within the meaning of the act of November 3, 1893, and the various restriction acts amended thereby."

The first point we had occasion to consider and pass upon in *Lew Jim v. U. S.*, 66 Fed. 953, and we decided that the act of congress did apply to merchants departing prior to its enactment. The point, therefore, is not well taken.

We think that the second point is also untenable. It will be observed that the definitions of the act are very careful and confined, and we may not enlarge them. The designation "merchant" does not include, comprehensively, all who are not labor-

ers, but strictly "a person [to quote the act] engaged in buying and selling merchandise." To fabricate merchandise, as appellant did, is not to buy and sell it. Nor may both be done, for the "merchant" may not (again to quote the act) "engage in the performance of any manual labor except such as is necessary in the conduct of his business as such merchant,"—that is, in buying and selling merchandise; and the manual labor which is precluded is skilled as well as unskilled. One-half of appellant's time was engaged in cutting and sewing garments. This was manual labor not necessary in the buying and selling of merchandise. If we may indulge this, we may indulge more, and all artificers would be excluded from the act provided they worked for themselves or mingled with their proper work any traffic in merchandise.

We think, therefore, that the judgment of the district court was correct, and it is affirmed.

Ex parte JERVEY et al.

(Circuit Court, D. South Carolina. March 12, 1895.)

1. CONSTITUTIONAL LAW — INTERSTATE COMMERCE — CARRYING LIQUOR INTO A STATE.

The provision of the South Carolina "Dispensary Law" (section 33) forbidding any person to bring liquors into the state, except as provided in that act, under penalty of fine and imprisonment, is void, as an interference with interstate commerce, in so far as it is sought to be applied to persons who bring liquors into a port of a state, without attempting to unload them from the vessel.

2. SAME—EFFECT OF THE WILSON ACT.

The Wilson act, passed by congress in August, 1890, merely operates to subject liquors brought into a state to the police power thereof, whether in the original packages or not, and it gives the state no authority to impose penalties upon persons who bring liquors into a port of the state without attempting to unload them from the vessel.

8. STATE AND FEDERAL COURTS—COMITY—HABEAS CORPUS.

A federal court having before it, on writ of habeas corpus, persons arrested under a state law alleged to be in contravention of the constitution of the United States, will not feel required, on the ground of comity, to remand them to the state courts, when the circumstances are such that delay in obtaining a decision upon the validity of the law would cause great injury to commerce. *Minnesota v. Barber*, 10 Sup. Ct. 862, 136 U. S. 313, and *In re Van Vliet*, 43 Fed. 764, followed.

This was an application for a writ of habeas corpus to procure the release of J. E. V. Jervy, Sr., J. E. V. Jervy, Jr., and Henry Gardner, who are alleged to be held in custody by the sheriff of Charleston county, S. C., contrary to the laws and constitution of the United States.

Bryan & Bryan, for petitioners.

C. P. Townsend, Asst. Atty. Gen., and W. Gibbes Whaley, for respondent.

SIMONTON, Circuit Judge. Joseph E. V. Jervy, Sr., is the master, and the other petitioners constituted the crew of the schooner *Carolina*, a vessel of the United States, duly licensed for

conducting a coasting trade between ports and cities in the states of North Carolina, Georgia, and South Carolina. In February last she was lying in the port of Savannah, and there took in a cargo consisting of 6 barrels marked "whisky" and 22 barrels marked "vinegar," shipped on her to be transported by sea to Charleston, S. C., and for which she was to receive freight \$75. As far as appears, none of the petitioners had any ownership in any of the barrels or their contents, or any other interest in them except the freight for their carriage between these two ports. Immediately on the arrival of the Carolina alongside the wharf in Charleston, some time before daylight on 26th February, and before cargo was broken, these three men were arrested by the city police, and held in custody. On the same day a warrant was issued by George W. Rouse, Esq., a trial justice of the state, in these words:

"The State of South Carolina, Charleston County.

"Affidavit for Arrest Warrant.

"Personally appeared before me E. C. Beach, who, being duly sworn, says that in the state and county above named, at Charleston, S. C., about the 26th day of February, 1895, J. E. V. Jervy, Sr., J. E. V. Jervy, Jr., and Henry Gardner did unlawfully bring alcoholic liquors into this state, in violation of section 33 of the dispensary act, and that Sergt. Quin and Private McCaffrey are material witnesses for the state. E. C. Beach.

"Sworn to before me, this 26th day of February, 1895.

"George W. Rouse, Trial Justice.

"South Carolina, Charleston County.

"Arrest Warrant.

"By George W. Rouse, Trial Justice, in the Court and State Above Named, to Any Sheriff or Constable E. C. Beach: Whereas, complaint has been made unto me by E. C. Beach that J. E. V. Jervy, Sr., and J. E. V. Jervy, Jr., and Henry Gardner did unlawfully bring into the state, in violation of section 33 of the dispensary act, alcoholic liquor, these are therefore to command you to apprehend the said J. E. V. Jervy, Sr., J. E. V. Jervy, Jr., and Henry Gardner, and to bring them before me to be dealt with according to law.

"Given under my hand and seal, at Charleston, this 26th day of February, 1895. George W. Rouse, Trial Justice."

By virtue of this warrant, they were arrested, and put in custody. They gave bail, but were surrendered by their bail to the sheriff in whose custody they were when the petition was filed. The petitioners are in custody because they, master and crew of the schooner Carolina, transported in the schooner, for freight money, these barrels of whisky, from the port of Savannah, in the state of Georgia, to the port of Charleston, in this state. It is charged that in so doing they violated section 33 of the dispensary act of this state, in these words:

"No person, except as provided in this act, shall bring into this state, or transport from place to place within this state, by wagon, cart, or other vehicle, or by any other means or mode of carriage, any liquor or liquids containing alcohol, under a penalty of one hundred dollars or imprisonment for thirty days for each offence, upon conviction thereof, as for a misdemeanor."

The petitioners allege that this section of the dispensary law, so far as it is sought to apply it to them, is an attempt to regulate commerce between the states, and is in conflict with the constitution and laws of the United States, and therefore null and void.

The issue thus presented is one cognizable in this court. "Under the provisions of sections 751 to 753 of the Revised Statutes of the United States, the courts of the United States and their judges have jurisdiction upon a writ of habeas corpus to inquire into the cause of the imprisonment of the petitioner; and if, upon such inquiry, he is found to be in custody for an act done or omitted in pursuance of a law of the United States, he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued, the constitution and laws of the United States made in pursuance thereof being the supreme law of the land." *In re Neagle*, 39 Fed. 833; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734; *Ex parte McCreedy*, 1 Hughes, 598, Fed. Cas. No. 8,732; *Electoral College of South Carolina*, 1 Hughes, 571, 8 Fed. Cas. No. 4,336; *Wildenhuis' Case*, 120 U. S. 1, 7 Sup. Ct. 385. Is the act of the legislature of South Carolina upon which this arrest was based in conflict with the constitution and laws of the United States? The act declares it a misdemeanor, punishable by fine or imprisonment, for any person, except as provided in the act, to bring into this state, by any means or mode of carriage, any liquor or liquids containing alcohol. Is it a regulation of commerce? It relates to liquids or liquor containing alcohol,—an article of commerce. "That ardent spirits, distilled liquors, ale and beer, are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress, and decisions of the court, is not denied." *Leisy v. Hardin*, 135 U. S. 110, 10 Sup. Ct. 681. The dispensary act itself recognizes alcoholic liquors as the subject of interstate commerce, as it provides for their transportation; and, when imported, it recognizes them as subjects of exchange, barter, and traffic, for it provides elaborate machinery for the sale of them to the people of the state. This being so, the act does not forbid absolutely the importation of these liquors or liquids, but forbids their importation, "except as provided in this act." The provision, therefore, is clearly a regulation of commerce. "Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities." *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826. Transportation is essential to commerce, or rather is commerce itself, and every obstacle to it or burden laid on it by legislative authority is regulative. *Railroad Co. v. Husen*, 95 U. S., at page 470. See, also, *Hall v. De Cuir*, *Id.* 485. The power to regulate commerce is vested in congress, is complete in itself, and has no limitations other than those prescribed in the constitution. *Gibbons v. Ogden*, 9 Wheat. 1. This power so vested in congress is the power to prescribe rules by which it should be governed, that is to say, the conditions upon which it shall be conducted,—to determine when it shall be free, and when subject to duties or other exactions. *Gloucester Ferry Co. v. Pennsylvania*, *supra*. This power is exclusive. "All that portion of commerce with foreign

countries or between the states, which consists in the transportation, purchase, sale, and exchange of commodities is national in its character. Here there can, of necessity, be only one system or plan of regulation, and that congress alone can prescribe. Its nonaction with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free." *County of Mobile v. Kimball*, 102 U. S., at page 697.

The power to regulate commerce is so complete in itself, acknowledging no other limitations than those prescribed in the constitution, and so coextensive with the subject on which it acts, that it cannot be stopped at the external boundaries of a state; it enters into the interior. *Leisy v. Hardin*, 135 U. S., at page 111, 10 Sup. Ct. 681. The feebleness of the Confederacy, formed during the Revolution, over this subject, was one of the prime causes of the convention of 1789; and this provision of the constitution to meet this question, and to confer absolute and exclusive control over commerce in congress, was the result. The nature of this provision and its correction of the evils it was intended to cure require that a similar power should not exist in the states. *County of Mobile v. Kimball*, 102 U. S. 691. It is true that in certain cases in which the legislation of the state is not directed against commerce, but relates to the rights, duties, and obligations of citizens, and affects the operations of foreign and interstate commerce, or persons engaged in that commerce remotely and indirectly, such legislation does not conflict with the constitution. *Sherlock v. Alling*, 93 U. S. 100. But that is not this case. Here the prohibition is direct and complete. The case itself shows the distinction. The legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Page 102. We are not left to conviction or to the application of abstract principles. In *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, the supreme court of the United States held that:

"The statute of the state of Iowa, forbidding, under penalty, common carriers, their agents or any person, to bring liquor into the state unless previously furnished with a certificate from the county auditor that the consignee was authorized to sell the same, was void as a regulation of interstate commerce."

This power to regulate interstate commerce being vested in congress, it is within the power of congress to permit its exercise in whole or in part by the states. In sections 4278 and 4279 of the Revised Statutes of the United States, relating to nitro-glycerine and other explosives, congress gives directly to any state, territory, district, city, or town the right to prohibit the introduction of such substances into their limits for sale, use, or consumption therein. The legislation with regard to spirituous liquors and their relation to interstate commerce is in what is known as the "Wilson Act" (26 Stat. 313). To construe this act, we must ascertain the mischief it was intended to remedy. The right of the states under the police power to regulate, restrain, forbid the use, sale, and keeping of

Intoxicating liquors within their own boundaries had been fully established by a long line of authorities. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. 8, 97; *Mugler v. Kansas*, 123 U. S. 659, 8 Sup. Ct. 273; *Crowley v. Christensen*, 137 U. S. 91, 11 Sup. Ct. 13. But the decisions of the same court had declared that sealed packages were not within the police power. Instances were of constant occurrence in which importers would carry into a state, whose laws forbade the sale of intoxicating liquors, sealed packages of convenient size, which were sold in that condition, protected under these decisions. Thus, the laws of the state were evaded and set at naught, and the humane design of the legislation was entirely defeated. Every effort to destroy this evil failed, and finally, in *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, the supreme court declared the law granting immunity to the sealed package. It was promulgated April 28, 1890. In August, 1890, congress met the decision with the Wilson bill, and in effect declared it inoperative for the future. These are the words of the act:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

It will be noted that the act deals only with the liquors transported into a state, and declares them subject to the police power, whether in the original package or not. This is the full extent of its operation. It gives the states no new power. In *re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865. It simply puts in the same character liquors made in or being in the state and imported liquors in sealed packages or otherwise. As it is expressed by Mr. Justice Miller in his work on the Constitution (page 676), after this act took effect (the Wilson act), "such liquors introduced into the state from another state, whether in original package or otherwise, became subject to the operation of its then existing laws, enacted in exercise of its police powers." The liquors must first be introduced into the state before these laws can operate. It is upon their arrival within the state—that is, when the transit terminates (In *re Van Vliet*, 43 Fed. 761)—that the police power can act; and up to and until that time the police power cannot act (In *re Ianford*, 57 Fed. 570).

The prisoners have been arrested for bringing liquors into the state. The undisputed facts are that the goods were shipped at the port of Savannah, Ga., for this port, on the schooner of which they are master and crew, at a stipulated freight for carriage by sea. This was an act of interstate commerce. Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The *Daniel Ball*, 10 Wall. 557. It can make no difference that this was the first voyage of this schooner, and that she may

not have theretofore been engaged in the business of a common carrier. The law of interstate commerce affects every citizen of the United States. Its protection and its penalties weigh equally on all. It is also not disputed that, immediately on reaching the wharf, they were arrested and detained in custody by the city police, and afterwards held under the warrant produced here; that they did not land their cargo or any part of it; and that, when they were arrested, it was afloat. The transportation was not ended. They were actually engaged when arrested in interstate commerce. Their detention by the police was unlawful, and the warrant by which they were incarcerated is based on a provision of law in conflict with the constitution and law of the United States. It is wholly void.

The learned representatives of the attorney general pressed upon the court that it should hold its hand in deference of and in comity with the state court. The advice of the supreme court of the United States in *Cook v. Hart*, 146 U. S. 195, 13 Sup. Ct. 40, meets with the hearty sympathy and approval of this court. But in *Re Frederick*, 149 U. S. 70, 13 Sup. Ct. 793, that high tribunal recognizes that, under special facts and circumstances, it is the duty of this court to act, and not to remand the prisoner to the state courts. These facts occur in this case. The question involved in it affects the commerce of every port in the state. Delay would work irreparable mischief. Let the channels of trade become once diverted, and it may take the life of a generation to restore them. If it be accepted that the master and crew of any vessel arriving at any port in South Carolina may be arrested and imprisoned simply for carrying goods in the course of foreign or interstate commerce, and while engaged in such transportation, and that they would have no protection, no vessel would venture to touch at any of them. The dispensary law has become fixed in the legislation of the state of South Carolina. It is for the interest of all her citizens that it be settled, and the constitutionality of all its parts ascertained, and that speedily. But were this matter to be remanded to the trial justice who issued the warrant, and the cause take its slow course through that tribunal, then on appeal to the circuit court, then to the state court, then to the supreme court of the state, and by writ of error to the supreme court of the United States, years may intervene before a final decision can be reached. The cause can go up from this court direct to the supreme court of the United States. Besides this, the conclusion reached is that this clause of the dispensary act, so far as it has been made to apply to these petitioners, is absolutely void. Following the example of *Caldwell, J.*, in *Re Van Vliet*, 43 Fed. 764, and of the circuit court in *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, the case is retained here.

It is ordered that the prisoners be discharged from custody.

In re CHARGE TO GRAND JURY.

(District Court, N. D. New York. March 19, 1895.)

LACK OF FACILITIES FURNISHED TO THE COURT FOR THE TRANSACTION OF BUSINESS—NEED OF AN OFFICIAL STENOGRAPHER—NEED OF ADDITIONAL BAILIFFS — WANT OF PROVISION FOR FURNISHING MEALS TO JURORS IN CIVIL CASES—FAILURE TO PROVIDE FUNDS FOR TERMS OF COURT.

The following is a portion of a charge delivered to a grand jury at Utica by the district judge (ALFRED C. COXE) March 19, 1895, together with a presentment thereon made by the grand jury, at Utica, March 27, 1895.

COXE, District Judge (charging grand jury). There is another matter to which I desire to call your attention, with the request that, after investigation, you make such presentment upon the subject as you may deem proper. I refer to the facilities, or, rather, the lack of facilities furnished to this court. All patriotic citizens, no matter how they differ upon other subjects, unite in the desire that the courts of our country shall be conducted with dignity and decorum, so as to command the respect and confidence of all. The people of this state have favored every amendment to the constitution intended to increase the efficiency of the courts. It is unnecessary for us to emulate the pomp and ceremony which surround the tribunals of foreign countries, but it is of the utmost importance that our courts, both state and federal, should be provided with the necessary conveniences with which to transact the business confided to their care in a decorous manner and in conformity with modern usages. Especially is this true of the federal courts, which represent the judicial branch of the national government, and are charged not only with the interpretation and construction of the national laws, but often with the maintenance of the national honor. They should be models in all that goes to make up a dignified, efficient and orderly judicial tribunal. Not only are the means and appliances furnished these tribunals inferior in many respects to those of the highest courts of our state, but, I believe, that it can be demonstrated that the circuit and district courts of the United States, charged with the decision of the most vital and far-reaching questions, having to dispose of causes often involving millions of money, have not as good facilities for the transaction of business as some of the police courts of our larger cities.

Let me be more specific. A stenographer is now a necessary adjunct of every well-conducted trial. In this age of superlative progress we are not contented to revert to the antique methods of a quarter of a century ago. Time and money are saved by enlisting the services of those expert writers, who are able to take the evidence as fast as it falls from the lips of the witnesses. A court that adopts the method of writing down the evidence in long hand is regarded as intolerably slow and behind the age, and yet in the United States courts there is no official stenographer. Other courts have felt the impulse of modern progress, but the federal courts in this respect are in the condition of a century ago. When

a stenographer reports a civil cause here he is furnished and paid for by the lawyer for the plaintiff, or defendant, unless they agree to divide the expense between them. The presiding judge has no control over his action. He follows the direction not of the court, but of the parties who employ him. There is no official record. The inconvenience and impropriety, to say nothing of the graver abuses which may occur, and do occur under this system, suggest themselves at once. Not only is it unfair to litigants to compel them to bear this burden, but it is unseemly that one who bears such an important relation to the court should be the paid assistant of the attorneys. It is true that in some of the causes tried here the services of a stenographer are not needed. It may be that you will say that the appointment of an official stenographer is unnecessary, but surely the court should have the authority to employ one in every case where, in the opinion of the judge, the issues involved are of sufficient importance to justify the expense.

Again, a few years ago, in 1888, I believe, the congress of the United States paused long enough from the task of elucidating the momentous questions which confronted it, to pass a bill reducing the number of bailiffs in the federal courts from five to three. After an experience of 12 years upon the bench, I am prepared to assert that it is simply impossible to conduct the business of the United States courts in this district in an orderly and proper manner, with only three bailiffs. A moment's consideration will make this plain. One bailiff is necessary for attendance upon the grand jury, one at the door of the court room, one in the court room to preserve order, one to attend a petit jury when deliberating on their verdict, one should be assigned to the district attorney, and at least two should be detailed to conduct the prisoners to and from the jail. Here are seven whose presence is essential, and, besides this, the services of several more are often very useful. For instance, at a recent term of court four petit juries were deliberating at once. The three bailiffs and the crier were impressed into the service, and the court was for a time left without a single officer in attendance. With work for seven officers, the court is allowed but three. Compare this condition of affairs with the courts of our state. During a recent investigation in this county a sheriff was criticised because, as I remember the accusation, he employed 13 constables at ordinary terms of the circuit court. Several lawyers of prominence and experts in such matters gave testimony, and though some thought that 13 was too large a number, no one, I believe, put the number of necessary officers at less than eight; this in a local court and in a court where few criminals are tried. Here, on the contrary, the time of the district court is largely occupied in the trial of criminals. Strangers from all parts of the United States and a motley assemblage, representing all sorts and conditions of men, gather before its bar. It goes without saying that the maintenance of order in such a tribunal requires the services of a larger number of officers than in a local court, where every one is known

and where civil causes largely predominate. A misunderstanding between the judges of the court of general sessions in the city of New York caused an investigation a few weeks ago in which it appeared that 40 officers are constantly assigned to duty in the criminal courts, 10 being in attendance upon each branch of the court. The judges, though differing upon other matters, all agreed that this number was insufficient. Since the number of bailiffs in the federal courts has been reduced to three we have often been in a lamentable condition. The court has frequently been entirely without officers, all of them being detailed for necessary outside duty. Preservation of order has been at times almost impossible. In trials of public interest the presiding judge has frequently seen men standing upon the seats and window sills and conducting themselves more as if they were in a theater than in a court of justice. The judge has been powerless to prevent these unseemly exhibitions. Several prisoners have escaped for lack of sufficient officers to guard them. At a recent term of the court one of the prisoners left the prisoners' box, came up upon the platform behind the bench and commenced a conversation with the judge during the trial of a cause. There was no officer in the court room to see the impropriety, not to say indecency, of such conduct and prevent it. It seems to me intolerable that the court should be crippled thus in the discharge of its duty in order that the government may save the two dollars per day which would be paid to a few extra bailiffs. This is not economy, it is parsimony.

Again, there is no provision made for furnishing meals to jurors in civil cases. The time has gone by when jurors can be starved into a verdict. Common decency and common humanity require that while they are endeavoring to reach a conclusion they should be furnished at least with the ordinary necessities of life, and yet in civil cases in the United States circuit court their meals must either be paid for by the parties to the litigation or the jury must be discharged after a few hours deliberation. The expense, delay and trouble of a second trial is thus made necessary. The short-sighted character of this policy is made apparent when it is remembered that the cost of one second trial may exceed the cost of supplying meals to jurors for years to come.

I might go on indefinitely enumerating instances of the penurious policy pursued towards the federal courts. Often they are entirely without means. Some of you remember that only last year congress wholly failed to provide money for this term and the court was adjourned without date. From the inconveniences of that adjournment the court has hardly yet recovered. In New York City where the courts are practically in session during the entire year the pay of the court officers is several months in arrears. I am informed that some of them, being unable to pay their rent, have been turned into the streets by their landlords. In this district the marshal has several times been compelled to borrow money in order to hold a term of court, or has given the jurors and witnesses vouchers which they have negotiated at local banks at

a ruinous rate of discount. The district attorney, the marshal and the clerks will go before your body if requested to do so and doubtless will inform you upon these and other matters which may occur to them. I have been hoping for years that a congress would some day assemble which would deal with the federal courts, if not in a liberal, at least not in a niggardly and hostile spirit, but as matters in this regard have constantly been growing worse instead of better I have concluded, after consultation with the other officers of the court, to call your attention to what we all consider serious obstacles in the path of efficient work. It is possible that this treatment grows out of indifference, or lack of information on the part of those in the legislative and executive branches of the government. Such treatment is surely unbecoming a great and powerful nation and it is possible that your presentment may call attention to the subject and result in a more liberal policy in the future.

In accordance with the above charge, the grand jury made the following presentment to the district court at Utica, March 27, 1895:

We have examined and heard the statements of the United States attorney, his assistants having charge of the presentation of cases before us, the United States marshals and the clerks of the circuit and district courts respectively, and as the result of our inquiry make this presentment:

The investigation developed a most surprising condition of affairs. We doubt if one in a thousand of our fellow citizens has any knowledge of the fact that while terms of United States courts are required by statute to be held at stated times and places, a failure of congress to make necessary appropriations or the neglect of a department at Washington promptly to honor a requisition for money to defray expenses, nullifies the statute by preventing the holding of the court. It seems incredible, nevertheless it is true, that the presiding judge has no power to make any order involving the payment of money to defray any expense connected with the proper conduct of the business of the court, other than pay of jurors and fees of witnesses, without the sanction of the department of justice previously obtained, and that the marshal, the executive officer of the court, is often placed in the position of either disobeying orders requiring the payment of money for some unexpected expense, or taking the alternative of making the payment at personal risk. To-day, almost at the close of the nineteenth century the expenditures of United States courts are controlled and limited by statutes enacted from fifty to one hundred years ago, and by restrictions inserted in appropriation acts passed by the congress of the United States which are a disgrace to our nation. As grand jurors sworn and charged well and truly to inquire of such matters and things as shall be given us in charge we deem it our duty to call attention to some of the most glaring deficiencies brought to our notice.

United States courts are the only courts of record sitting in this state not provided with stenographers. It is unnecessary to make argument concerning the necessity of an official stenographer in a court of justice in this age of progress and pressure. We find it to be a fact, notwithstanding, that in the trial of criminal cases, a stenographer, if employed, must be paid either by the defendant or the United States attorney at individual expense; in civil cases the stenographer is not under control of the court, his minutes are unofficial, and if objected to, the end of his employment is defeated. In many cases the failure to provide a stenographer works injustice to the litigants; in all cases the economy which lops off this expenditure defeats its object and becomes an extravagance by protracting trials, thereby adding largely to the expense for witnesses and jurors. Without entering into details we feel justified in finding, from the evidence before us, that the salary of a competent stenographer for an entire year would be saved by the decrease in other expenses at a single important term of court.

In 1888, by an enactment in the legislative and judicial appropriation bill, the number of attendants at all courts of the United States except those held in the Southern district of New York, was fixed at three bailiffs and one crier; should additional attendants be required they can be secured only by application made by the marshal, before the sitting of the court, to the department of justice for authority to employ a specified number of laborers. A presentment, complete in itself, could be made upon the annoyance and difficulty caused the court, and the absolute injury to and delay of justice caused by this penny wise pound foolish legislation. We find that during the term of court held at Albany in 1894, the court was left absolutely without attendants, no less than four petit juries being out of court deliberating upon causes tried and submitted; the fourth being in charge of the crier of the court; that during the session of the court a prisoner left the prisoner's box, mounted the bench and addressed the presiding judge, there being but one bailiff available for and on duty in the court room and he too far away to prevent the unseemly performance. At the present term we have observed prisoners going to and from jail to court inadequately guarded. We have seen the proceedings of the court delayed for lack of sufficient officers to bring prisoners to court. For the last five days we have seen from four to thirteen prisoners in court at the same time, the room crowded to overflowing with attorneys, litigants, witnesses and spectators and a meager force of two or three bailiffs to preserve order and guard the prisoners. Escapes of prisoners in this district have occurred more than once for want of sufficient guards, and this week we received an object lesson when called on to consider the case of a prisoner under sentence, who made a most desperate and well-nigh successful attempt to rescue himself and five other prisoners who were proceeding from court to jail under the guard of two bailiffs. That the attempt failed was due only to the opportune presence of the sheriff of this county and one of his deputies. If the people are to respect the courts, their proceedings must be conducted with such order and dignity as will cultivate and inspire that respect. During the past few years the power of the courts of the United States has been repeatedly invoked to repress riots, demonstrations and unlawful interference with property; in many instances respect for the mandate has been the only deterrent force required. If that respect is to continue, the courts must have at least the authority to enforce order within their own precincts. Their sessions are public, attended by all the people, and we submit that nothing is more calculated to destroy respect and inculcate contempt than the spectacle of a court powerless to enforce order, practically at the mercy of the spectators; and all to save the United States the salary of two dollars a day for the number of bailiffs necessary to assure order and decency in the conduct of judicial proceedings. We believe that our fellow citizens have no sympathy with or support for legislation which requires pretended economies of this character.

In criminal cases the court decides that the interests of justice will be promoted by holding the petit jury together from the time it is impaneled until a verdict is rendered, or an agreement becomes impossible. Here, again, we find the court hampered by the statute limiting the number of attendants, and by regulations requiring applications to be made in advance to the department of justice, for authority to incur the expense for board of jurors and officials in charge. Such statutes and regulations serve no good purpose: they embarrass and oftentimes defeat the proper administration of justice. In all cases where the United States is not a party, we were astounded to learn that the barbarous and inhuman custom of past centuries still prevails in United States courts, and that a jury in such cases, after retiring to deliberate upon their verdict, literally and truly can have neither meat nor drink, water excepted, at the expense of the United States. If not fed at the cost of the litigants, which can be done only by stipulation, jurors must feed themselves or starve. We find that the cost to the United States of one mistrial, which occurred in the circuit court of this district because the judge humanely declined to allow the jury to deliberate until they agreed or starved, would have more than paid for all meals likely to be furnished jurors for at least two years.

That the court cannot transact business unless provided with a reasonable amount of stationery is self-evident. We find that to procure such stationery,

the marshal must make application to the department of justice in advance for authority to make the purchase. His application for such authority for this term, made in due season, has not yet been granted, although court has been in session over a week, and had he not purchased the necessary articles without authority and at his own risk, the court would have convened without any stationery to use in the transaction of its business. Comment on regulations of this character is useless. They are unnecessary and indefensible, still they are but part and parcel of the system unsuitable to the demands of the age, and which ingrafted from time to time with the results of hasty, undigested legislation, seems to have been devised and maintained for no other purpose than to annoy and embarrass litigants and place every possible obstacle in the way of the proper, orderly and speedy administration of justice.

The evils specified could easily be remedied by the passage by congress of general laws giving the courts of the country control over expenditure necessary to provide proper facilities for the transaction of their business. To say that the courts of our country cannot be trusted with the administration of such a fund would be an insult to a judiciary that annually and finally disposes of questions involving sums in comparison with which the expenses of the maintenance of the courts are but a trifle.

Without entering into details, we recommend the passage of such laws as will provide for the courts:

First—A permanent appropriation to be drawn upon by the marshal of each district, upon the approval of the circuit or district judge, his expenditures to be audited and allowed by the court, such audit and allowance to be final.

Second—The repeal of the law fixing the number of bailiffs and providing that the number be fixed from time to time by the court upon application of the marshal.

Third—The issue under the authority and at the expense of the United States to each marshal of a sufficient number of badges, or other designation of office, to be worn by the bailiffs while on duty. At present it is impossible to distinguish a bailiff from a spectator or witness.

Fourth—The employment of an official stenographer for each court. Such stenographer to be appointed by the presiding judge.

Fifth—The enactment of such other laws as may be necessary to place the courts of the United States upon an equal footing with the supreme court of this state regarding the facilities for the transaction of business by the court and the judges thereof sitting, either in chambers or at places other than their residence.

After the presentation had been made, Judge COXE, addressing the jury, said:

"I wish to thank you, gentlemen, for the thorough investigation you have made of the matters to which your attention was called by me at the opening of the court. The full, clear and convincing presentment which you have made on this subject will, I am sure, excite wide interest not only in this district but throughout the United States. I feel confident that it will do much to bring about reforms so much needed.

"You are discharged with the thanks of the court for the able and efficient manner in which you have discharged your duty."

SALTONSTALL, Collector, v. BIRTWELL.

(Circuit Court of Appeals, First Circuit. March 21, 1895.)

No. 117.

1. CUSTOMS DUTIES—TIME OF PROTEST—PAYMENT ON GROSS ESTIMATE.

Where gross estimates of duties were made prior to liquidation in accordance with Rev. St. § 2869, and were paid by the importer in order to obtain possession of the goods, no protest was then required, but it was sufficient if the protest was filed within 10 days after the date of the final liquidation. Rev. St. § 2931, and § 3011 as amended, construed. 63 Fed. 1004, affirmed.

2. SAME—"PAYMENT UNDER PROTEST" DEFINED.

The words "payment under protest," as used in the first part of Rev. St. (2d Ed.) § 3011, as amended, must, by reason of the reference, in the latter part, to section 2931, which defines a protest, be construed to include a payment in connection with a protest; that is, a payment preceded by, accompanied with, or followed by a protest, whichever is permitted by said section 2931.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Joseph Birtwell against Leverett Saltonstall, collector of the port of Boston, to recover duties paid under protest. There were two trials of the case, the first resulting in a judgment for plaintiff (39 Fed. 383), which was reversed by the supreme court on a writ of error (14 Sup. Ct. 169, 150 U. S. 417). After a second trial the circuit court again rendered judgment for plaintiff. 63 Fed. 1004. Defendant then brought error to this court.

Sherman Hoar, U. S. Atty., and William G. Thompson, Asst. U. S. Atty., for plaintiff in error.

Josiah P. Tucker (William Odlin, on the brief), for defendant in error.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. The importations in this case were two invoices of iron, arriving in February and March, 1888. The collector, on the respective entries of the goods, made gross estimates of the duties, as provided in section 2869 of the Revised Statutes. These gross estimates were paid in accordance with the classification and rate of duty then assessed by the collector, and which classification and rate of duty were the same determined on when the duties were finally liquidated. The question which the importer seeks to raise is whether the classification and rate were sufficiently favorable to him.

The record finds that, at the times the gross estimates were made, the importer paid the amounts thereof for the purpose of obtaining possession of the merchandise. After the gross estimates had been paid and the merchandise delivered to him the duties on one invoice were liquidated, on the 4th day of April, 1888, and on the same date a protest was filed. On the 10th of April, the duties

on the other invoice were liquidated, and on the same day a protest touching it was filed. No protest was filed at or before the payments of the gross estimates, or until the respective days above named; and only one question arises on this writ of error. The importer claims that the proceedings were governed by section 2931 of the Revised Statutes, and that that section, in connection with other provisions of statute, gave a right of action, provided protests or notices of dissatisfaction were filed, in the form required by it, within 10 days after the respective liquidations, and without any protests at or before the payments according to the gross estimates. The United States claim that section 2931 merely provides additional regulations, and that the importer, to maintain his suit, must show, not only that he complied with it, but also that he complied with the provisions of section 3011 of the Revised Statutes, to the extent of having made payment under protest, which payment under protest the United States define as requiring for this case protests at or before the times the payments were made according to the gross estimates. For the purpose of determining this question, it is not necessary that we should specially examine the nature of a protest at common law, or the legislation prior to the act of 1864, as the nature of the early legislation and the common-law character and use of protests are settled by decisions and rules too familiar to require a lengthy review.

The act approved March 2, 1799 (chapter 22), contained, in section 49 (1 Stat. 664), the following:

"And the collector jointly with the naval officer, or alone where there is none, shall, according to the best of his or their judgment or information, make a gross estimate of the amount of the duties on the goods, wares or merchandise, to which the entry of any owner or consignee, his or her factor or agent, shall relate, which estimate shall be endorsed upon such entry, and signed by the officer or officers making the same. And the amount of said estimated duties having been first paid, or secured to be paid, pursuant to the provisions of this act, the said collector shall, together with the naval officer, where there is one, or alone where there is none, grant a permit to land the goods, wares and merchandise, whereof entry shall have been so made, and then, and not before, it shall be lawful to land the said goods."

This is found re-enacted in section 2869 of the Revised Statutes, already referred to, in all substantial respects the same as originally enacted.

The next act to which we need to refer is that of February 26, 1845, c. 22 (5 Stat. 727), as follows:

"That nothing contained in the second section of the act entitled 'An act making appropriations for the civil and diplomatic expenses of government for the year one thousand eight hundred and thirty-nine,' approved on the third day of March, one thousand eight hundred and thirty-nine, shall take away, or be construed to take away, or impair, the right of any person or persons who have paid or shall hereafter pay money as and for duties under protest to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him, or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the secretary

of the treasury to refund any duties paid under protest. Nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

It will be seen that this act was not of an affirmative character; that is to say, that it did not itself give a right of action, but simply removed the difficulty arising under the previous statute, with reference to the recovery of duties paid under protest,—a difficulty which was declared by the supreme court in *Cary v. Curtis*, 3 How. 236. The previous act referred to, that of March 3, 1839, c. 82, § 2 (5 Stat. 348), is now section 3010 of the Revised Statutes, requiring the collector to forthwith place to the credit of the treasury moneys received by him for unascertained duties, as well as for duties paid under protest. Notwithstanding the apparently explicit language of this last-named statute, Chief Justice Taney ruled in *Brune v. Marriott*, Taney, 132, Fed. Cas. No. 2,052, with reference to importations made in 1848, that the payment of the gross estimate, made in accordance with the act of 1799, already cited, was rather in the nature of a pledge or deposit than a payment, so that protest might legally be made when the duties were finally determined and the amount assessed by the collector. This case came before the supreme court in 9 How. 619, where the judgment below was affirmed, the court saying (page 636):

"But where the duties had not been closed up in any cases, when the written protest in April was filed, though the preliminary payment of the estimated duties had taken place, the court justly considered the protest valid, because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer."

There was an act passed in 1857 (March 3, c. 98, § 5; 11 Stat. 195) framed somewhat as the act of 1864, which we will hereafter refer to, but limited to the determination of the question whether goods were free or dutiable, as was settled in *Barney v. Watson*, 92 U. S. 449. This act did not come before the supreme court with reference to any question except that decided in *Barney v. Watson*, and was not re-enacted in the Revised Statutes, the commissioners' report stating that section 2931 superseded it. Therefore, we need not give it further attention.

The next act to which we need refer was that of June 30, 1864, c. 171, § 14 (13 Stat. 214), re-enacted in section 2931 of the Revised Statutes without change, as follows:

"On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatis-

fied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the secretary of the treasury. The decision of the secretary on such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the secretary of the treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted until the decision of the secretary of the treasury shall have been first had on such appeal, unless the decision of the secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

It is claimed by the United States that this act, like the provisions of section 2931, as the latter are interpreted by the United States, gave no right of action, but provided additional regulations, and was merely a limitation of whatever right of action existed previously. There is very much in its frame and history to lead to a different construction of it, and to the understanding that congress intended by it to form an entirely new system touching the topic which it involved, superseding prior legislation. If this were so, the mere fact that a right of action was not given in terms would not necessarily exclude such right, because it could fairly be implied, although not expressly stated, by what is found in the enactment. The apparent purposes of the act were to give ample opportunity for all parties concerned to ascertain and state carefully their rights, and yet within a time sufficiently seasonable to inform the United States and its officers, and thus to relieve from the inconvenience, and the liability to confusion, error, and misunderstanding, inherent in the old system, by which protests must be filed before the merchant could obtain his merchandise, no matter how urgent his necessities nor how brief the time they allowed him. The customary rules of interpretation, applied to this statute in its historical position, would naturally lead to the construction which the importer puts on it. The expressions of the supreme court in *Barney v. Watson*, 92 U. S. 449, 452, 453, *Arnson v. Murphy*, 109 U. S. 238, 241, 3 Sup. Ct. 184, and *U. S. v. Schlesinger*, 120 U. S. 109, 114, 7 Sup. Ct. 442, though perhaps not necessary to the conclusions in those cases, strengthen this view. The mere facts that the act of 1845 was not expressly repealed, and that the next section in the act of 1864 uses the word "protest," would have little weight to the contrary. The notice of dissatisfaction provided in the act of 1864, although given after the duties are paid and the merchandise received, would be in law a protest, as there is nothing in the word itself which always limits it to a proceeding taken before or at the time of the act to which it relates. However, we need not determine the effect of the act of 1864 standing alone, because the question was, we think, settled by subsequent legislation.

It is a common expression that the act of 1845 was reproduced in section 3011 of the Revised Statutes. This is a mistake, as appears

by the commissioners' report, and as results from what is said in *Barney v. Watson* and *Arnson v. Murphy*, already cited. Section 3011, as enacted, closed as follows:

"But no recovery shall be allowed in such an action, unless a protest in writing, and signed by the claimant or his agent, was made and delivered at or before payment, setting forth distinctly and specifically, the grounds of objection to the amount paid."

Thus, the Revised Statutes brought together section 2931 and section 3011,—an apparently incongruous result. Congress so determined, because by the act of February 27, 1877, c. 69 (19 Stat. 247), which was expressly passed "for the purpose of correcting errors and supplying omissions in the Revised Statutes," "so as to make the same truly express the laws," section 3011 was amended, so that the closing paragraph now reads as follows:

"But no recovery shall be allowed in such an action unless a protest and appeal shall have been taken as prescribed in section 2931."

These references give all the legislation bearing on the proposition before us; and by admission of the counsel of each party, as well as from our own investigation, the question raised on this writ of error remains to be determined for the first time. Various expressions of the supreme court and various inferences from its decisions may, perhaps, have a tendency one way or the other; but in none of them can it be said that that court had the precise question now before us under consideration. The expression found in *U. S. v. Schlesinger*, 120 U. S. 109, on page 113, 7 Sup. Ct. 442, may be thought to lead to the view that no payment of duties is within the provisions of section 2931, except one made at or after protest. But the question before us was not under consideration by the supreme court at that time, and this expression was incidental.

It is conceded that, as the law thus stood, giving full effect to section 2931, and section 3011 as amended, an importer could not recover unless the payment made by him was in order to obtain possession of his merchandise. The case finds that the payments in this case were thus made. It is also claimed by the United States, as already said, that the "payment under protest," described in section 3011, means a protest made at such a time as was required by the common law in order to maintain an action for duties wrongfully assessed; in other words, a protest made at or before the time of payment. The importer says that, even if this be true, the duties in this case were not paid until they were liquidated. He relies on *Brune v. Marriott*, Taney, 132, Fed. Cas. No. 2,052, and the same case in 9 How. 619, to which we have already referred. The syllabus prefixed to the case by Mr. Howard, the supreme court reporter, contains the following expression:

"But if the protest be made in a single case with a design to include subsequent cases, and the money remains in the hands of the collector without being paid into the treasury, and it was so understood by all parties, such a protest will entitle the importer to recover the money from the collector."

The revised syllabus found in 18 Curt. Dec. 283, covers the point under discussion, but omits the facts specially stated by Mr. Howard. Judge Curtis, however, in *Warren v. Peaslee*, 2 Curt. 231, 236, Fed. Cas. No. 17,198, about five years after the decision of *Brune v. Marriott* on appeal, considers that case; and, although he speaks of it with reference to a point other than that which arises here, he says, generally:

"The circumstances of that case were very peculiar, and they are relied on by the court as the reasons for the decision, at which they manifestly felt great difficulty and hesitation in arriving."

We refer, also, to the views of Judge Nelson, expressed in 1859, in *Crocker v. Redfield*, 4 Blatchf. 378, Fed. Cas. No. 3,400, where, with reference to a payment under section 3010, he says that "the money deposited was to be applied by the collector to the duties, and it cannot be said after this that it was paid compulsorily in order to get possession of the goods." He closes that a protest after the duties were ascertained came too late. As Judge Nelson was on the bench of the supreme court when *Brune v. Marriott* was determined, he must have understood the effect of that decision. *Moke v. Barney*, 5 Blatchf. 274, Fed. Cas. No. 9,698, states the practice at the custom house in New York as defendant in error claims the law to be; but the case itself is not in point, and the expressions of Judge Nelson on pages 277 and 278, 5 Blatchf., and Fed. Cas. No. 9,698, are in harmony with *Crocker v. Redfield*.

The act of 1845 had no reference to any moneys except those paid "as and for duties under protest." Notwithstanding other changes from the act of 1845, found in section 3011 of the Revised Statutes, this expression was saved in the words there existing, "payment under protest" "of any money as duties." Both statutes also contain the limitation that the payment must be made "in order to obtain possession of the merchandise imported." In *Porter v. Beard*, 124 U. S. 429, 8 Sup. Ct. 554, it is directly held that, under the Revised Statutes, the importer is limited to the recovery of moneys paid "in order to obtain possession of the merchandise"; and *U. S. v. Schlesinger*, 120 U. S. 109, 113, 7 Sup. Ct. 442, is of the same effect. In the case at bar the payments to obtain possession of the merchandise were made at the times of the gross estimates, and if, as claimed by the importer, the payments of the duties were not made until they were liquidated, then there has been no payment by the importer "of any money as duties" "in order to obtain possession of the merchandise imported." The importer, by his proposition on this point, puts himself and the court to the dilemma of maintaining and holding that the payment of his money "as duties" was after he had obtained possession of his merchandise; so that it would be apparently impossible for him to meet the first requirement of the law. Notwithstanding the reliance placed by the importer on *Brune v. Marriott*, which, if applied to the case at bar, might result fatally to him, we think our safe course is to adhere to the plain letter of the statute, and determine that the moneys paid in at the times of the gross estimates were duties, either unascertained or paid under protest, as nominated in section

2869 of the Revised Statutes, and that the duties to which this writ of error relates were paid at those times, and not when the final liquidations were made.

Having disposed of this question, the case comes, we think, directly to a conclusion in harmony with that of the circuit court, although, in view of the plain error, afterwards admitted by congress, in combining sections 2931 and 3011 in the Revised Statutes, and of the peculiar method by which this error was in part corrected in 1877, it is not easy to reconcile, if taken in their primary and natural sense, the words "payment under protest," in the first part of section 3011. It must be admitted that these words, although having relation in section 3011 to a merely statutory regulation, are presumptively to find their interpretation in the common law, and thus they primarily and naturally intend, in this and like connection, where a protest lays the basis of an action for money paid, a protest made before or at the time of the act protested against. Yet, as section 3011 originally stood, these words, "payment under protest," were not left to be ascertained from the common law, but they were expressly defined in the latter part of the same section by the words "unless a protest in writing, and signed by the claimant or his agent, was made and delivered at or before the payment." Therefore, we find in this section a precise, legislative definition of the words "payment under protest." By the act of 1877 this legislative definition was taken out, and another substituted; that is to say, a protest or notice made and given as prescribed in section 2931. The following expressions of Chief Justice Marshall in *Alexander v. Alexandria*, 5 Cranch, 1, 17, seems very apt in this connection:

"If, in a subsequent clause of the same act, provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

Of course, congress might have provided, as apparently it did by the Revised Statutes as they stood before the amendment of 1877, that not only should a protest be made within 10 days after liquidation, but that one should also be made at or before payment. In other words, it might have required, as claimed by the United States, and, perhaps, before the amendment of 1877 did require, a double limitation as to time. But, if congress intended to retain the law in this form, it is to be presumed that it would not have stricken out the clear words "at or before the payment," although it left standing the expression "payment under protest." By electing to strike out, as between these two, the one that was unmistakable, it declared its intention as certainly, though not as clearly, as though it had stricken them both out. As the section now stands, "payment under protest" must be construed to mean other than its natural and primary sense, and to include a payment in connection with a protest; that is, a payment preceded by, accompanied with, or followed by, a protest, whichever is permitted by section

2931. This is one of the instances where a purely literal construction of one part of an enactment must yield to the undoubted intention of the legislature, expressed in another part. Examples supporting a construction of statutes with this result are not infrequent. One of them is found in *Davies v. Miller*, 130 U. S. 284, 9 Sup. Ct. 560, touching this very section 2931, by which the words "within ten days" are diverted from their natural and primary meaning, so as to include a period anterior to the "ten days." As stated in substance by the learned judge of the circuit court, congress, at the close of section 3011, before it was amended, and again when it was amended, defined the nature of the protest named in the first part of the same section, as well as the circumstances under which it was to be made. Originally, it was required to be made at or before the time of payment, and now within the time provided in section 2931, whatever it may be.

We have referred to the fact that the United States question the construction of the act of 1864, to the extent that they claim it gave no new right of action, and that after it was passed, and before the enactment of the Revised Statutes, a protest at or before the time of payment was necessary. While we have already said that we lean against this construction, we concede that, as it stood originally, there was doubt on these propositions. The construction of it, as it stood in the Revised Statutes as originally enacted, we need not consider. But the act of 1877, by striking out the expression found in the act of 1845, and also in section 3011 of the Revised Statutes, "at or before the payment," has presumably declared that the notice or protest, as thereafter required by section 2931, may be given at any time prior to the expiration of 10 days from liquidation, whether before or after the payment of duties. As already said, this answers all the purposes of the United States, and gives its executive officers information sufficiently seasonable for their action.

In this connection, we call attention to the fact that the words "payment under protest," appearing in the early part of section 3011, would permit an oral protest, as well as a written one. To prevent a reversal of the declared policy of the United States, in existence continuously in every direction since 1845, adverse to parol protests, the definition of this expression which was made in the last part of the same section became necessary. But, on the view of the United States of the law as it now stands, the importer has his option to file at or before payment of duties a single, consolidated written protest or notice of dissatisfaction (*Davies v. Miller*, 130 U. S. 284, 9 Sup. Ct. 560, already referred to) if within the 10-days period; or, following the literal construction insisted on by the United States, he may make an oral protest at or prior to the payment of duties, to be followed by a written notice of dissatisfaction later, within the 10-days period. In other words, the position of the United States on the point in controversy leaves standing, and of some effect, a provision which includes every form of protest known to the common law, with the rest an oral one. Experience has shown such a protest of no value, and that it

leads to misunderstandings and errors, and congress has so impliedly declared. Our views already expressed are therefore strongly re-enforced by the violent presumption that it cannot be supposed congress intended to revive, for any purpose, the oral protest, abolished so many years ago, and so constantly provided against by legislation.

Whatever else might be said about the evidence of Miss Kenrick which was excepted to, our conclusions render it immaterial and harmless.

The judgment of the circuit court is affirmed.

CHICAGO DOLLAR DIRECTORY CO. et al. v. CHICAGO DIRECTORY CO.

(Circuit Court of Appeals, Seventh Circuit. March 20, 1895.)

No. 210.

COPYRIGHT—DIRECTORY—INFRINGEMENT—EVIDENCE—INJUNCTION.

Defendants compiled and printed, and were about to publish, a business directory of the city of Chicago, containing about 60,000 names, alphabetically arranged, under an alphabetical classification of businesses, containing about 800 pages. On a preliminary hearing, in a suit for infringement of complainant's copyrights in annual directories of the city of Chicago, it appeared that 67 errors in the annual business directory of complainant were followed in defendants' directory. Defendants' canvassers testified that they made a personal canvass, and obtained the names from original sources. *Held*, that an order granting an injunction against the whole book should not be disturbed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a bill in equity brought by the Chicago Directory Company, a corporation of the state of Illinois, against the Chicago Dollar Directory Company, the Interstate Directory Company, Emory A. Hartsig, J. E. Scanlan, W. E. Bishop, James Ditty, and others, for infringement of copyright. The bill alleged that for the last 20 years complainant and its predecessors had compiled and published an annual general directory of the city of Chicago, and for more than 10 years past an annual business directory of the city of Chicago. The bill alleged that the general directory and the business directory for the year 1893, which were known as "The Lakeside Annual Directory" and "The Lakeside Annual Business Directory," respectively, were duly copyrighted. It also alleged that the business directory embraced an alphabetical list of business houses and persons in the city of Chicago, occupying 562 pages, and also a classified list of the various businesses and callings, alphabetically arranged, with the names of the persons thereunder, occupying 655 pages, and also miscellaneous information, covering about 218 pages. The bill further alleged that Emory Hartsig, J. E. Scanlan, and W. E. Bishop were the managing officers of the Interstate Directory Company, and that said persons, with Ditty and other defendants named, were managers, agents, or employés of the Dollar Directory Company, which latter corporation was doing business under various names; that defendants, in furtherance of a scheme to injure and defraud complainant and pirate and infringe the copyrights of its said directories, had compiled a business directory of the city of Chicago planned similar to that of complainant, 600 pages of which had already been printed; that pages 101-646 were made up substantially by copying from complainant's business directory, and that in such copying defendants had copied numerous errors and mistakes which were contained in complainant's business directory, 14 of which errors were set out; that defendants had not compiled their directory from

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original sources of information, but had made it up substantially by copying from complainant's business directory and general city directory for the year 1893, with a few colorable changes, made apparently for the sole purpose of evading the law. The bill prayed an injunction, and an account of profits, and general relief. The bill was sworn to and filed May 26, 1894, and on the same day served upon defendants, with notice of motion for an injunction.

On June 1, 1894, defendants filed a demurrer to the bill, on the ground that the copyrights were not duly alleged, and that it was nowhere shown that there was a similarity between the directories in question. On June 5, 1894, defendants filed an answer, in which they specifically denied all the material allegations in the bill. They alleged that there were numerous errors and mistakes in complainant's directory, which to a very large extent had been corrected in the directory proposed to be published by defendants. They denied that they had not made up their business directory from original sources of information, and they denied that they had made up the same "substantially, or otherwise, by simply idiotically, or otherwise, copying" complainant's business directory or general directory of 1893. Further answering, defendants alleged that Hartsig, about the month of March, 1892, undertook to prepare a business directory of the city of Chicago, and in pursuit of such enterprise employed agents, from three to ten, at different times, from such date up to and until October 1, 1893, to canvass said city for the purpose of getting the names and addresses of the business people of the city; that about the latter date said Hartsig, having obtained through said agents and otherwise a very considerable number of names and addresses, but not a complete list, sold and transferred the same to defendants Bishop and Ditty, together with the enterprise and good will, and that thereupon said Bishop and Ditty undertook and further prosecuted the incomplete work of canvassing all names and addresses of business people in said city in districts and places not covered by Hartsig, and subsequently organized the Chicago Dollar Directory Company, and incorporated the same, and under such incorporation have further prosecuted the work for the purpose of completing the list, employing for that purpose since October 1, 1893, and up to about April 1, 1894, seven or more agents to make a personal canvass, upon whose reports, and those of the agents previously employed by Hartsig, defendants' proposed directory has been compiled; that, in pursuit of their business enterprise, defendants had expended the sum of \$12,000.

Complainant supported its motion for a preliminary injunction by various affidavits, among which was that of Reuben H. Donnelley, manager of complainant company, who swore that James Ditty, who was formerly, and for many years, in the employ of complainant, admitted to deponent, in a conversation on or about January 15, 1894, that defendants' solicitors had been using slips for canvassing for information and advertisements for defendants' directory by cutting and pasting the capital letter lines from the Lakeside City Directory for 1892, but that this had not been done since he assumed the management of the affairs of the Dollar Directory Company. In another affidavit of said Donnelley it was averred that the information for the compilation of complainant's annual directories is obtained from original sources by actual canvass, in the making of which complainant employ from 250 to 300 persons for a space of five or six weeks, and that the compilation of the material so collected occupies several weeks after the completion of the canvass, and employs the labor of about 50 persons. In an affidavit made by John G. Rickard he averred that he had been employed for three years as compiler and canvasser by complainant, except for a period of five weeks, commencing January 8, 1894, when he was employed in compiling on the Dollar Directory, in which work he was furnished by Ditty, the manager, with slips containing the names and addresses and businesses of persons to be compiled for the Dollar Directory; that deponent observed in the handling of said slips, and in compilation thereof, that large numbers of said slips, containing the names of persons commencing with the same letter of the alphabet, were in the handwriting of the same person, while the locations of the persons as given upon the slips were widely separated and remote from each other, and that the same had evidently been copied by one person from a list or directory already compiled, and had not been obtained by a personal canvass; and the deponent believed that the slips used by him in compiling were copied from the alphabetical

list of names in complainant's business directory for 1893, and that deponent and other persons employed by the Dollar Directory Company, in compiling its business directory, under the direction of the said Ditty, used complainant's business directory for 1893 in making corrections of the information contained in said slips, and in deciphering illegible writing, and in determining correct locations, where the slips were imperfect in that respect, and that the compilers made constant use of complainant's business directory, and that the correction of slips was made without any other inquiry or investigation.

Defendants, for answering proofs, filed an affidavit by Emory A. Hartsig, in which deponent alleged that from March, 1892, until October 1, 1893, he employed from three to ten agents to make an original inquiry for the purpose of a business directory, and that on the latter date he transferred to defendants Bishop and Ditty the slips and information obtained by himself and canvassers, and the good will of his enterprise, and that he secured none of said information and reports by copying from complainant's business directory for 1892. Defendant also filed affidavits by Samuel Hartsig, William O. Henry, and Joseph Leckey, who swore that they were employed by Ditty from about October 1, 1893, until April, 1894, in canvassing for names, etc., for defendants' business directory, setting out the territory covered by them. Edward S. Rowley, proof reader with the printers of defendants' directory, swore that he read the entire proof on the directory; that the copy was prepared by pasting individual directory slips upon long sheets of paper in the order in which they were to appear, and that the same was prepared in the handwriting of different persons, as though reported by various agents, and apparently in the manner usually adopted in compiling a directory from original sources through a personal canvass, and that the material did not have the appearance of having been copied from some other directory. An affidavit was also made by James Ditty, who had the management of the preparation of the Dollar Directory, who swore that he had been engaged in the enterprise since September 7, 1893, and in pursuit thereof had constantly employed agents, varying in number from 7 to 18, to make original canvasses, and had compiled the directory entirely from slips made by such agents and those furnished by Emory A. Hartsig, and not by imitating complainant's business directory for 1893; that in compiling defendants' directory he used a copy of the Lakeside Annual Directory for 1893, for the purpose of checking up the information returned to him by his agents, and that in correcting mistakes of his agents by such comparison he inadvertently inserted the names and addresses alleged in the bill of complaint as showing errors followed. Deponent further averred that the copy from which the directory was printed was destroyed and disposed of prior to May 25, 1894, preparatory to removal from defendants' office, in the Adams Express Building, to the Rialto Building, and that deponent is therefore unable to produce the same as evidence in the case.

The motion for a temporary injunction was overruled without prejudice to complainant's right to renew the same, and the cause was referred to E. B. Sherman, Esq., a master in chancery, to take proofs which might be used for a further motion.

On the hearing before the master, complainant put in evidence "Take 417," which it appears was surreptitiously obtained from the possession of defendants' printers for complainant's inspection. This was admitted to be a part of the copy for defendants' directory. There were 22 names on the "take," which were on directory slips pasted on a long strip of paper, all of which appeared in defendant's directory under the head of "Cigar Manufacturers." All of the names but two were in the same handwriting, and one of such two was written by one Mathison, while soliciting advertisements and subscriptions. Rowley, the proof reader, and Burt, the person who held the copy, testified that "Take 417" resembled copy which passed through their hands. The copy holder testified that, while the copy was in various handwritings, four or five or more of the slips in one handwriting would come together. Mathison, a witness called for complainant, testified that he did soliciting for Dollar Directory advertisements, and in such work would hand in the names on regular directory slips; and that about January 1, 1894, he had written between 4,000 and 5,000 names on slips for Hartsig, which he had copied from printed sheets about the size of a directory page, giving the name

of the person, his address and business. He was unable to identify such sheets, though conversant with complainant's directories. Richard testified for complainant that he was engaged five weeks after January 8, 1894, in compiling, with three other men, on defendants' directory; that the slips so compiled were in at least 10 different handwritings, and that he noticed that a number of names beginning with the same letter would run along together in the same handwriting; and that he, with the other compilers, used the Lakeside Business Directory for 1893 in making corrections on the slips and for reference in various ways for information, and that there was no dispatching done save in the building which defendants then occupied; that the work of the compilers was turned over to Ditty, and that he did not see it thereafter, and that the slips so compiled by him appeared to have been copied from the alphabetical portion of the Lakeside Business Directory; that he copied a number of names in "caps" from the Lakeside Business Directory, but that he did not know that any were reprinted in defendants' directory.

Complainant produced witnesses whose testimony tended to show that the copy from which the Dollar Directory had been printed was fraudulently destroyed or concealed to prevent its use as evidence. One witness testified that Ditty had admitted to him, several days before the copy was alleged to have been destroyed, that he understood that complainant was going to get out an injunction restraining defendants from publishing their directory. Ditty swore that the copy had been taken from the vault in his office, and had been torn up, and thrown in the corner of the room, and presumably removed by the janitor in the course of his duty in taking out waste paper, and this was between May 23d and May 25th. The testimony on this subject was quite conflicting. The janitor of the building could not say whether he removed waste paper similar to "Take 417." One of the men who helped defendants to move from the Adams Express Building testified that he carried out a large pile of matter like "Take 417," in several bundles, tied loosely with a string around the center; while another, who loaded the wagon, testified to a very small amount of matter of about that size, but wrapped so that he could not tell what it was. Donnelley testified that a search in the paper warehouse to which all scrap paper from the building was carried revealed a large amount of matter from defendants' office, but nothing similar to "Take 417." Donnelley, in calling at defendants' vacant office, was handed a portion of "Take 1190," which the janitor had picked up. Ditty testified that matter somewhat similar to "Take 417," which had been removed from his office in the Adams Express Building, was copy for a directory of another city for the Interstate Directory Company.

It appeared that there were about 60,000 names in defendants' directory. Ditty testified that he got from 40,000 to 50,000 names from Hartsig, and that he added probably 7,000 or 8,000 names after he took the matter in hand; that he kept no record of the territory covered by his various canvassers. There was no record kept by Hartsig of the particular territory covered by his canvassers. Ditty explained the use made of the Lakeside Annual Directory of 1893, for the purpose of checking, as follows: "There were several names copied from the Lakeside Directory, and I had those things arranged in proper alphabetical order under the headings, and then, as it came to me, of course, I compared them with the slips that I had gotten on an original canvass, and also those that Mr. Hartsig had turned over, and I checked those things up, and when I found any name that was missing I would dispatch for it." Ditty claimed that the errors followed, if any there were, must have been caused by the failure of his dispatchers to properly verify the names so dispatched for. He also testified that the slips turned over to him by Hartsig were in bunches, as though they had just come from the hands of the persons who had obtained the names from a personal canvass; that, owing to the poor condition of the slips secured from original sources, it was frequently necessary to have them copied; that the person whom he employed for pasting the slips for copy did the work very indifferently, and that the papers, when laid together, would stick and become torn, and that many of the slips would have to be copied; and that the "cap" slips, which were cut from complainant's directory, were used for the purpose of soliciting advertisements and subscriptions, and not otherwise. He also testified from memory as to most of the territory claimed

to have been covered by his canvassers. Emory A. Hartsig testified that, in undertaking the original enterprise, he had the city blocked out into large sections, cutting up a Rand-McNally map for that purpose, and that at the time of selling the business to Bishop and Ditty he believed he had canvassed the entire city; and that he was assisted by Scanlan, who was at the present time very ill at his home in Connecticut. Hartsig also testified as to the work done by the canvassers employed by him, and as to about the time and the territory covered by each. Neither Hartsig nor Ditty produced any record or entries showing the territory covered by their various canvassers, or the time for which they worked, or the amounts paid them; and Hartsig testified that no such records were kept or entries made. Hartsig gave the names of nine canvassers who worked for him, and approximately the territory covered by them. He was unable to give the addresses of four of such canvassers. The other canvassers, save Scanlan, who was very ill at his home in Connecticut, testified that they made a personal canvass, specifying approximately the territory covered and the time which they worked, from which it appeared that they spent an average of two and a half months each on such canvass, from November, 1892, to August, 1893. Defendants also produced five of the canvassers who worked under Ditty, who testified that they made a personal canvass, specifying the territory covered. All of the compilers, as well as the persons who pasted the slips for copy and the foreman for the printers, testified that there were from 10 to 20 handwritings on the slips; and three of the compilers, who had been canvassers, testified that during their work of compiling they recognized in the materials slips which they had gathered themselves from original sources. Eight different witnesses testified that they did dispatching for Ditty, some of whom were engaged a month or more on such work. All of defendants' compilers, save Rickard, testified that the errors discovered in compiling were not corrected by the compilers, but that the slips were turned over to Ditty, who dispatched for the names. The agents of several large office buildings, alleged to have been canvassed by defendants, were called on behalf of complainant, and testified as to several occupants who had moved in after complainant's directory of 1893, and before the last canvass made for defendants' directory, whose names were not in the latter directory. There were also names in defendants' directory of persons located at places which the canvassers testified they did not cover, and of persons who deceased before defendants' last canvass was made.

Complainant produced evidence of 67 errors followed, most of which could only have been made by copying from complainant's book. Defendant produced an exhibit showing about 3,600 differences between the two books, consisting in the names and addresses, and in additional names found in defendants' directory that were not found in complainant's directory. It also appeared that, while complainant's directory gave the names of about 650 music teachers, defendants' directory gave only 300. It appeared that the names in the defendants' directory under the head of "Saloons" were obtained directly from the licensed bonds on file in the city hall.

After a hearing, the court, June 23, 1894, decreed that defendants should be enjoined "from in any manner, either directly or indirectly, any further printing of the matter, or any part thereof, contained in the Chicago Dollar Business Directory for 1894, except the names under the head of 'Saloons,' commencing on page 690 and ending on page 738, and from publishing or selling, or exposing to sale or delivery, to patrons or subscribers, or any other person, any of the printed sheets, bound or unbound, or in process of binding, except as aforesaid, constituting said Chicago Dollar Business Directory, or in any other book, directory, or gazetteer."

A motion was made to dissolve the temporary injunction issued in accordance with such decree, in support of which defendants filed an affidavit of Joseph E. Scanlan to the effect that deponent was unable to attend at the taking of the testimony before the master because of sickness, and corroborating the testimony of Hartsig as to the manner in which the original canvass was taken; and in which deponent further averred that the sheets given to Mathison for copying contained names of firms or persons engaged in business in the city of St. Louis, and were not a part of the Chicago directory, but were used for the Interstate Directory Company, for the purpose of checking up information for the St. Louis section of the Interstate Di-

rectory. An affidavit was also filed by Hartsig to the same effect. Affidavits of three of defendants' canvassers were also filed, which were to the effect that deponents remembered having made a personal canvass of 16 of the names set out as showing errors followed, and that in some instances the names as they appeared in defendants' directory were the names that were given to deponents at the time the canvass was made. Defendants also filed an affidavit by one Parks, to the effect that he had had long experience in directory work, and had assisted for four months in the compilation of the Dollar Directory, and that the slips were in the handwriting of 15 or more persons, and that after the same were compiled in alphabetical order the different handwritings were interspersed through the alphabet, and that they did not show from their appearance or arrangement that they had been copied from some other directory, but that after they had been compiled they presented the appearance and arrangement that directory slips would naturally present which had been gathered from original sources of information by a personal canvass among the business houses of the city; that after May 4, 1894, deponent did not see either Bishop or Ditty, or notify them as to his location, until August 13th, and that from June 2d until August 6th deponent was out of the state. Defendants also filed an affidavit by De Lisle, one of their compilers, to the effect that he had had a conversation with Rickard since the hearing before the master, in which Rickard admitted that he testified falsely. In answer to such proof complainant filed the affidavit of Rickard, in which he denied the conversation sworn to by De Lisle.

After hearing, the court, September 19, 1894, denied the motion, and defendants took this appeal, assigning as error the action of the court: (1) In deciding that the complainant had submitted sufficient evidence of the validity of the copyright of the book sued on, in view of the fact that no certificate of the librarian of congress or other satisfactory evidence was offered by complainant to show that complainant had duly complied with the copyright law in the premises. (2) In continuing the preliminary injunction notwithstanding the fact that it appeared from the evidence that defendants had, through agents, made a general canvass of the city of Chicago, and secured from the original sources of information the matter from which the alleged infringing book was published. (3) In deciding that the fact that certain errors which were in the book sued on also appeared in defendants' book was proof that the latter had been copied from the former, and that, therefore, defendants' book was an infringement of complainant's copyright. (4) In deciding that the testimony of Herman Mathison that he had copied certain names from printed sheets upon directory slips for Emory A. Hartsig, one of the defendants, was evidence that they were names copied from complainant's book sued on, and were used by defendants in printing their alleged infringing book. (5) In continuing the preliminary injunction, notwithstanding the fact that it appeared from the evidence that the copy or manuscript from which the alleged infringing book of defendants was printed was compiled from regular directory slips gathered by defendants and their agents from the original sources of information. (6) In continuing the preliminary injunction, in view of the fact that it appeared from the evidence that the damage to defendants, if the same were continued, would be irreparable, and would involve the almost total loss of \$12,000 to them, while the evidence did not show that complainant would have been damaged at all if the preliminary injunction had not been continued. (7) In continuing the preliminary injunction, because the bill of complaint nowhere states or shows that the complainant would suffer or sustain any damage in consequence of the alleged infringement, nor do the evidence, exhibits, and affidavits prove, or tend to prove, that the complainant would suffer any damage by reason of or in consequence of the alleged infringement of his copyright. (8) In continuing the preliminary injunction, because the bill of complaint in this case does not make out or state a sufficient cause of action upon which an injunction pendente lite might issue. (9) In deciding that Exhibit A of complainant was an infringement of complainant's alleged copyright of its Exhibit B. (10) In deciding that the fact that defendants used the book sued on, in checking up information for insertion in the alleged infringing book, constituted an infringement of complainant's alleged copyright. (11) In deciding that the evidence showed that any part of the al-

leged infringing book was prepared from matter copied from the book sued on. (12) In continuing the preliminary injunction upon the finding that the book sued on had been used by defendants to some extent in preparing and printing the alleged infringing book, and that some of the latter had been copied from the former. (13) In not excepting from said preliminary injunction all of the matter in the alleged infringing book of defendants that the court found was not copied from the book of complainant sued on, and was not infringing matter. (14) In not deciding that witness Rickard for complainant stood impeached. (15) In deciding that the evidence submitted by complainant regarding alleged errors that appear coincident in Exhibits A and B was competent. (16) In continuing said injunction, because the continuing of the same was contrary to the law and evidence in the case.

A motion was made to dismiss the appeal, the decision of which, with the proceedings relating to the same, will be found reported in 65 Fed. 463.

E. Banning, Thomas A. Banning, and Homer C. Fancher, for appellants.

Defendants dispute that the 67 names instanced by complainant as errors in its directory copied by defendants were either errors in complainant's directory or were copied by defendants. But, admitting complainant's contention, it appears that complainant has shown copying of only one name in a thousand. The names instanced are comprised on 52 pages, and to enjoin an entire book, of over 800 pages, because 67 names, appearing on 52 pages, have been copied, is unsupportable under the decisions. *Publishing Co. v. Keller*, 30 Fed. 774; *Webb v. Powers*, 2 Woodb. & M. 497, 524, Fed. Cas. No. 17,323; *Lawrence v. Dana*, 4 Cliff. 1-88, Fed. Cas. No. 8,136. There is no evidence to show that the printed sheets from which Mathison copied 4,000 or 5,000 names were taken from complainant's directory, and the evidence is uncontradicted that the names were intended for the Interstate Directory. It plainly appears that the copy from which the Dollar Directory was printed was destroyed several days before the suit was commenced, in the regular course of business, preparatory to defendants' moving their office. There is no evidence that such destruction was expedited, but the evidence is quite to the contrary. The work of Hartsig and Ditty and their canvassers covered a period of nearly two years, and all the canvassers whose names and addresses were known were called, and testified as definitely as possible as to the time and territory covered by them, and their testimony stands uncontradicted. All the persons who worked upon the compilation of the directory, save Rickard, testify that the slips had every appearance of having been obtained by a personal canvass, and that in the work of compilation no corrections were made in reliance wholly upon complainant's directory, but, in cases of discrepancies and omissions, the slips were passed to Ditty, who dispatched for the names. Complainant had for months known of defendants' competing directory, and its employé Rickard apparently entered defendants' employ at the instance of complainant, for the purpose of implicating them in a charge of infringement. Eight witnesses testified as to the dispatching which was done. The evidence overwhelmingly and conclusively establishes the fact that defendants made an original canvass, and proceeded in the proper way in the compilation of their directory, and did not copy from complainant's directory, and that the injunction granted by the court is wholly erroneous and unjustifiable. *New York Grape-Sugar Co. v. American Grape-Sugar Co.*, 10 Fed. 837; *Machine Co. v. Hedden*, 29 Fed. 149; *Scribner v. Stoddart*, 9 Rep. 139, Fed. Cas. No. 12,561; *Bonaparte v. Railroad Co.*, 1 Baldw. 218, Fed. Cas. No. 1,617.

John C. McClellan and L. L. Bond, for appellee.

The common errors prove not only copying in those particular instances, but they raise the presumption that the whole of defendants' book has been copied from complainant's book, and the burden of proof is on defendants to show, if they can, what part of their book, if any, was not copied from complainant's book. *Drone*, Copyr. 428, 515; *Longman v. Winchester*, 16 Ves. 269. The doctrine contended for by defendants is applied only to cases where the part copied can be readily separated from that which is original. *Webb*

v. Powers, 2 Woodb. & M. 497, Fed. Cas. No. 17,323. Takes 417 and 1,199 conclusively show the manner in which defendants' directory was made. Twenty names out of the 22 on "Take 417" are in the same handwriting, and the persons live in widely separate districts, alleged to have been canvassed by five or six different canvassers, and the 20 slips do not vary in the names, business designations, and locations from the way in which they are found in complainant's book. The fact that the manuscript from which defendants' book was printed appeared to be in the handwriting of from 10 to 15 different persons does not tend to prove an original canvass. The fact would be the same, though all the names were copied from complainant's directory. Defendants' testimony as to the destruction of the manuscript is wholly unworthy of credit, showing, as it does, a total disregard of business principles. Neither did the defendants make any effort to recover any of the manuscript, though it appears that it might easily have been recovered after the commencement of the suit. The absence of all evidence in writing as to defendants' acts, etc., relating to the original canvass, is a suspicious circumstance. It also appeared from the canvassers' testimony that they canvassed and recanvassed each others' territory, and they contradict each other as to the territory actually canvassed by them. If the evidence of Ditty's canvassers alone is to be believed, Ditty must have obtained 240,000 new names. The fact that defendants did a large amount of dispatching will not help them, if they, in fact, in the first instance, copied their names from complainant's directory. When a material piracy is shown, plaintiff will not be required to prove actual damages to maintain its right to an injunction. *Drone*, Copyr. 521; *Campbell v. Scott*, 11 Sim. 39; *Tinsley v. Lacy*, 32 Law J. Ch. (N. S.) 539.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

PER CURIAM. This appeal is from an interlocutory order of injunction, for a statement of which reference is made to the opinion of the court upon the motion to dismiss. The present question is of the merits of the order. The court has carefully considered the evidence, and, without entering upon a review, which might prejudice the final hearing, deems it enough to declare its conclusion that the appeal should be overruled, and it is so ordered.

UNITED STATES v. FOURTEEN PACKAGES OF WHISKY.

(Circuit Court of Appeals, Fifth Circuit. February 12, 1895.)

No. 261.

INTERNAL REVENUE—SHORTAGE IN PACKAGES OF LIQUORS—REV. ST. § 3289.

Certain packages of whisky were inspected and gauged at the distillery, marks and brands placed thereon by the United States gaugers, and the taxes paid. Upon being regauged, some months later, at another place, it was found that there was a shortage in each package, and that the contents of each package were below the proof indicated by the marks. *Held*, that these facts were no evidence that the United States had been in any manner defrauded, and did not justify the forfeiture of the whisky, under Rev. St. § 3289.

In Error to the District Court of the United States for the Middle District of Alabama.

This was an information claiming forfeiture of 14 packages of whisky, under Rev. St. § 3289. J. B. Lanier filed a claim to the

whisky, and a trial was had in the district court, resulting in a verdict for the claimant. The government brings error. Affirmed.

Henry D. Clayton, for the United States.

T. H. Watts, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. This is an information and an amended information under section 3289 of the Revised Statutes. The information charges that 14 packages of whisky, seized by the United States internal revenue officer on a claim of forfeiture, did not have on them the proper marks and brands required by the revenue laws of the United States, and that said packages did not have thereon each mark and brand required by law, in that they did not have the marks and brands showing truly the proof of the spirits in said packages, and showing truly the number of wine gallons in each package. One J. B. Lanier answered the information by filing a claim to the whisky, in which he sets up that the marks and stamps on said packages were placed thereon by the proper officer of the United States who gauged the whisky. He denies that said marks and stamps are wrong, and he denies that there were absent from said packages the marks and stamps required by law to be placed thereon. The evidence on the part of the prosecution is that the deputy internal revenue collector for the district of Alabama, finding the whisky in question in the storehouse of one Tatum, in Montgomery, Ala., regauged the several packages thereof on or about the 24th November, 1890; that this regauge by him showed that there were in all the packages a shortage averaging a loss of net wine gallons of about $1\frac{1}{2}$ gallons per package; that the proof marked on each package was "A. P. 100," and that the proof on the regauge averaged from 90 to 95; that the packages contained 5 gallons or more each; that there were marks and brands on the said packages, and that they all bore the rectifier's stamps; that the whisky in the packages did not correspond with the marks and brands thereon, either as to the proof, or as to the quantity contained therein. The packages showed, by proper marks thereon, that they had been inspected and gauged by United States gaugers, in North Carolina, at various dates from March 4, 1890, to July 19th of the same year. This is the substance of the evidence for the plaintiffs. The claimant testified, among other things, as follows: That he resided at Salisbury, N. C., and was a distiller, rectifier, and wholesale liquor dealer; that he had been engaged in business as such since 1866, except about 18 months; that all the packages of whisky sought to be forfeited, and in controversy in this case, had been distilled and rectified at his establishment, which was located near Salisbury, N. C. The witness further stated that, after the rectification of spirits, sugar was put into them for the purpose of mellowing and making them more palatable, and they were then regauged by the proper officer; that the proportion of saccharine matter put in each package of spirits was

about one gallon to each barrel. The witness was allowed by the court, against the objection of the plaintiffs, to give an ocular demonstration, in the presence of the jury, with spirits, sugar, and hydrometer, for the purpose of showing that the difference in the apparent proof ("A. P.") marked on the packages containing the whisky in controversy and the proof of such whisky as shown by the regauge may have been caused by the sugar which had been put into the spirits by the rectifier, to which action of the court the plaintiffs excepted. The witness also testified that the introduction of sugar into spirits reduces the proof. There was also evidence showing the amount of evaporation allowed in spirits by the regulations of the internal revenue department.

There were various instructions requested by the plaintiffs, which were refused by the court, to which refusal exceptions were duly taken, and on which error is assigned. We will not consider in detail the several rulings of the trial court, and which are presented by the assignment of errors. The court could have properly ordered a verdict for the claimant, and we are satisfied of the correctness of the finding on the charge given, the effect of which was to direct a verdict for the claimant. The complaint in the case is that the 14 packages of whisky did not have or bear the proper marks and brands required by law to be placed on them. The law required that such packages should be inspected and gauged on the premises of the rectifier who has paid the tax, by a United States gauger, who should place thereon an engraved stamp, properly signed, and which shall state the date when affixed, and the number of proof gallons contained therein. Rev. St. § 3320. The proof is that the packages in question were duly marked and stamped by United States gaugers on the premises of the claimant, the rectifier, in North Carolina, and that when regauged, some six months thereafter, there was a divergence both in proof gallons and in wine gallons in said packages. The divergence, we think, is clearly accounted for. But, if it were not satisfactorily accounted for, yet we cannot see how the United States has been in any manner defrauded, or could have been defrauded, unless the spirits which had been inspected and gauged in North Carolina had been taken out of the packages, in whole or in part, and other spirits, on which the tax had not been paid, had been put in them. There is, however, no charge of this sort in this information. In no aspect of the case made by the record could the plaintiffs recover. Any error in the rulings of the trial court adverse to the plaintiffs was therefore error without injury. The judgment is affirmed.

TANNAGE PATENT CO. v. ZAHN.

(Circuit Court, D. New Jersey. March 26, 1895.)

1. PATENTS—SUFFICIENCY OF SPECIFICATION.

The specifications of a patent are addressed primarily to persons "skilled in the art," by which is meant, not those having very great technical knowledge relating to the subject-matter of the invention, but rather

those having ordinary and fair information; and if to these latter the specifications sufficiently describe the invention or process, it is all that is required.

2. SAME—PROCESS PATENT—WEIGHT OF EVIDENCE.

Much greater weight should be attached to the testimony of witnesses who say they have accomplished the results sought by a process patent, by following the methods described in the specifications, than to the testimony of others, who say that they were unable to attain success.

3. SAME—ANTICIPATION—ANALOGOUS USE—PROCESS OF TANNING LEATHER.

The Schultz patents (Nos. 291,784 and 291,785) for processes of tanning leather, which consists substantially, first, in saturating the skins with acidulated bichromate of potash, or chromic acid; and, second, by employing sulphurous acid as a reducing agent to change the chromic acid into chromic oxide, *held* anticipated by the previous use of like processes in the treatment of other substances than leather, and particularly by the Swan patent, covering improvements in the treatment of gelatinous tissues of gelatine and gum, and of compounds containing such substances.

This was a bill by the Tannage Patent Company against William Zahn for infringement of patents for processes of tanning leather.

George Blodget and Charles Howson, for complainant.
Rowland Cox, for defendant.

GREEN, District Judge. The bill of complaint charges the defendant, William Zahn, with infringement of letters patent Nos. 291,784 and 291,785, both granted on January 8, 1884, to Augustus Schultz, for new and improved processes for "tawing hides and skins," and which were duly assigned by the patentee to the complainant. There seems to be but little difference in the two processes, as claimed in the respective patents. In patent No. 291,784 it is said that:

"This invention relates to a new process for tawing hides or skins, said process consisting in subjecting said hides or skins to the action of compounds of metallic salts, such as bichromate of potash, and then treating the same with hyposulphite of soda, by which term is understood that salt which is more recently sometimes called 'thiosulphate of soda' ($\text{Na}_2 \text{S}_2 \text{O}_3$)."

In the other patent (No. 291,785), the inventor says:

"This invention relates to a new process for treating hides or skins. Said process consisting in subjecting said hides or skins to the action of a bath prepared from a metallic salt, such as bichromate of potash, and of then treating the same with a bath containing sulphurous acid."

It is quite apparent that, if there be any difference in these processes, it is more in the descriptive words used than in the actual means employed. In both the first step is identical, and in the second step the action of sulphurous acid upon the skin or hide after it has been taken from the first bath is provided for. In the first process this necessary sulphurous acid is obtained by subjecting hyposulphate of soda to a chemical agent which, by decomposition, will produce it. In the second process the sulphurous acid is directly supplied to the last bath. Such being the processes of the two patents, broadly considered, it is to be expected that the claims should show an equal similarity in their purport. In the one patent the claim (and there is but one claim in each patent) is stated in almost the exact words of the specifications, as follows:

"The within-described process for tawing hides and skins, said process consisting in subjecting the hides or skins to the action of compounds of metallic salts, such as a solution of bichromate of potash, and then treating the same with a compound containing hyposulphurous acid (or, as it is otherwise called 'thiosulphuric acid'), such as a solution of hyposulphite of soda or of potash in the presence of hydrochloric acid."

In the later patent the claim is:

"The within-described process for tawing hides and skins, said process consisting in subjecting the hides or skins to the action of a bath prepared from a metallic salt, such as bichromate of potash, and then to the action a bath capable of evolving sulphurous acid, such as a solution of sulphite of soda, in the presence of another acid, such as hydrochloric acid, substantially as described."

These patents relate to what is now known as "chrome tanning." Chrome tanning, as contradistinguished from other tanning, characterizes itself by making use of mineral salts in the tanning process, rather than vegetable matter. As is well known, the older method of obtaining leather was to immerse the hide or skin in some liquid containing tannic acid, which was commonly obtained from oak or hemlock bark. This method was reliable, not exceedingly expensive, save with regard to the length of time the operation required, and its product was the transformation of the hide or skin into a high grade of leather, impervious to and unalterable by the action of water, and with great ability to resist wear and tear. But months were consumed in the proper and sufficient action of the tannic acid on the hide, already prepared for exposure to its transforming power. And because of this expense of time for many years the attention of practical tanners had been closely engaged with attempts to remedy so great an inconvenience. The chrome method of tanning successfully solved the problem, and by it the time for the action of the tanning agent was immediately reduced from the months of the current method to a few hours, which now suffice when the mineral salts are used. This undoubtedly was a great benefit and gain to the manufacturers of leather, and as such it is entitled, as far as possible, to the protection of any court, when it seeks such protection. This chrome method of tanning, Mr. Schultz says, constitutes his invention, and it is this alleged invention which the defendant is charged with infringing. The usual defenses are, by the answer of the defendant, set up in reply to these charges; but apparently he mainly relies upon two, which we will briefly consider. They are (1) the insufficiency and misleading character of the specifications of the letters patent in question; and (2) want of novelty in the alleged process.

The purpose of the specification, as contradistinguished from a claim, in letters patent, is to describe clearly the invention sought to be protected by them, and the manner of making, using, and constructing the same. The letters patent constitute a contract between the patentee and the public. On the one hand is granted an exclusive use of the invention for a specified term. On the other, by way of consideration, a full disclosure of the invention, in all its parts, must be made. It is through the instrumentality of the specifications that this disclosure is made, and the invention

thereby fully placed within the knowledge of the public. Necessarily, upon their thoroughness in that respect, and upon their accuracy in statement, depends the validity of the contract of the letters patent. If there be material failure in either respect, there necessarily results such failure of consideration as must vitiate the contract. It follows, then, that a specification failing in any material respect to make the invention fully known and accessible to the public must be held fatally defective, and the patent based upon it, ipso facto, becomes void. *Wayne v. Holmes*, 2 Fish. Pat. Cas. 20, Fed. Cas. No. 17,303. But it should be borne in mind, in judging of the sufficiency of the specifications of letters patent, that while the language and the methods of statement used by the inventor must be such as will fully place the invention in the intelligible possession of the public generally, it is not necessary that it should be so minutely and exactly described as to be readily understood by every person going to make up the public. The specifications of letters patent are addressed primarily to those skilled in the art to which the invention relates, and not to those who are wholly ignorant of the subject-matter. In *Plimpton v. Malcolmson*, 3 Ch. Div. 531, Sir George Jessel, the master of the rolls, thus states the principle:

"In the first place, it is plain that the specification of a patent is not addressed to people who are ignorant of the subject-matter. It is addressed to people who know something about it. If it is mechanical invention, as this is, you have, first of all, the scientific mechanicians of the first class,—eminent engineers. Then you have scientific mechanicians of the second class,—managers of great manufactories; great employers of labor; persons who have studied mechanics, not to the same extent as those of the first class, the scientific engineers, but still to a great extent, for the purpose of conducting manufactories of complicated and unusual machines. * * * And then the third class, consisting of the ordinary workman, using that amount of skill and intelligence which is fairly to be expected from him,—not a careless man, but a careful man, though not possessing that great scientific knowledge or power of invention which would enable him by himself, unaided, to supplement a defective description or correct an erroneous description. Now, as I understand, to be a good specification it must be intelligible to the third class I have mentioned, and that is the result of the law. It will be a bad specification if the first two classes only understand it, and if the third class do not."

And in the case of *Morgan v. Seaward*, 1 Webst. Pat. Cas. 174, Mr. Baron Aderson used this language:

"The specification ought to be framed so as not to call on a person to have recourse to more than those ordinary means of knowledge (not invention) which a workman of competent skill in his art may be presumed to have. You may call upon him to exercise all the actual existing knowledge common to the trade, but you cannot call upon him to exercise anything more. You have no right to call upon him to tax his ingenuity or invention."

From which it seems to follow that persons skilled in the art to which the specification is addressed are in fact those of ordinary and fair information, but not to those having very great technical knowledge relating to the subject-matter of the invention. And if, to them, the specification sufficiently and well describes the invention or process, it is quite sufficient. Now, the courts have always been generous towards inventors, in their application of these principles of the law, and their consequent judgment of the

validity of a specification. Although the specification may be in some degree incorrect, or vague or incomplete, if from it, taken in connection with accompanying drawings and models and plans and formula, and especially the rest of the letters patent, one skilled in the art, as above defined, can, by exercise of purely non-inventive powers, succeed in constructing the machine, or in following the process, or in combining the ingredients of matter mentioned into one whole, it is sufficient. On the other hand, if experiment and inventive skill on the part of a skilled operator or user is necessary, in addition to the instructive statements of the specification, to render the invention available and the use successful, then the specification is fatally defective, and the patent based thereon is void. *Lockwood v. Faber*, 27 Fed. 63; *McNamara v. Hulse*, 2 Webst. Pat. Cas. 128; *Tyler v. Boston*, 7 Wall. 327.

Applying, then, these principles as to the sufficiency of the specifications to these patents, it becomes apparent, upon reflection, that the severe criticism which has been made upon them is not wholly deserved. Possibly, they could have been written in language more exact, perhaps more perspicuous, but upon close examination they will be found to be sufficient to convey the necessary knowledge of the invention to those who are skilled in the art. Before testing the specifications, it is proper to say that the manufacture of leather seems to comprise three distinct stages. First, the preparation of the skins or hides up to a point where they are ready for the tanning process proper. This stage includes the loosening of the hair by some depilatory agent, removing the hair by mechanical means, cleansing the skins, and putting them generally in condition for treatment by tanning materials. The second stage includes the tanning process proper, by which the skins are changed from their primary state into leather. The third stage contemplates the finishing of the leather as it leaves the tanning process, by the use of coloring material, grease, oil, or other matters. It is apparent that the invention in this case is addressed solely to the second stage of the general manufacture, to wit, the actual tanning process.

In the specification of patent 291,784 (and, as has been already stated, the specifications of the two patents are practically alike), Mr. Schultz describes his process in this way:

"In carrying out my process I unhair the rawhides, and prepare them in the same manner in which they are made ready for tanning. If the hides have not been pickled, I subject them to the action of a solution of bichromate of potash in the presence of an acid, such as bichloric acid, or, if the hides have been pickled, they may be treated in a solution of bichromate of potash in water, without the addition of an acid. In this solution the hides are left for a shorter or longer time, according to their thickness and to the strength of the solution employed. A skiver, or the face of a sheepskin, can be done in a strong solution, as above described, in about fifteen minutes, while a full-skin roan would require, in the same solution, about one hour. I call the solution weak if it contains five per cent. or less, of the weight of skins, of bichromate of potash, and I call the solution strong if it contains more than five per cent. of bichromate of potash. It is not material, however, how strong the solution is. The skins are completed if small pieces cut from the thickest parts of such skins show that the solution has entirely penetrated. The skins are then ready to be taken out, and, after the

adhering liquor has run off, the skins are introduced into the second solution, which consists of hyposulphite of soda dissolved in water, and adding an acid, such as hydrochloric acid. The solution may be strong or weak of hyposulphite, and the quantity of acid used at first may be less than requisite to split up the entire quantity of hyposulphite; and more acid may be added if the skins show that more is required, which is indicated by the color of the skins. When they are done, they show a whitish, bluish, or greenish color, according to the time they are kept in the hyposulphite solution. A skiver which first has been exposed to the action of the bichromate for fifteen minutes will be ready by remaining in the hyposulphite solution about twenty minutes. For thicker skins a proportionate longer time is required. * * * After the leather is treated in the manner above indicated, it may be colored, soaped, and greased in the usual way."

In other words, the inventor, in this specification, designates with sufficient exactness for verification the chemical agents which he uses in his process, the quantities to be used to produce good results, the manner of their application to the hides or the skins, and the time necessary to elapse in the carrying out of the complete manufacture. This, perhaps, is more clearly shown if the specification be paraphrased somewhat. Shortly stated, the process is simply this: The subjection of hides which are ready for the tanning process to a bath of bichromate of potash, in which there is an acid, such as hydrochloric acid, if the hides have not previously been pickled. Then, after an immersion therein for a length of time sufficient to thoroughly saturate them, subjecting them to a second bath, in which there is sufficient sulphurous acid to decompose the chromic acid of the first bath. It appears that it is not material whether the first bath is weak or strong. That should depend somewhat upon the character of the skin or hide submitted to it. And the time in which the hides or skins are to be immersed depends upon their thickness, and upon the strength of the bath. A weak bath is one which contains 5 per cent., or less, of the weight of the skin in bichromate of potash. A strong bath is one that contains more than such 5 per cent. Fifteen minutes is the length of time sufficient for the action of the bath upon a skiver. In case of a thicker skin, a longer time would be required. And so, similarly, the skiver which has been exposed to the action of bichromate for 15 minutes will be completely done in the hyposulphite solution by remaining there about 20 minutes. Thicker skins require longer time. The real test of the impregnation of the skin, in the first bath, and the conclusion of the tanning process, in the second bath, however, is made known by an examination of the skin itself. Its general surface color, and its appearance when cut, show whether the operation has been finally concluded. Such directions seem sufficiently explicit to be followed, and that they are sufficiently clear is abundantly proved by the evidence in this cause. It is true, indeed, certain of the defendant's witnesses testified that they failed to make leather, in following the directions of the specification. But this negative testimony is overcome by the success of witnesses for the complainant, who, being practical tanners, not only succeeded, but succeeded without any difficulty, in obtaining first-class chrome leather by closely following the specification. The testimony of

Mr. Landell, Mr. Stanley, Mr. Britton, Mr. Burk, and others establishes this fact beyond question. Such affirmative testimony is far more valuable than the testimony of those who failed to make a success of the process of Schultz. As was said in the case of *Loom Co. v. Higgins*, 105 U. S. 580, "When the question is whether a thing can be done or not, it is always easy to find persons ready to show how not to do it." If one succeeds by following the directions of the specification, that establishes the sufficiency of the specification, no matter how many others may fail. The law does not require inventors, in order to obtain a patent, to bring their invention to the highest degree of perfection, and to describe it in technically exact and precise terms. As stated before, it is enough if, for instance, a process is described in the specification with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if they point out some practical way of putting it into operation. This has been done by Schultz in this case, and therefore it seems proper to hold that the specifications are sufficient, in their descriptive language, to be sustained.

The other defense is one which gives more trouble. Was there any novelty in this alleged discovery? What was the exact discovery of Schultz? Technically, it was what is called a "process." And a process has been defined as "a mode of treating certain material to produce a given result. It is an act or a series of acts performed upon the subject-matter to be transformed and reduced to a different state or thing." *Cochrane v. Deener*, 94 U. S. 780. And in *Tilghman v. Proctor*, 102 U. S. 707, the court tersely declares, a "process" to be an act or mode of action, and, as contradistinguished from a "machine," which is a "thing" visible to the eye, and an object of perpetual observation, is a "conception of the mind." Now, it is plain from what has already been said that the process conceived by Schultz was (1) the saturation of skins and hides with acidulated bichromate of potash, or chromic acid; and (2) employing sulphurous acid as a reducing agent to change the chromic acid into chromic oxide. He limited his process to skins and hides, to change them to leather. But saturation with acid, and the converting of that saturating acid into oxide by chemical reduction, must, by force of the eternal and unchangeable laws of nature, be always the same, no matter what may be the character of the substance or material which may be used in carrying out the operation. In other words, given saturation by bichromate of potash, and subsequent reduction of the chromic acid by sulphurous acid, the result must be constant and identical. To be sure, the substance or material affected may be wholly diverse in character. It may be woolen yarn, or it may be goat skin. Nevertheless, the saturation with chromic acid and the after reduction by chemical agents must be the identical process in each case. If this be true, Schultz is very far removed from being a pioneer discoverer as claimed, or, indeed, from being a discoverer at all, except so far as he himself may be personally concerned. The evidence in this case shows various instances of processes well known before Schultz's discovery.

covery, which concerned themselves solely with saturation by bichromate of potash and reduction by sulphurous acid. Such saturations and such reductions were described as early as 1859, again in 1860, and again in 1866, in Wagner's *Jahresberichte*, a well-known German publication. The following are extracts from these articles:

From Wagner's *Jahresberichte*, 1859, p. 536:

"If chrome alum is used instead of bichromate of potash, both the aforesaid difficulties disappear." "We have in sulphurous acid a very cheap reducing agent of chromic acid, and obtain in the sulphuric acid which is formed during the process the acid necessary for the formation of chrome alum."

From Wagner's *Jahresberichte*, 1860, p. 513:

"C. Koechlin discusses the utility of oxide of chromium in dyeing and printing on fabrics, based on the solubility of oxide of chromium in alkaline disulphates. Sulphite of soda, when mixed with an acid which liberates the sulphurous acid, decomposed by means of bichromate of potash, and then made alkaline with ammonia, yields oxide of chromium."

From Wagner's *Jahresberichte*, 1866, p. 592:

"The process depends on the fact that when sulphurous acid is led through a solution of chromate the chromic acid is reduced to oxide of chromium; there being formed at the same time sulphuric acid, which combines both with the oxide of chromium that was produced and with the base originally united with the chromic acid. Besides the sulphates, a certain quantity of sulphur compounds is formed at the same time. Chaudet proceeds as follows: Sulphur is placed and lighted in a cast-iron retort, which is connected with bellows on one side and with a vessel containing the solution of the chromate on the other. On operating the bellows the sulphurous acid produced by the combustion of the sulphur is driven into the solution of the chromate."

Page 593:

"In order to simplify the use of oxide of chromium as a mordant, the author endeavored, by using bichromate of potash as a mordant, to convert the chromic acid into oxide of chromium on certain tissues like wool; and he succeeds in doing so by bringing the tissue mordanted with chromate of potash in contact with agents which reduce chromic acid to oxide of chromium, such as sulphurous acid, alkaline sulphides, organic acids, alcohol, sugar, etc., afterwards washing and dyeing."

It is true, as appears from these extracts, that the material used as the subject of the saturation and subsequent reduction was not "hides or skins." The object sought to be gained by these especial processes was, as appears from the published articles, improvement in "dyeing and printing on fabrics," and in "treatment of wools." But the chemical result was the important end sought, and the use of chrome alum and of bichromate of potash as a saturating means, and the after reduction by sulphurous acid, achieved that; and, whether it was wool or goat skins, the whole process and the final result were necessarily chemically the same. If this be so, it is difficult to ignore these publications as an anticipation of the process involved in the case at bar. And, if an anticipation, novelty vanishes. But the defendant brings stronger evidence of want of novelty in Schultz's alleged discovery, in the letters patent granted December 15, 1856, to Joseph Wilson Swan, for "improvements in the treatment of gelatinous tissues of gelatine and gum, and of compounds containing such substances." In the specification of this patent appears the following:

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"My invention consists in the use of salts of the sesquioxide of chromium. * * * My invention is applicable to various uses; * * * to the fixing of pigments and dyes in calico printing; * * * to the tanning of skins and hides. * * * In tanning, I immerse the skins or hides in a solution of chromic salt, or in a solution of chromate or bichromate of potash, or any equivalent salt; the said chromate or bichromate being decomposed in the skin or hide by the action of a suitable acid, so as to produce the required compound of chromic oxide. In tanning, I immerse the skins or hides in a solution containing about one per cent. of chrome alum, or in a solution of chromate or bichromate of potash, or other suitable chromate or bichromate, and I decompose the said chromate or bichromate in the skin or hide by means of oxalic or other suitable acid, so as to produce by the decomposition and reduction of the said chromate or bichromate the required compound of chromic oxide."

As was said by Dr. Morton, one of the expert witnesses for the defendant, this is quite as good a description of Schultz's process as the one which he gave to the public in his own specification. In fact, it would be exceedingly difficult, if not impossible, to differentiate the Swan process from the Schultz process. There can be no question that the Swan patent describes a process by which would be produced chrome tanned leather, and that the process consisted—First, in saturating the skin or hide with chrome acid, or acidulated bichromate of potash; and, secondly, reducing the chromic acid or bichromate to chromic oxide by suitable acid. This is identical with the process of the complainants, and must be held an anticipation. The truth is, it is very difficult to discover just what Schultz can possibly claim as original in his process. It will be noticed that in the instances of anticipation given the dyeing of wools and the printing on fabrics are prominently, and perhaps preferably, mentioned as the subjects of the processes detailed. To be as liberal toward Schultz as possible, all that can be fairly predicated of his alleged discovery is that an old process could be availed of in a new relation. The saturation and the reduction which had been applied to wool and other substances could be applied to skins and hides. What he did, therefore, was to apply an old process, and use chemicals perfectly well known, in a new relation, without the slightest change in the mode of application. This ingenuity, if it can be so characterized, can hardly afford a substantial basis for a patent. In *Pennsylvania R. Co. v. Locomotive Engine Safety-Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220, the court says:

"It is settled by many decisions of this court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated."

Perhaps it should be stated, in this connection, that the reduction of bichromate of potash and of chromic acid by sulphurous acid has been for many years perfectly well known to chemists, and was clearly within the "circle of what belonged to the public" at the date of Schultz's patent. It is unnecessary to examine the other patents for similar processes referred to by the defendant, and which, if they do not amount to positive anticipations, are at least so instructive that, with them as guides, one skilled in the art would readily arrive at the same result at which Schultz did. The

Cavallus process, the Ordway process, the Heinzerling process, and perhaps others, all have, in a very high degree, a positive likeness to, if not practical equivalency with, the Schultz process, and clearly disclose a state of art which leaves scarcely anything to be accomplished in the future, so far as chrome tanning is concerned. Certainly, considered in connection with the Swan patent and the publication on this subject extant years before Schultz made his experiments, they strip his alleged discovery of all legitimate claim to that novelty and invention upon which alone rests safely the validity of letters patent. The bill of complaint must, for the reasons stated, be dismissed.

EBERHARD MANUF'G CO. v. ELBEL et al

(Circuit Court, N. D. Ohio, E. D. August 8, 1893.)

No. 5,009.

PATENTS—ANTICIPATION—INFRINGEMENT—HARNESS TRIMMINGS.

The Zeller patent, No. 207,791, for improvements in harness trimmings, shows patentable invention, and was not anticipated either by the Zeller patent of 1874, or by the Hinman patent of February 25, 1868.

This was a suit by the Eberhard Manufacturing Company against Elbel & Co. for infringement of the Zeller patent, No. 207,791. The patent relates to drop hooks and terrets for harness. The hook is used for holding the checkrein which extends from the bridle bit, and is secured to the apex of the harness saddle. The terrets are rings through which the driving reins pass, and are fixed to the sides of the harness saddle. The patented hook comprised three parts,—a base plate having rivet holes enabling it to be attached to the harness saddle, and having a concave bearing for the hook; an annularly grooved hook; and a covering cap piece fitting over the groove of the hook, forming, with the concavity of the base plate, a contracted cylindrical cavity, which prevents the shank from moving lengthwise, but leaves it free to turn laterally, and drop into a horizontal position when not in use.

E. A. Angell and Thomas W. Bakewell, for complainant.

M. D. Leggett and Charles R. Miller, for respondents.

RICKS, District Judge. The bill is filed for infringement of letters patent No. 207,791, granted on September 3, 1878, to Melancthon E. Zeller, for an improvement in harness trimmings. The complainant has given to the public a very simple device, which combines several elements that are all calculated to make it acceptable and useful. Though it presents no single element evincing great invention, it combines several new features, which, taken together, make it a successful device, which has rapidly won its place among articles of useful manufacture. It is easily and cheaply made; so designed and constructed as to be easily put together; each part performs the function claimed for it; and when put into

use it is superior to any other article made or designed for the same purpose. It can be made and sold separately; can be readily attached to any kind of harness; and it fulfills the uses for which it was designed. In it the patentee developed as to its leading features that "last step" which completes invention, and makes the device a success. This is particularly striking in comparing the device of the patent in suit with the device of the same patentee in the patent designated the "Zeller Patent of 1874." That device was practically inoperative, both because of the expense and difficulties connected with its manufacture, and more particularly because the falling hook, which was designed to receive the checkrein, had such a long vertical end projecting through the elevated plate or passage that when the strain on the checkrein was lessened so as to permit the hook to slip back, or to force it back, towards or over the crupper loop, the ring, instead of falling easily and surely, would catch and remain rigid. One of the principal features claimed for the hook so constructed was that it would readily fall and prevent its destruction in case the horse or mule should fall or roll with the harness on it, so that for the chief advantage claimed it was inoperative. The chief defense against this patent is that it was anticipated by the manufacture and sale of various articles of common use by nine prior United States patents. The two chiefly relied upon as showing an anticipation are those of J. W. Hinman, February 25, 1868, and of M. E. Zeller, of September 15, 1874, just referred to. The Hinman patent, while it involves the drop hook and drop ring in a device intended for an entirely different use, did not disclose those uses in a way to make them any more conspicuous than had been done in other devices in which they had been previously employed, or than would suggest such use in a drop hook such as used in complainant's patent. I do not, therefore, think that the Hinman patent was an anticipation.

For the reasons stated before, I do not think the earlier Zeller patent is an anticipation. It is intimated in brief of defendants' counsel that the claim in the earlier patent, abandoned by Zeller, viz.: "A harness finding consisting of the plate, A, upon which is formed the elevation, a, having an eye or passage, A', to receive a terret or ring, a hook or other harness attachment, substantially as and for the purpose set forth,"—is substantially the same as the claims of the later patent, and should estop him from setting up the same in his present suit. The essence of the later invention is that the parts are cast separately, and so made as to be easily and cheaply made and put together, and, when so combined, to furnish a stronger and more satisfactory product. All this is accomplished. And there is no ground for estoppel on the plea that the former claim abandoned is the same device. The defendants have not seen fit to use any of the devices set out in the nine patents pleaded. They have, however, patterned the article they manufacture exactly from that of complainant. They have done this after correspondence, and with full information as to complainant's claims. The hook is a clear infringement of the first and

third claims of the patent, and the terret of the second claim. The complainant is entitled to a decree sustaining its patent, finding infringement, and for an accounting.

WESTINGHOUSE et al. v. BOYDEN POWER-BRAKE CO.

(Circuit Court, D. Maryland. March 11, 1895.)

1. PATENTS—INFRINGEMENT—AIR BRAKES.

The Westinghouse patent No. 360,070, for a fluid-pressure automatic brake mechanism, is not infringed as to claims 1 and 4, which are expressly limited to an auxiliary valve independent of the triple valve by the Boyden brake mechanism (patents Nos. 481,135 and 481,136), in which the main valve is made to do both main valve work and quick-action work, when needed.

2. SAME—FUNDAMENTAL INVENTIONS—DIFFERENCES IN FORM.

Claim 2 of the Westinghouse patent is not, however, thus restricted, and, as the invention is a broad one, *held*, that this claim is infringed by the Boyden mechanism, which attains the same result by means functionally equivalent, though differing in form.

3. SAME—DISCLAIMERS—AMENDMENTS IN PATENT OFFICE.

Amendments made to meet the objections of an examiner are not to be construed as a disclaimer of the patentee's actual invention, if such construction can be avoided without doing violence to the obvious meaning of the language used. *Lake Shore & M. S. Ry. Co. v. National Car-Brake Shoe Co.*, 4 Sup. Ct. 33, 110 U. S. 229, and *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, followed.

4. SAME—FUNDAMENTAL INVENTIONS—EFFECT OF SUBSEQUENT IMPROVEMENTS.

In the case of a fundamental invention, a defect which prevents the commercial success of the mechanism as originally patented, but which is not radical in character, and is readily corrected by the inventor after experiment, does not deprive the patent of its meritorious character, although the improvement itself becomes the subject of a subsequent patent.

This was a bill in equity by George Westinghouse, Jr., and the Westinghouse Air-Brake Company against the Boyden Power-Brake Company, George A. Boyden, president, Charles B. Mann, secretary, and William Whitridge, treasurer, for the infringement of a patent.

George H. Christy, I. Snowden Bell, Frederic H. Betts, and Bernard Carter, for complainants.

Lysander Hill, Hector T. Fenton, and Barton & Wilmer, for defendant.

MORRIS, District Judge. This is a bill in equity, in usual form, charging the defendant with infringing the Westinghouse patent No. 360,070, dated March 29, 1887, for a fluid-pressure automatic brake mechanism. The claims alleged to have been infringed by the defendant are claims 1, 2, and 4, which are as follows:

"(1) In a brake mechanism, the combination of a main air pipe, an auxiliary reservoir, a brake cylinder, a triple valve, and an auxiliary valve device, actuated by the piston of the triple valve and independent of the main valve thereof, for admitting air in the application of the brake directly from the main air pipe to the brake cylinder, substantially as set forth. (2) In a brake mechanism, the combination of a main air pipe, an auxiliary reservoir, a brake cylinder, and a triple valve, having a piston whose preliminary traverse

admits air from the auxiliary reservoir to the brake cylinder, and which by a further traverse admits air directly from the main air pipe to the brake cylinder, substantially as set forth." "(4) The combination, in a triple-valve device, of a case or chest, a piston fixed upon a stem and working in a chamber therein, a valve moving with the piston stem, and governing ports and passages in the case leading to connections with an auxiliary reservoir and a brake cylinder and to the atmosphere, respectively, and an auxiliary valve actuated by the piston stem and controlling communication between passages leading to connections with a main air pipe and with the brake cylinder, respectively, substantially as set forth."

The only defense now urged by the defendant is non-infringement.

The history of the pioneer inventions of George Westinghouse, Jr., in fluid-pressure brakes, by means of which the brakes of a train of railroad cars can be operated by air pressure controlled by the engineer of the train, and the history of the successive steps and inventions by which he has devised mechanisms adapted to apply that power so as to act automatically on each car, and the scope and fundamental importance of his later inventions, by which he has accelerated in an astonishing degree the quickness with which the brakes can be applied almost simultaneously on each car of a long train, consisting of as many as 50 freight cars, has been carefully and fully stated by Judge Townsend, who delivered the opinion in the case of *Westinghouse v. Air-Brake Co.*, 59 Fed. 581; and by Judge Shipman in the same case on appeal (11 C. C. A. 528, 63 Fed. 962); and in the opinion of Judge Lacombe, filed December 27, 1894, in a case between the same parties in the United States circuit court for the Southern district of New York (65 Fed. 99).

The patent now in suit, No. 360,070, March 29, 1887, is the first of the Westinghouse patents in which he describes an additional function ingrafted upon his automatic air brake, which is to be used only in cases of unusual emergency, and which is intended to meet the difficulties of applying air brakes quickly on long trains. The purpose of the device was to increase the quickness of the serial action of the automatic brake mechanism on each successive car by making the triple-valve device of each brake mechanism set in operation the valves on the car immediately in its rear, and at the same time to make use of the train-pipe air vented for this purpose from the train pipe at each triple valve, so as to add its power to the power supplied from the auxiliary reservoir of each car. The result which Westinghouse was seeking in the new device described in patent No. 360,070 was, first and principally, to vent the train pipe at each car so as to quicken the serial action of the brakes from car to car; and, secondarily, to utilize the vented air, and not waste its power. Westinghouse discovered that he could accomplish this result by so constructing the ordinary triple valve of his automatic mechanism that, in an emergency, the engineer, by widely opening his engineer's valve and thereby causing a sudden and unusual release of pressure in the train pipe, could cause the piston of the triple valve to make an unusual and further traverse, and thereby actuate a valve which opened a port by which the train-pipe air was admitted suddenly and directly into the brake cylinder, without passing through the auxiliary reservoir. This sudden release of air

from the train pipe vented that pipe at the first car, and that, venting in like manner, released the pressure in the train pipe at the valve of the next car, and so on, from car to car, with almost instantaneous rapidity. It is shown that this device, as first constructed, was not entirely successful. It applied the brakes with greatly increased serial rapidity as compared with any former device, and with much greater power, but not so quickly but that the rear cars impinged against the forward ones with destructive shocks. The reason for this appears to have been that the operation of venting was not carried far enough, because the port opened by the auxiliary valve was not of sufficient size, and did not release the full volume of train-pipe air suddenly enough to vent it sufficiently. This defect was remedied by an improved mechanism devised by Westinghouse, and described in his patent No. 376,837, January 24, 1888. The success of this improved device has demonstrated that the invention by which the further traverse of the triple-valve piston beyond the extent of the traverse required for the ordinary application of the brakes is made to admit a large volume of train-pipe air directly to the brake cylinder was one of great importance. The proofs show that a quick-action automatic brake, which would give the results which this brake has accomplished, was earnestly sought after by inventors and car builders, and all had failed, until Westinghouse discovered that it could be done by this mode of operation. In the cases above referred to, in which this patent No. 360,070, and the improvement on it, No. 376,837, were discussed with reference to the state of the art and the scope of the invention therein disclosed, these were held to be patents of a fundamental pioneer class, describing an invention of primary importance. In those cases the defendants, who were charged with infringing, were using a separate and independent valve to open the port to the train pipe, and the question was whether or not Westinghouse was restricted to the form of independent valve and the precise mode of actuating it set out in his patent. It was held that he was entitled to a liberal construction of his claims, and that in respect to the emergency valve the form of his device was not of the essence of his invention.

In the Boyden mechanism, which is alleged in this case to infringe, I have not been able to satisfy myself that Boyden makes use of an "auxiliary valve" in the sense in which that term is employed in the specification and in some of the claims of the patent No. 360,070, now in suit. It appears from the specification of patent No. 360,070 that what Westinghouse meant by the auxiliary valve, which is made one of the elements of the combination in the first and fourth claims, is such a valve as he has described in his specification, and which is independent of and performs none of the functions of the main valve of the ordinary triple-valve device; and I am not satisfied, notwithstanding the very positive testimony of the complainants' experts, that the poppet valve 22 of the Boyden mechanism is such a valve, for Boyden's poppet valve 22 does, as I understand its operation, to some extent perform the functions of a main valve of the triple valve as well as the function of Westinghouse's

auxiliary quick-action or emergency valve. It is probably true that in the Boyden mechanism the stem valve, i, k, j, which I take to be the equivalent of the sensitive graduating valve shown in the Westinghouse patent No. 220,556, October 14, 1879, is so constructed that it may do, and probably in most cases does do, the work of ordinary braking; that is to say, by two or three successive applications of pressure through that smaller and more sensitive valve, the brake cylinder is filled, and the main valve 22 becomes nonessential, or, if lifted off its seat, is moved very gently. But valve 22 will, if the engineer uses his brake valve carefully, do the work of a main valve, as is demonstrated, I think, by the experiments in which the sensitive graduating valve, i, k, j, was plugged up. So I take it that defendant's valve, i, k, j, must be held to be the sensitive graduating valve usual in triple-valve devices since the Westinghouse patent No. 220,556 and the defendant's valve 22 must be considered to be the main valve, and that in defendant's mechanism he has been able, by an ingenious arrangement restricting the admission of auxiliary reservoir air to the triple-valve chamber, to cause the main valve to do both main-valve work, when needed, and to do quick-action work, when needed. As, by the explicit terms of claims 1 and 4, Westinghouse has restricted himself as to those claims to an auxiliary valve, independent of the triple valve, I hold that the defendant does not infringe those claims.

Claim 2.

Claim 2 reads as follows:

"(2) In a brake mechanism, the combination of a main air pipe, an auxiliary reservoir, a brake cylinder, and a triple valve, having a piston whose preliminary traverse admits air from the auxiliary reservoir to the brake cylinder, and which by a further traverse admits air directly from the main air pipe to the brake cylinder, substantially as set forth."

The first three elements of this claim are the usual mechanism of an automatic air brake. The remaining element, which was the only novel one at the date of the patent, is a triple valve having a piston which, by two distinct movements, performs two distinct functions,—the first, its preliminary traverse, by which it admits air from the auxiliary reservoir to the brake cylinder, which is the ordinary effect of the usual movement of the triple-valve piston; and the second, its further traverse, which is a new and distinct use, admitting air directly from the main air pipe to the brake cylinder, resulting in venting the main air pipe and in producing the quick action. Now this, as I understand it, was the invention which Westinghouse brought to light. He discovered, and by experiment demonstrated, that, by a further traverse of the triple piston, train-pipe air could be vented from the train pipe, and that it would give two very important results, namely: First, quickening of the action of the brakes from the forward to the rear cars, so that the application of the brakes became almost instantaneous on all the cars; and, second, utilizing the vented air for direct action in the brake cylinder.

Now, although quick-action emergency brakes were being sought for, no one before Westinghouse had accomplished this result,

and the means by which he accomplished it were entirely novel. Indeed, upon first impression, it is paradoxical and startling to find that, when a sudden, quick, and powerful application of brakes is needed in the face of impending danger, it is to be obtained by a sudden large release of the pressure in the train pipe, to the extent of 15 or 20 pounds below that in the auxiliary reservoir, and that by using this low-pressure air to operate the brake cylinder, instead of the air under greater pressure stored in the auxiliary reservoir, this remarkably effective application of the brakes is obtained. In the domain of quick-action brakes, this device would seem to belong to that class of pioneer inventions, the patents for which are to be construed so as to be coextensive with the real invention, if the language of the claim will permit it.

It is shown that Westinghouse was the first who used a further traverse of the triple-valve piston to perform the operation required to vent the train pipe into the brake cylinder to effect quick action. The result was new, and the means were new. His claim 2 is broad enough in language to cover every device in which that is done by the further traverse, admitting air directly from the train pipe to the brake cylinder, substantially by the means described in the specification; that is, by the further traverse actuating a valve which so admits the train-pipe air. The result accomplished by defendant's mechanism is identical with that of Westinghouse, and the means by which the mechanism is actuated so alike that in its published trade catalogue defendant claims that cars fitted with its valves can be used on the same trains with the Westinghouse quick-action brake, because the engineer in applying or releasing the air pressure may treat them as identical, the same functional operations of the valves and the same results being obtained from the same changes in the engineer's brake valve; so that there is strong *prima facie* reason to suppose that Boyden's way of using the same release of pressure to vent the train pipe and to actuate the valves, which produces identical results, may be Westinghouse's way.

In mechanisms actuated by air under pressure the transmission of power is not visible to the senses as plainly as when it is done by cranks and levers, and, being transmitted by an invisible agency in all directions in which the air can escape, the functions of the instrumentalities by which it operates are more important than their forms, and, in judging of an infringement, we are to direct our minds rather to functional equivalents than to mechanical equivalents.

The use by Boyden of a central opening through the triple-valve piston to admit train-pipe air to the triple-valve chamber was not new, nor the use of a poppet valve for the main valve of the triple; both of these constructions having been shown in the Westinghouse patent No. 141,685, May 24, 1873, and in others of his patents. So that there is nothing in the Boyden device not before exhibited in some one of the Westinghouse patents, except that he has been able to cause one of the valves of the triple (valve 22), at one stage of the application of brakes, to perform ordinary service

work, and at another to do quick-action work. This Boyden does by an ingenious construction, not before used, by which he restricts the passage of auxiliary reservoir air into the triple-valve chamber, so that, when the further traverse of the piston suddenly unseats the poppet valve 22, the port opened by it to the brake cylinder is so large, and the supply of auxiliary reservoir air through the restricted passage so feeble, that the train-pipe air raises its check valve, and vents itself into that chamber, and thence through the large port to the brake cylinder. For the mechanism embodying this ingenious contrivance, by which the poppet valve 22 is made capable of doing ordinary service work by a careful, intermittent, slow release of pressure by the engineer, and quick-action work by a quick, sudden release, patents were granted to Boyden (No. 481,134, August 16, 1892, and No. 481,135, August 16, 1892); but if this construction contains the underlying invention of the patent in suit, which was granted March 29, 1887, Boyden cannot make use of his improvement during the life of that patent.

It is true that, in searching for some device which would give quick action, Westinghouse had, before the date of the patent in suit, conceived the idea that it might be accomplished by venting the train pipe at intervals along the train. He had tried having two or three vents at intervals in the length of the train, controlled by electrical apparatus, and also had tried relief valves placed in the pipe coupling of each car, which would open to the atmosphere and vent the train pipe quickly, in case of accident or other sudden release of pressure in the forward part of the train. This was shown in the Westinghouse patent No. 217,838, July 22, 1879, but neither of these attempts was successfully applied, and they did not solve the problem of quick action.

The problem was not solved. Indeed, the first step in the direction of solving it does not appear to have been taken until the experiments which led to the Westinghouse patent now in suit. The substance of the method then devised is the use of the sudden further traverse of the triple-valve piston to open a valve in a manner different from the valve opening made by the preliminary traverse for service braking, thereby admitting train-pipe air to the brake cylinder without its passing through the auxiliary reservoir.

In the Westinghouse apparatus the further traverse of the triple-valve piston causes it to impinge against an additional separate valve, which admits the train-pipe air. In Boyden's apparatus used by defendant the further traverse pulls the poppet valve 22, which Boyden substituted for the ordinary main valve of the triple, suddenly off its seat, thereby, in the manner before mentioned, causing the train-pipe air to raise the check valve, and flow with volume through the triple-valve chamber direct to the brake cylinder. The device in Boyden's apparatus, by which the difference of pressures in the triple-valve chamber between auxiliary reservoir air and the train-pipe air is produced and used, is ingenious and admirable; but the result obtained is just the same as when in the Westinghouse apparatus the auxiliary valve is unseated, and the means used are, in my judgment, functionally equivalent.

Under the ruling of *Sewing Mach. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, and of the many cases cited in the opinion delivered in that case, the rights of a pioneer inventor are infringed by one who accomplishes the same result by means which, although never used for that purpose before, are mechanical equivalents for the means used by the inventor, under a liberal construction of his patent. It was said in that case by Mr. Justice Blatchford (page 273, 129 U. S., and page 299, 9 Sup. Ct.):

"Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine."

In *McCormick v. Talcott*, 20 How. 402, the controversy arose over a device which McCormick had added to his reaper called a "divider," intended to separate the standing grain which is to be left from that which is to be cut. The court said:

"If he be the original inventor of the device or machine called the 'divider,' he will have the right to treat as infringers all who make dividers operating on the same principle and performing the same functions, by analogous means or equivalent combinations, even though the infringing machine be an improvement of the original, and patentable as such."

In *Machine Co. v. Murphy*, 97 U. S. 120-125, it was said:

"Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained."

The language of the supreme court in *Consolidated Safety-Valve Co. v. Crosby Steam-Gauge & Valve Co.*, 113 U. S. 157-171, 5 Sup. Ct. 513, is applicable:

"The prior structures never effected the kind of result attained by Richardson's apparatus, because they lacked the thing which gave success. * * * Taught by Richardson, and by the use of his apparatus, it is not difficult for skilled mechanics to take prior structures, and so arrange and use them as to produce more or less of the beneficial results first made known by Richardson."

It is true that a patentee can claim nothing beyond the scope of his patent (*Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274), but the scope and meaning of a broad claim in the patent can only be interpreted by an understanding of the real scope of the invention itself.

If the Westinghouse patent now in suit is for an invention of a primary character, and if the gist of that invention is the use of the further traverse of the triple-valve piston to open a valve which admits air directly from the train pipe to the brake cylinder, with the result that the train pipe is vented and the train-pipe air utilized, then it appears to me that the defendant cannot exculpate itself from the charge of infringement by the fact that in its device the train-pipe air is admitted through the triple-valve chamber and not through a by-passage, nor by the fact that in its device the further traverse of the piston opens the main valve in

a special manner, which produces the same result, but does not make use of a separate auxiliary valve, provided Westinghouse has not by the explicit terms of his claim 2 restricted himself to the use of an auxiliary valve.

I do not think Westinghouse has so restricted himself in claim 2, although he does appear to have done so in claims 1 and 4.

There is, without question, some difficulty and embarrassment in the broad construction of claim 2, growing out of the proceedings in the patent office, as shown by the file wrapper and contents; but, considering what was the real invention, I am not of the opinion that the legal effect of those proceedings is to restrict claim 2 to a device containing a separate auxiliary valve. From the contents of the file wrapper it appears that, as the application was prepared, the first claim of patent No. 360,070 differed from that which now appears in the patent as granted. The claim 1 first proposed was:

"(1) In a brake mechanism the combination of a main air pipe, an auxiliary reservoir, a brake cylinder, a triple valve provided with a device for admitting air directly from the main air pipe to the brake cylinder, substantially as set forth."

It was objected by the patent-office examiner that this claim, and also claim 2, were anticipated by patent No. 280,285, to G. A. Boyden, June 26, 1883, and the examiner requested that a working model of the triple valve should be furnished. Boyden's patent of 1883, No. 280,285, was a form of triple-valve mechanism intended for use with Westinghouse's automatic air brake, the object of which was to provide for replenishing the auxiliary reservoir of each car when the pressure therein had been lessened by leakage and while the brakes remained applied. This was done by the engineer causing, not a release, but a slight increase of the pressure in the train-pipe air, which, acting upon a check valve in the center of the triple-valve piston, by a peculiar arrangement of the valves, caused train-pipe air to pass, together with auxiliary reservoir air, to the brake cylinder. The object, function, and result of whatever was new and patentable in this Boyden device was altogether different from the object, function, and result of the Westinghouse device in patent No. 360,070, and there seems to be no analogy or comparison which can be made between them.

It is true that the "always open one way passage" in the Boyden patent, which, when the check valve was raised, allowed train-pipe air to reach the brake cylinder, was, in the language of the canceled claim 1 of No. 360,070, "a device for admitting air directly from the main air pipe to the brake cylinder," and there were other devices used by Westinghouse himself which this wording would include; and the claim was therefore justly open to the criticism of the patent examiner, but there was no similarity in the means by which the two devices were actuated, no similarity in the object to be accomplished, and no similarity in the mechanical principle of operation. It was simply a fact that there did exist in the Boyden device a passage for train-pipe air direct to the brake cylinder, which the engineer could cause to open by a slight increase of train-pipe pressure; but there was no hint or suggestion

of the important discovery how that fact could be utilized to accomplish the entirely new function necessary to create a quick-action brake, when, in an emergency, quick action was needed, and how, when quick action was not needed, it should not interfere with ordinary graduation and service stops. This Boyden device was not in the direction of quick action, but its opposite.

While, therefore, it was proper that Westinghouse's original claim 1 should be corrected so as to express more definitely his real invention, this was not because the Boyden patent in any manner whatever anticipated that invention or suggested it in any of its functions.

For the same reason there was then inserted in the specification of the Westinghouse patent No. 360,070 this clause:

"I am aware that a construction in which 'an always open one way passage' from the main air pipe to the brake cylinder is uncovered by the piston of the triple valve simultaneously with the opening of the passage from the auxiliary reservoir to the brake cylinder has been heretofore proposed, and such construction, which involves an operation different from that of my invention, I therefore hereby disclaim."

In the Boyden infringing device now used by the defendant, the passage from the main air pipe to the brake cylinder is not "uncovered by the piston of the triple valve simultaneously with the opening of the passage from the auxiliary reservoir to the brake cylinder." If it was, the defendant's mechanism would always be a quick-action brake, and never anything else; but, on the contrary, in the infringing device, the passage is not opened until there has been a sudden further traverse of the piston, which then brings it into operation for the distinct purpose of quick action. The statement of the so-called "disclaimer" is strictly true that the construction of the Boyden 1883 patent "involves an operation different from" the Westinghouse invention, and the so-called "disclaimer" in reality disclaims nothing which has relation to the Westinghouse quick-action invention. The disclaimer was substituted in the place of the following, which had been in the specification, and was canceled:

"Further, while in the specific construction described and shown the function of admitting air from the main pipe is performed by a valve separate from that which effects the preliminary admission of reservoir pressure to the cylinder, a modification in which the same office is performed by a valve integral with the main valve, and formed by an extension thereof, would be included in and embody the essential operative features of my invention."

The testimony tends to prove that this clause of the specification was taken out because the examiner objected that no such form of triple valve was illustrated in the drawings. For whatever reason it may have been canceled, it is not a necessary result that the patentee is precluded from claiming that his patent covers other forms of valve integral with the main valve, if such is his legal right when his invention, as disclosed in his patent, is found to be a broad one, and if he is not restricted by his claims, and if he has done nothing to impair his right to be protected in his whole invention. The effort should be to preserve, rather than to for-

feit, the inventor's rights. *Manufacturing Co. v. Adams*, 151 U. S. 144, 14 Sup. Ct. 295.

The object and scope of the invention, and the means employed to effect his object, are thus stated by Westinghouse in the specification of his patent in suit:

"The object of my invention is to enable the application of brake shoes to car wheels by fluid pressure, to be effected with greater rapidity and effectiveness than heretofore, more particularly in trains of considerable length, as well as to economize compressed air in the operation of braking by utilizing in the brake cylinders the greater portion of the volume of air which in former practice was directly discharged into the atmosphere. To this end, my invention, generally stated, consists in a novel combination of a brake pipe, an auxiliary reservoir, a brake cylinder, and a triple-valve device, governing, primarily, communication between the auxiliary reservoir and the brake cylinder, and, secondarily, communication directly from the brake pipe to the brake cylinder."

This language exactly describes the infringing mechanism of the defendant. The amendments made to meet the objections of the patent examiner are not to be construed to disclaim the patentee's actual invention, if such construction can be avoided without doing violence to the obvious meaning of the language. *Lake Shore & M. S. Ry. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229-236, 4 Sup. Ct. 33; *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958.

It has been urged that the invention disclosed by the patent in suit is not of a meritorious character, because in the form in which it is there embodied, or, at least, in the first mechanism manufactured by Westinghouse, it failed of success in some essentials, and was immediately improved by Westinghouse in a manner which was the subject of a subsequent patent, before it was successful in the use for which it was intended. The defect developed by experimental test, and which Westinghouse in a few months remedied, was that the opening uncovered by the auxiliary valve was not sufficiently large to suddenly release the full volume of train-pipe air. This was not a defect inherent in the device. *Westinghouse v. Air-Brake Co.*, 59 Fed. 581-591. There were structural objections to making that opening large, but, when made larger, the device answered the purpose for which it was intended. It was thought, however, better to remedy the difficulty by adding an auxiliary piston as well as an auxiliary valve, and it was in that line that Westinghouse carried his further improvements, and he has adopted that form as the best to be manufactured for general use. This defect in the patent in suit was not radical, and was only one of those defects common in the first forms of many pioneer inventions, which usually have to be improved upon before they attain commercial success.

It is further urged that in a doubtful case the scale should be turned by the fact that, subsequent to the date of the patent in suit,—indeed, more than two years after the institution of this suit,—patents Nos. 481,134 and 481,135, August 16, 1892, were granted to Boyden for the mechanism now used by the defendant. Boyden was entitled to patents for whatever was a patentable nov-

elty in the devices by which he was able to make his valve 22 answer for both service and quick-action work, in connection with the restricted passage, B, and for any other patentable novelty in the forms of his mechanism. The widely different forms in which he has illustrated his devices in the two above-mentioned patents show that, taking what Westinghouse had discovered and demonstrated to be the underlying principle of a quick-action brake, a skillful and inventive mechanic can devise many forms for applying it. But, in his specification of patent No. 481,135, Boyden alleges that his device differs essentially from Westinghouse's patent No. 360,070, and involves a new mode of operation. The question whether it does or does not was the very question then pending in this suit, and, so far as the examiner passed upon it in allowing the specification to stand, he did so upon the ex parte application of Boyden, and unassisted by testimony as to the state of the art at the date of the Westinghouse patent, and without testimony as to the scope of the Westinghouse quick-action invention, and its great importance and merit; and therefore without the opportunity of judging whether or not it was a pioneer invention of a fundamental character, entitled to a construction coextensive with the invention, or was simply a patent for an improvement in a known art, to be restricted to the form of the device shown in the model and illustrations. The determination of that question is the starting point in the consideration of the controversy, and, in my judgment, the fact that Westinghouse was the first discoverer of the vital underlying invention should turn the scale in his favor. The complainants are entitled to a decree for an injunction and account, with a reference to a master in the usual form.

GURNEY v. OAKES et al.

(Circuit Court of Appeals, First Circuit. February 13, 1895.)

No. 107.

PATENTS—INFRINGEMENT—DEVICE FOR BUILDING CARRIAGE TOPS.

The Oakes patent, No. 378,457, for an adjustable form for setting and building carriage tops, *held* infringed, as to claims 1 and 3, by a device made in accordance with the Quimby patent, No. 458,252. 62 Fed. 269, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a bill by Judson E. Oakes and others against James W. Gurney for infringement of a patent. The circuit court rendered a decree for complainants (62 Fed. 269), and defendant appealed.

James E. Maynadier, for appellant.

William H. Clifford, for appellees.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

COLT, Circuit Judge. This case turns on the infringement of the first and third claims of letters patent No. 378,457, granted to Cummins C. Oakes, February 28, 1888, for an adjustable form for setting and building carriage tops. The invention in this device resides in the adjustable feature of its different parts. Previous to this invention, it was customary to set the framework of carriage tops upon the finished carriage seat. This method was open to several objections. By means of the patented apparatus, carriage tops can be built separately from the carriage body, and made of any height and width to fit carriage seats of different sizes. The device consists of two base blocks having bolted to their under sides horizontally sliding bars, by which means they can be moved towards and from each other. Rising from the outer ends of these blocks are upright standards supporting horizontal crossbars which have small grooved blocks on their outer faces. This framework composes the support for the bow, bow sockets, and carriage-top rails of the carriage top; the crossbars support the upper ends of the bow sockets, which are received and held in proper position by the grooved blocks, while their lower ends are brought together and pivoted to the carriage-top rails, which are secured to the bases. By means of the sliding bars and connecting mechanism, the bases are made adjustable to each other, and so regulate the width of the carriage top; by means of the vertical slots and connecting mechanism in the crossbars, the crossbars are made adjustable, and so regulate the height of the bow sockets and carriage top; by means of the horizontal slots and connecting mechanism in the crossbars, the grooved blocks are made adjustable, and so regulate the relative position with respect to each other of the bow sockets; by means of the vertical slots and connecting mechanism in the supports of the carriage-top rails, the bow sockets are made adjustable to the bases, and so regulate the distance of the carriage top from the bases or from the seat of the carriage. The first claim of the patent is for the combination of the adjustable moving bases with their sliding bars; the upwardly projecting standards; the connecting bars with the grooves on their outward faces; and means for securing the carriage-top rails to the bases. The third claim is for the combination of the adjustable connecting bars provided with the adjustable blocks.

It is manifest that the defendant's device, which is constructed under the Quimby patent, No. 458,252, dated August 25, 1891, has the same general adjustable features, and accomplishes the same result, as the patent in suit. The defendant contends that he does not infringe these claims of the patent, by reason of certain specific differences in the mechanical construction of his apparatus; but we are of opinion—First, that the screw threads and connecting mechanism of the defendant's device are plainly the equivalent of the sliding bars and connecting mechanism of the Oakes patent; second, that the inner faces for the reception of the bow sockets used in the defendant's form are the equivalent of the outer faces described in the patent; third, that the defendant has substantially the same or equivalent means for securing the bow sockets of the

carriage top to the base of the form. With respect to the last point, the controversy turns on the signification of the words "means for securing the carriage-top rails to the base of the form," which are found in the first claim. While the defendant's device, strictly speaking, has not any carriage-top rails, it has projecting horizontal points to which the lower ends of the bow sockets are attached, and which correspond to the horizontal projections of the carriage-top rails of the patent, and it has the same adjustable means for attaching these horizontal points to the base of the form as are found in the Oakes patent. If we cut off all the carriage-top rails except the horizontal projections, we find the defendant uses the same means for accomplishing the same result. The carriage-top rails are not made an element of the combination of this claim. The defendant uses all that portion of the rails which is necessary to secure the bow sockets to the base of the form. The pins in defendant's apparatus which receive the lower ends of the bow sockets are manifestly the same as the horizontal ends of the carriage-top rails of the patent, and these horizontal points are made adjustable in defendant's apparatus, by means of a slot and a clamping thumb nut, in precisely the same way as the horizontal points of the patent.

As to the third claim, the conclusion of the majority of the court is in favor of the plaintiffs below. The defendant admits the use of the adjustable blocks, and seeks to avoid infringement on the ground that the crossbars of his device are not adjustable. The only difference in mechanical construction between the two devices is that the bow sockets in the defendant's apparatus are made adjustable by means of the pins moving in the slots of the vertical arms attached to the outer edges of the base blocks, instead of by means of the adjustable crossbars of the patent; in other words, the point of adjustability is transferred from the upper to the lower ends of the bow sockets. This difference arises from the fact that the defendant's apparatus does not contain the carriage-top rails, but it is plain that he uses the same or equivalent means for accomplishing the same end. We do not understand that the defendant seriously contests the patentability of either of these claims, but the case really turns on the question of infringement. This is not a case where the defendant has left out from the alleged infringing apparatus one element of the combination described in the claim of the patent; nor is it a case where the patentee, by reason of the prior art, is restricted to the specific form of mechanism set forth in his claim; and therefore the authorities cited by the defendant do not apply to the present case. The decree of the circuit court is affirmed.

BUEL v. KNAPPMAN et al.

(Circuit Court, E. D. New York. February 26, 1895.)

PATENTS—INFRINGEMENT OF COMBINATION PATENT—CHALK-DROP MACHINE.

The Buel patent, No. 343,755, for a machine for making and drying chalk drops, the claim being for a combination of several elements, *held* not infringed by a machine which lacked some of the elements of the combination.

This was a bill by Arthur Buel against William Knappman and others for infringement of a patent.

H. Albertus West, for complainant.
Franham & Stevens, for defendants.

WHEELER, District Judge. This suit is brought upon the first claim of letters patent No. 343,755, dated June 15, 1886, and granted to the plaintiff for a machine for making and drying chalk drops. These drops had been made before with a funnel-shaped vessel, having a handle and rubber stop for, by a blow, forming them upon boards, where they were dried. The specification sets forth that the "invention relates to an apparatus designed more especially for drying white lead and other pigments or comminuted pasty substances; and the invention consists principally of means for depositing the substance to be dried in small cones or hillocks upon a traveling belt or apron to which heat is applied," and describes a machine having "an endless belt or apron placed upon drums, one of which may be revolved by hand or other power for causing the belt to travel slowly, which is heated by hot air or steam supplied through a pipe; and the pigment or other material to be dried is supplied to the upper surface of the belt in small cones or piles, from a hopper which has a series of openings made in its bottom, and is given an up and down motion for that purpose. The hopper is held by trunnions in slots in uprights of the main frame, and is given a slow upward and a sudden drop or downward motion by means of cams on the drive shaft. The drop motion of the hopper may be accomplished in various other ways, and, in order to cause the material to be dropped in perfectly formed cones, the outlets are made conical."

The claim is for:

"(1) In a drying apparatus, an endless drying belt, and a hopper having holes in its bottom, combined with means, substantially as described, for lifting and dropping the hopper for depositing the material to be dried in small cones or hillocks upon the drying belt, substantially as and for the purposes set forth."

In the alleged infringing machine no drums or endless belt or heat were used. The hopper was raised and let fall by a string over the uprights, and the drops were formed on slides, on which they were taken away and dried. It lacks the drying belt of the combination of this claim, construed with the specification or by itself; and really has nothing of that combination but the moving

hopper, and the uprights, which are not patented by themselves. This claim, therefore, does not appear to be infringed. Let the bill be dismissed.

THE WALTER D. WALLET.

TRACEY v. THE WALTER D. WALLET.

(District Court, S. D. Alabama. March 20, 1895.)

No. 720.

ADMIRALTY JURISDICTION—COMITY—LIBEL BY FOREIGN SEAMAN AGAINST FOREIGN VESSEL.

Where a British seaman, injured on a British ship on the high seas, was placed in a hospital by the master on arrival here, to be cared for at the expense of the ship, and the British consul signified his intention of sending the seaman home by the ship, which at the time was loading for a return voyage direct to England, *held*, that a court of this country would decline, on the ground of comity, to assume jurisdiction of a libel for damages, in opposition to the wishes of the consul, especially as the voyage was not completed, or the seaman discharged, and as the rights of the parties must be determined by the English law.

This was a libel by John Tracey, a seaman, against the British ship Walter D. Wallet to recover for personal injuries.

Smith & Gaynor, for libellant.

Pillans, Torrey & Hanaw, for claimant.

TOULMIN, District Judge. The libel sets forth:

"That while the vessel was on the high seas, six days out from Liverpool, England, bound for Mobile, libellant, a seaman on board, was ordered aloft on the foreyard to do some work there, which required him to stand on the foot ropes of said yard, and the becket ropes, regular appurtenances provided to hold on to to secure his safety while doing his work, by the negligence of the owner or master, whose duty it was to use due care to provide and keep there good, safe, and strong becket ropes, were allowed to get and remain in a rotten, unsound, and unsafe condition, so that they were insufficient to answer the purposes they were intended for, and by reason thereof gave way while libellant was using them in performance of his duties, and thereby he fell to the deck, broke his thigh, dislocated his elbow, and cut his head so that he will probably be disabled for life from the pursuit of his present calling; therefore, libellant sues for damages in the sum of \$10,000."

The courts of the United States in admiralty may, in their discretion, take jurisdiction in cases of complaints made by foreign seamen. But the supreme court, in the case of *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, say that:

"Circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts. * * * The cases of foreign seamen suing for wages, or because of ill treatment, are often in this category; and the consent of their consul is frequently required before the court will proceed to entertain jurisdiction, not on the ground that it has not jurisdiction, but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have

been dismissed, or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul."

There are no treaty stipulations existing between the United States and the British government with regard to adjusting controversies arising between the master and crew, or other matters occurring on a British ship. In the absence of such treaty stipulations, on general principles of comity, the admiralty courts of this country will not interfere in such cases unless there is special reason for doing so, and will require the foreign consul to be notified; and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction. *The Belgenland*, supra.

The libellant in this case is a British seaman on a British vessel. When six days out from Liverpool, England, bound for this port, he was seriously and permanently injured by a fall from the foreyard of the vessel, where he was at work. He sues to recover damages for the injuries sustained by him, and also for expenses of his cure and subsistence; and he prays to be discharged, and for wages. This was the first port made by the vessel after the injury occurred. On arriving here, the libellant was placed in the United States marine hospital, where, under arrangements made by the master of the vessel, or by the consul, he has had medical care and attention, and has been subsisted, at the expense of the vessel. The voyage for which the libellant shipped has not ended. The libellant has not been dismissed, and he has not been treated with cruelty, so far as the court is advised. But it appears that the master has done what humanity and his duty required him to do towards alleviating the suffering and supplying the wants of the unfortunate sailor. The vessel is now loading, and is destined for Great Britain. The British consul does not petition the court to take jurisdiction of the case; but, on the contrary, requests the court to decline to entertain jurisdiction of it, representing to the court that the ship is now loading, and is destined for Great Britain, whither she will soon sail; and that it is his purpose to send the libellant home on her, that he may have full opportunity at home to enforce any and all rights that he has in the premises.

The rights of the parties are governed by the laws of Great Britain, to which country they belong, and there is no difficulty in a resort to its courts. As I have said, the voyage has not ended, the libellant has not been dismissed, or treated with cruelty; and the consul protests against the court entertaining jurisdiction in the case. It is the duty of the ship to pay the expenses of the seaman's cure (as far as cure is possible), care, and subsistence, and it is doing so. Under the British law it is its duty to take him back home if he is able to go, and the consul informs the court that his purpose is to send him back. If he is not able to be taken back, the British law provides for such contingency, specifies the rights of the seaman, and prescribes the duties of the master and the consul in such case, and the presumption is that those duties will be faithfully performed. The libellant is not entitled to be paid his wages now unless his relation to the ship has terminated, and it appears that it has not.

Whether the libel can be maintained for the personal injury depends upon the British law, and I think that can better be determined by the courts of Great Britain, to which country the parties belong. It seems to me that justice between the parties would be better subserved by this court declining jurisdiction and remitting the parties to their domestic and natural forum, the courts of their own country. But, whether this be so or not, there do not appear to me any special reasons for this court to entertain jurisdiction, but rather that, from motives of international comity and good policy, this court should decline to exercise jurisdiction in the case.

"The jurisdiction will, in the discretion of the court, be declined in suits between foreigners, where it appears that justice will be as well done by remitting the parties to their home forum." *The City of Carlisle*, 39 Fed. 815.

The libel is therefore dismissed.

JERVEY v. THE CAROLINA et al.

(District Court, E. D. South Carolina. March 15, 1895.)

1. MARITIME TORT—ADMIRALTY JURISDICTION.

An illegal seizure of a vessel while lying at the dock is a maritime tort, giving a district court jurisdiction in admiralty of a libel to recover her.

2. INTERSTATE COMMERCE — INTERFERENCE WITH — SEIZURE OF BOAT TRANSPORTING LIQUOR AT NIGHT.

"Dispensary Act" S. C. Jan. 2, 1895, § 38, declaring that any boat or other conveyance transporting liquors at night, other than regular passenger or freight steamers and railroad cars, shall be liable to seizure and confiscation, is, in the case of a boat bringing liquor from another state, void, as an interference with interstate commerce.

3. SAME—EFFECT OF WILSON ACT.

The Wilson act of August, 1890, merely declared that imported packages of intoxicating liquor should, on their arrival in the state, become subject to the police power, equally with liquor produced therein, and gave no power to seize a boat having on board liquor which it had brought from another state.

4. COURTS—CONFLICT OF JURISDICTION.

The mere fact that a constable without process or warrant has seized a boat under Act S. C. Jan. 2, 1895, declaring that any boat transporting liquor at night shall be liable to seizure and confiscation, presents no conflict of jurisdiction on the owner libeling it, and therefore no reason why the federal court should remit him to the state court for his remedy.

Libel by Joseph E. V. Jervay, Sr., against the schooner Carolina and M. T. Holley, Sr.

J. P. K. Bryan, for libellant.

W. A. Barber, Atty. Gen. S. C., C. P. Townsend, and W. Gibbes Whaley, for defendant Holley.

BRAWLEY, District Judge. The schooner Carolina, a vessel of the United States, whereof Joseph E. V. Jervay, Sr., is owner, and which is duly enrolled and licensed for the coasting trade under the laws of the United States, sailed from the port of Savannah, in the state of Georgia, on the 18th day of February, 1895, and, crossing the bar of Charleston about 9 o'clock on the night of the 25th Febru-

ary, reached Palmetto wharf about 3 o'clock on the morning of the 26th, having on board six packages marked "whisky," and twenty-six packages marked "vinegar," which investigation proved to contain whisky. While lying in the dock, and before her cargo was unloaded, she was seized by M. T. Holley, Sr., chief constable of the state of South Carolina, under section 38 of the act of the general assembly of said state approved January 2, 1895, commonly known as the "Dispensary Act," which section is as follows:

"Sec. 38. Any wagon, cart, boat or other conveyance transporting liquors at night, other than regular passenger or freight steamers and railway cars, shall be liable to seizure and confiscation, and to that end the officer shall cause the same to be duly advertised and sold, and the proceeds sent to the state commissioner."

A libel in rem in a cause of possession was filed by Jervey, as owner, on the 27th of February. The answer of the defendant Holley, by the attorney general of South Carolina, filed March 5, 1895, avers that the seizure was lawful, and denies the jurisdiction of this court. Theodore G. Barker, intervening for his interest, claims that he advanced to Jervey the purchase money of said schooner, taking a mortgage thereon, which has been duly enrolled; that a balance of \$560, with interest thereon from March 31, 1891, remains unpaid; and that by the stipulations of said mortgage the title to said schooner has vested in him.

The first question to be considered is that of jurisdiction. The constitution of the United States provides (article 3, § 2): "The judicial powers shall extend to all cases of admiralty and maritime jurisdiction." This clause, imputed to Charles Pinckney, was accepted by the framers of the constitution without debate and without dissent. The most vigilant defenders of the rights of the states, and the most jealous upholders of the rights of the people, intent upon preserving to them the right of trial by jury, and protection to person and property, and providing for its administration according to the course of the common law in all the material subjects of litigation, conceded to the courts of the United States jurisdiction in all admiralty and maritime cases, without exception as to subject or place. The intent of the framers of the constitution manifestly was to secure perfect equality in the rights and privileges of the citizens of the different states, not only in the laws of the general government, but in the mode of administering them. The sea belongs to no state. It is the joint property of the nations. And as the tranquillity, reputation, and intercourse between citizens of different states and foreign nations would be affected by admiralty decisions, it is essential that they should be uniform, and no uniformity could be expected if there were as many independent jurisdictions as there are distinct states. By the judiciary act of 1789 (Rev. St. § 563) congress vested this entire grant of judicial power in the district court: "The district court shall have jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving the suitors in all cases the right of common law remedy when the common law is competent to give it, and such jurisdiction should be exclusive."

The supreme court of the United States, in *The Moses Taylor*, 4 Wall. 430, declares the reason why this grant should be exclusive: "Because it connects itself with diplomatic relations and duties to foreign nations and their subjects, with great interests, foreign and domestic, of navigation and commerce." And in *The Belfast*, 7 Wall. 643, it declares that the saving clause in this section operates as a privilege to the suitor to invoke a common-law remedy at his election. "It is to suitors, and not to state courts, nor to the circuit courts of the United States." Examined carefully, it is evident that congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy, etc. And, comparing the common-law remedies, the court says: "But there is no form of action at common law which, when compared with the proceeding in rem in admiralty, can be regarded as a concurrent remedy;" and, referring to the question again, in *Moran v. Sturges*, 154 U. S. 276, 14 Sup. Ct. 1019, the court says: "This act saves to suitors in all cases the right of a common-law remedy where the common law is competent to give it;" that is, not a remedy in the common-law courts, but a common-law remedy. Suitors are not compelled to seek such remedy if it exist, nor can they, if entitled, be deprived of their right to proceed in a court of admiralty.

It being the manifest intention of the framers of the constitution to create a tribunal in the interest of commerce, and for its safety and convenience for the speedy decision of controversies where delay would be ruinous, and this court having been created with a jurisdiction, original, instant, plenary, and exclusive, it remains to consider whether this cause falls within its cognizance. Here is a schooner, duly enrolled as a United States vessel, sailing from the port of a neighboring state, over the high seas, laden with an undischarged cargo, her transit completed, but, until discharged, still occupied in the business of navigation, seized without a warrant or other process of law. In determining the jurisdiction of a court in admiralty, locality is the primary question, and the ship or vessel, in its uses, forms the central point, for the great interests of commerce are affected by such instruments, and these interests become subject to the regulations of maritime law, called maritime because the sea is the place of its operation. Says Justice Story in *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3,776: "These words include jurisdiction of all things done upon or relating to the sea, or, in other words, all transactions and proceedings relating to commerce and navigation and to damages and to injuries upon the sea." And Justice Clifford in *Ex parte Easton*, 95 U. S. 68: "It may now be said without fear of contradiction that it extends * * * to civil marine torts and injuries, * * * illegal dispossession or withholding of possession from the owners of ships, * * * municipal seizures of ships," etc. "Petitory as well as possessory suits are cases of admiralty and maritime jurisdiction. They may be brought in all cases to reinstate the owners of ships who have been wrongfully deprived of their property." Ben. Adm. pp. 176, 177, § 311; Hen.

Adm. p. 38. Torts on navigable waters of the United States are cognizable in admiralty. The test is locality. The *Slavers*, 2 Wall. 383. "We reaffirm the rule that locality is the true test of admiralty cognizance in all cases of marine torts, that if it appears as in cases of collision, * * * illegal dispossession of ships, * * * that the wrongful act was committed on navigable waters within the admiralty and maritime jurisdiction of the United States, then the case is one properly cognizable in the admiralty." The *Belfast*, 7 Wall. 640. Jurisdiction in torts "depends entirely upon locality. If the wrong be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that they come within the jurisdiction of that court. Even Lord Coke declares 'that of contracts, pleas, and querels made upon the sea, or any part thereof which is not within any county, the admiral hath, and ought to have, jurisdiction.'" *Philadelphia, W. & B. R. Co. v. Philadelphia & H. S. Towboat Co.*, 23 How. 215. "Nor is the term 'tort,' when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrong suffered in consequence of the negligence or malfeasance of others, where the remedy in common law is by an action on the case." *Leathers v. Blessing*, 105 U. S. 630. In this case the only question raised was as to jurisdiction. The steamboat was lying at a wharf, securely moored thereto, with one of her gang planks out, and resting on the shore; and the libellant, having business on the boat, went aboard, when a bale of cotton fell upon him, breaking his leg. The court held that the fact that the boat was moored, and her gang plank ashore, did not make her a part of the land, or deprive her of the character of a water-borne vessel. Among the latest cases is that of *Vanderbilt's yacht* seized by the collector of the port of New York for nonpayment of duties, reported in *Re Fassett*, 142 U. S. 484, 12 Sup. Ct. 295, where the court uses this language: "The subject-matter of this libel is a marine tort, cognizable in a case of possession in admiralty by any district court of the United States which finds the vessel within the territorial limits of its process," and cites with approval *The J. W. French*, 13 Fed. 916, which was a case for restitution of a vessel seized and held under laws of the state of Virginia, which were held void.

It being clear that the conduct complained of is, if illegal, a marine tort, committed upon a vessel of the United States, and lying in the waters of the United States, this court cannot, consistently with its duty, refuse the jurisdiction with which it is clothed by the constitution and laws, where its aid is invoked by a party entitled to demand it. Its powers are limited to the inquiry and decision of the single question whether the seizure of the vessel under the circumstances was legal or illegal. It cannot pass upon the validity or invalidity of those police regulations whereby the state may undertake the control of the liquor traffic upon its soil. Between the citizens, claiming the right to sell liquor as "an inalienable right," and the state, asserting by strenuous legislation its right to a monopoly of that traffic, this court cannot interfere; nor, in the exercise of its function as a court of

admiralty, can it inquire what disposition is made of a cargo of liquor after it is landed. Whether it can be confiscated to the use of the state, and dispensed to its citizens, or whether it shall be poured out into the streets as a noxious poison, are questions solely for the determination of the proper authorities of the state; but every voyage of a vessel between two or more states is subject to the admiralty jurisdiction, and not to any state legislation. Vessel and cargo are agencies and articles of commerce, which, by the very terms of the constitution (article 1, § 8), are subject to the exclusive regulation of congress; and, until congress exercises such powers, all commerce between the states is free. This includes both transportation and commodities, with the single exception of nitroglycerine and other explosives, of which, by special act, the states may prohibit the introduction, sale, use, or consumption within their limits. That distilled liquor is a lawful article of commerce has been repeatedly decided by the courts of the United States; and the state of South Carolina, which is, perhaps, the largest wholesale and retail liquor dealer upon the continent, does not controvert that fact. The offense charged and penalty denounced against this vessel is that she transported this liquor in the nighttime. If it was a lawful article of commerce, can it be made an offense that this vessel, sailing upon the high seas, should avail herself of the lighthouses and range lights which the wisdom and beneficence of the government have provided in the interest of commerce? I have been but lately in the island of Cuba, which is held in the iron grasp of Spain. There are no lights there to guide the mariner to safe anchorage, and all vessels are forbidden to enter port at night; but despotic power holds with equal hand both great and small. Here it is the small and weak against which penalties are denounced; the great steamship comes and goes with impunity. Scarcely a week passes but there are reported seizures of liquor landed from steamships and railroad cars, but it is not contended that such steamships or cars are liable to confiscation. How, then, can this discrimination against sailing vessels in favor of other agencies of transportation be sustained? It is unnecessary to consider whether such discrimination is not obnoxious to the fourteenth article of the constitution of the United States, which secures to all citizens "the equal protection of the laws"; to the twelfth section of the bill of rights in the constitution of South Carolina, which forbids any "restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances." It will be considered simply in its aspect as a regulation of commerce, which is reserved by the constitution to the government of the United States. In *Railroad Co. v. Husen*, 95 U. S. 465, the supreme court considered and declared void a statute of the state which prohibited the driving or conveying any Texas cattle into the state. "Transportation," says Justice Strong (page 470), "is essential to commerce, or rather it is commerce itself, and every obstacle to it, or burden laid upon it, by legislative authority, is regulation." *Henderson v. Mayor of New York*, 92 U. S. 260, declares void a statute of New York requiring the master

of every vessel, within 24 hours of the landing of every passenger, to pay a commutation tax or give a bond to indemnify the state against any burden for the relief of indigent passengers. Says Justice Miller (page 271): "Nothing is gained in the argument by calling it the police power. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable. But, however difficult this may be, it is clear from the nature of this complex government that whenever a statute of a state invades the domain of legislation, which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely it may be allied to powers conceded to belong to the states." In the last expression of the supreme court on this subject (*Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829) the opinion of the supreme court of Pennsylvania sustaining an ordinance imposing a license tax upon drummers was reversed, and Justice Brewer, delivering the opinion of the court, says: "Even if it be that we are concluded by the opinion of the supreme court of the state that this ordinance was enacted in the exercise of police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which affects interstate commerce, can be sustained." And his conclusion is that "it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of congress, and that the silence of congress in respect to interstate commerce is equivalent to a declaration on its part that it shall be absolutely free." Any other view would defeat the object desired. When the constitution was adopted, the necessity for uniformity of regulations in all that concerned the transportation and exchange of commodities led to the conferring of the power to regulate commerce upon congress; otherwise there would be no security against conflicting regulations of the different states. If the state of South Carolina can discriminate among the classes of vessels which may enter her ports with merchandise, and the time when they shall enter, other states may discriminate in favor of their own products, and as to the class of vessels that may transport them, and there would be no limit to conflicting and discriminating state legislation.

The decisions of the supreme court on this subject have been so recently set forth in the able opinion of the circuit judge within this jurisdiction, in the habeas corpus Case of *Jervay*, 66 Fed. 957, that it would be a work of supererogation to make further comment thereon. Inasmuch, however, as the learned assistant to the attorney general has pressed upon the court the view that the *Wilson act* (August, 1890) has made a radical change in the law respecting interstate commerce, it may be well to consider the effect of that legislation. This act did no more, and purported to do no more, than to declare that imported packages of intoxicating liquor should, upon their arrival in the state, become subject to the police power equally with liquors produced therein. The supreme court had decided in *Leisy v. Hardin*, 10 Sup. Ct. 681, that

such imported packages could be sold when domestic liquor could not be sold. The Wilson act puts both upon the same plane; it does not prohibit importation; it leaves commerce free and untrammelled as before. In construing said act the supreme court in *Re Rahrer*, 140 U. S. 564, 11 Sup. Ct. 865, says: "Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state law in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." The court had previously decided in *Bowman v. Railway Co.*, 8 Sup. Ct. 689, that "the power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state." This decision is unaffected by the Wilson act, or by any decisions made since its passage. In the sense of the statute under consideration, there was no introduction and arrival of packages of liquor aboard this schooner. The proof offered by the state shows that the schooner had cut her lines, and was leaving the dock, when a pistol shot was fired across her, and she was seized by the constables. Not a single package had been discharged. But for such arrest she would have been free, upon finding that her cargo could not be landed, to carry it back to the place of shipment or to another market. Wherever ships float and navigation aids commerce they are under the protection of the law which declares that commerce must be free. It is true that the schooner was a small one, but she was not much smaller than that in which Columbus sailed to the discovery of this continent, and larger than that in which the Vikings crossed. This court knows of no law which permits it to discriminate as to the size of vessels entitled to invoke its protection; and the learned counsel for the state, whose research has known no limit, presents no authority for such discrimination. He has presented the case in another aspect, which demands consideration. He asks that this court should stay its hand, and allow the libellant to seek his remedy in the courts of the state. In support of this view he relies upon the case of *Taylor v. Carryl*, 20 How. 616. In that case the vessel had been seized under a process of foreign attachment, issued from a state court in Pennsylvania. The sheriff was in possession, and a motion was pending for a sale. Under such circumstances the court held (Chief Justice Taney and three other justices dissenting) that it would relinquish its jurisdiction in favor of the state court already in possession of the property. He also cites the case of *Moran v. Sturges*, 154 U. S. 257, 14 Sup. Ct. 1019. In that case proceedings had been commenced in the supreme court of New York, and a receiver appointed of a corporation organized under the laws of that state. Libels against certain towboats, the property of this corporation, were filed subsequent to the appointment of the receiver, when an injunction restraining libellants was issued by the supreme court (19 N. Y. Supp. 565), which was af-

firmed by the court of appeals (32 N. E. 623). Upon appeal to the supreme court of the United States these proceedings were set aside, and the jurisdiction of the United States district court asserted to be exclusive, the state court being without jurisdiction as to maritime liens. The principle upon which the court acted in *Taylor v. Carryl* in relinquishing its jurisdiction to the state court was simply a rule of comity, as has been repeatedly asserted in comments upon that decision. There is a comity between courts, and there is what is known as a comity of nations, which leads one country to give effect within its territory to certain laws and institutions of another state as a matter of courtesy; and so, where there are two courts of concurrent jurisdiction, it is customary and courteous for one court to abstain from interference with that which first obtains jurisdiction.

In this case there was no process in the state court, no warrant. The constable seized with a strong hand, dispossessed the owner, and was proceeding summarily to confiscate. There is, therefore, no conflict of jurisdiction between the judicial tribunals of the state and of the United States. It is not a question of comity, but of duty. This court assumes that the courts of the state would not refuse relief to any citizen entitled to their protection, but the delays unavoidably incident to courts of common law in their rules and mode of proceeding are oftentimes equivalent to a denial of justice, and for this reason, in the great majority of cases, seafaring men seek their remedies in the courts of admiralty. Having a choice of jurisdiction, the libellant has sought his remedy in this court. The court has no option to grant or withhold relief in a case clearly within its jurisdiction. It is adjudged that so much of the act of January, 1895, under which this vessel was seized, is null and void as an interference with interstate commerce, and that the libellant is entitled to a decree for possession and for his costs.

THE CHARLES H. TRICKEY.

SARGENT et al. v. SARGENT.

(Circuit Court of Appeals, First Circuit. February 16, 1895.)

No. 86.

1. COLLISION BETWEEN SAILING VESSELS—DUTY TO KEEP AWAY.

Where a schooner sailing closehauled, with the wind on her starboard side, collided with a vessel sailing free, with the wind on her port side, *held*, that the latter was solely in fault, it appearing that she violated her duty to keep out of the way, by luffing so as to strike the former, which held her course until the instant before collision.

2. SAME—EVIDENCE.

Where there is an irreconcilable conflict in the evidence of the crews of the colliding vessels, the testimony of disinterested witnesses on other vessels, in a position to see what took place, should govern the case.

Appeal from the District Court of the United States for the District of Maine.

This was a libel by Wyer G. Sargent and others, owners of the two-masted schooner Governor, and Wyer G. Sargent & Sons, as owners of her cargo, against the three-masted schooner Charles H. Trickey (Horace M. Sargent, claimant), to recover damages for a collision. The district court dismissed the libel, with costs, and the libelants appeal.

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellants.

Benjamin E. Thompson, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and ALDRICH, District Judges.

NELSON, District Judge. This was a libel for a collision between the two-masted schooner Governor and the three-masted schooner Charles H. Trickey, which occurred off the coast of Cape Cod, in the vicinity of Nauset Light, on the evening of the 25th of August, 1893, and resulted in the sinking of the Governor and the total loss of the vessel and her cargo. The Governor was sailing closehauled, with the wind on her starboard side. Her course was S. by W. The Charles H. Trickey was running free, with the wind on her port side, and she was steering N. by W. In these positions of the two sailing vessels, the Governor closehauled, with the wind on the starboard side, and the Charles H. Trickey running free, with the wind on the port side, the right of way belonged to the Governor, under clauses (a) and (c) of article 14 of the sailing rules, and the Charles H. Trickey was bound to keep clear of her, or show a sufficient excuse for not doing so. She alleges as such excuse that the relative positions of the two vessels were such that, if both had held their courses, they would have gone clear; but that immediately before the collision the Governor, being the leeward vessel, suddenly changed her course by luffing across her bow; that she made no change of course; and that this action on the part of the Governor was the sole cause of the collision. The contention on the part of the Governor, in which she is sustained by the testimony of all the men on board of her, is that she made no change of course whatever before the collision; that the Charles H. Trickey was seen on her port or lee bow, showing her green light, she showing her red light to the Charles H. Trickey; that the latter vessel then kept off showing her red light, and as she came nearer, and was only a short distance away, she luffed and showed her green light again, and on that course struck the Governor on the port side. On the part of the Charles H. Trickey, it is claimed, and in this she is borne out by the testimony of the men on board, that the Governor was on her starboard or lee bow, showing her green light; that the vessels were passing green to green, so that no collision was possible if each had held her course; that she made no change of course, and none was necessary on her part in order to go clear; that, immediately before the vessels struck, the Governor changed her course and luffed across her bow; and that this was the cause of the collision.

If the judge of the court below had decided this case upon the degree of credibility to be given to the witnesses from the two vessels called by the respective parties, we should have no thought of disturbing his finding in favor of the Charles H. Trickey. But the court below, without attempting to reconcile the opposing testimony, or to decide which set of witnesses was the more truthful and reliable, based its decision upon the testimony of the master and mate of the Break of Day, a schooner which was sailing in company with the Governor, and in the same direction, and was at the time a short distance to the leeward of the Governor, in a position where in the dusk of the evening the colliding vessels were in plain sight. There is no question made as to the opportunity which these men had to witness the occurrence, or as to the reliability of their testimony, each party relying upon their testimony in support of their respective claims. The court below held that their statements of what they saw confirmed the theory of the Charles H. Trickey. We do not so read their depositions. They both contradict the men on the Charles H. Trickey and confirm those on the Governor, in respect to the change of course on the part of the Charles H. Trickey. They both agree that that vessel, as she approached the Governor, luffed two points, and on that course struck the Governor. Neither of them observed any change of course by the Governor. It is true they say that they saw the sails of the Governor shaking in the wind, but we think it is manifest from their depositions that the shaking of the sails was at the very moment before the blow, after the wheel was abandoned and the vessel would necessarily come up into the wind. We think the only result of the testimony of these two men is to confirm the Governor, and contradict the theory advanced by the Charles H. Trickey. The Governor's case is also confirmed by the master of the schooner Nellie Grant, which was sailing in the same direction and on the same course with the Charles H. Trickey, and which passed to the leeward the Governor going north a few minutes before the collision. This witness did not see the collision, but he looked back after the collision, and saw the Charles H. Trickey near the place where it occurred. This witness states that the Charles H. Trickey was sailing right in the wake of the Nellie Grant, and this would bring the Charles H. Trickey to the leeward of the Governor, which is entirely in conflict with the theory advanced by the Charles H. Trickey, that she was the windward vessel. We agree that, in the sharp conflict of the evidence coming from the crews of the two vessels, the testimony of the disinterested witnesses from the Break of Day and Nellie Grant should govern the case, and this testimony is clearly and explicitly in favor of the Governor. The angle of two points in the courses on which the vessels were sailing would necessarily bring the green light of the Charles H. Trickey on the port bow of the Governor, if the latter was the windward vessel. The lookout on the Charles H. Trickey was a boy 16 years old, with little experience at sea. The two vessels were approaching each other at a speed of 12 or 13 knots an hour,—a mile in five minutes or less. It is much

easier to believe that the light seen over the starboard bow of the Charles H. Trickey was the green light of the Break of Day, which, upon the testimony of her master, was an eighth of a mile to leeward of the Governor, and in the exact position in which the evidence of the Charles H. Trickey places the green light of the Governor, or that the men in charge of the navigation of the Charles H. Trickey failed to see in season the red light of the Governor, or that they did not make sufficient allowance for the rapidity of the approach of the two vessels, than that the Governor, under the charge of an experienced and intelligent master, and having the right of way, should luff an eighth of a mile out of her course across the bow of the other vessel, in the manner claimed here. We are of opinion that the collision was caused solely by the fault of the Charles H. Trickey.

Reversed, and the case remanded, for further proceedings in conformity with this opinion.

END OF CASES IN VOL. 66.